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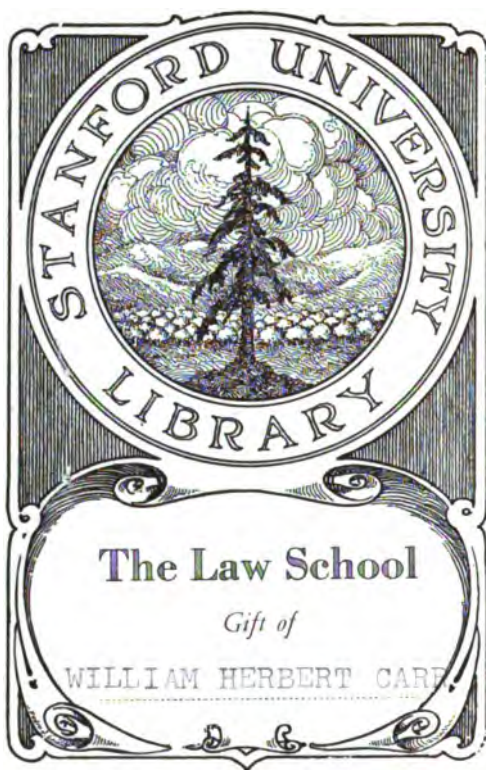
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Charles A. Han



BACON'S
ABRIDGMENT.

By GWILLIM,

VOL. V.



A
N E W
A B R I D G M E N T
OF THE
L A W.

By MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

THE FIFTH EDITION, CORRECTED;
WITH CONSIDERABLE ADDITIONS,
INCLUDING THE LATEST AUTHORITIES;
By HENRY GWILLIM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

IN SEVEN VOLUMES.

VOL. V.

L O N D O N :

PRINTED BY A. STRAHAN,

LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

For T. Cadell, C. Dilly, G. G. and J. Robinson, J. Johnson, R. Baldwin,
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1798.



Mortgage.

- (A) Of the Original and several Kinds of Mortgages.
- (B) What shall be deemed a Mortgage, or an Estate redeemable.
- (C) Of the Nature of a Mortgage, as to the distinct Interests of the Mortgagor and Mortgagee.
- (D) Of the legal Performance of the Condition.
- (E) Of the Equity of Redemption and Foreclosure :
And herein,
 - 1. Who may redeem, and by whom the Mortgage Money shall be paid.
 - 2. To whom the Mortgage Money shall be paid.
 - 3. Of the Precedency and Right of Redemption, where there are several Mortgagees or Incumbrancers : And herein of their Remedies against each other, as well as against the Mortgagor.
 - 4. How far the Purchasing in a precedent Mortgage or Incumbrance will protect such Purchaser, and entitle him to a Precedency of Redemption.
 - 5. Of the Equity which must be done by him, who would redeem, to the Person against whom a Redemption is prayed.
 - 6. At what Time the Redemption must be.
 - 7. Of the Manner of Redeeming and Foreclosing.
- (F) Mortgagees and their Assignees, how to account, and what Allowances to make.

(A) Of the Original and several Kinds of Mortgages.

Common,
62, 63.

THE notion of mortgaging and redemption seems to be of Jewish extraction, and from the Jews derived to the Greeks and Romans: the plan of the *Mosaic* law constitutes a just and equal agrarian, that the lands may continue in the same tribes and families, and the people might not be diverted by any extrick acts and inventions from the exercise of agriculture, in which innocent employment they were to be continually educated; and therefore whoever were compelled by want to sell, could transfer no estate in the lands farther, than to the next general jubilee, which returned once in fifty years; wherefore they computed till the jubilee, and according to the distance from thence, such was the interest that could be transferred to the buyer. But the vendor had power at any time to redeem, paying the value of the lands to the jubilee. But though he did not redeem at the year of jubilee, yet the lands then came back again free to the vendor and his heirs.

Justin. 992.

But our notion of mortgaging and redemption seems to come more immediately from the civil law, and therefore it will be necessary herein to consider the distinctions in that law between pledges and things hypothecated.

The *pignus* or pledge was, when any thing was obliged for money lent, and the possession passed to the creditor.

Ulp. de.
Pactum.

The *hypotheca* was, when the thing was obliged for money lent, and the possession remained with the debtor. Now in case of goods pignored, the creditor was obliged to the same diligence in keeping them, as he used about his own; so that if the goods were lost by the negligence of the creditor, an action lay as for a deposit; for the property being transferred to the creditor for a particular purpose, he was to keep them as his own.

Digest. lib.
20. tit. 6.
C. de pign. 269,
270, 271.

If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *actio pignoratitia*, or *hypothecaria*, which, when he had pursued, and obtained sentence thereon, he might sell the pledge as his own property. But there was this difference between the *actio pignoratitia* and *hypothecaria*; that the *actio pignoratitia* was only on the person of the debtor to foreclose him, because the *pignus* was already in the possession of the creditor; but the *actio hypothecaria* was *tam in rem, quam in personam*, and was given *ad pignus prosequendum contra quemcunque possessorem*; because herein the creditor had not the possession of the pledge, but it remained to the debtor. Until sentence was obtained in these actions, the creditor could not obtain the property of the pledge; and if the money was paid before sentence, the pledge was subject to redemption; and where the same thing was pledged to several, those were said to be *potiores in pignore* to whom the things were first hypothecated.

Digest. lib.
20. tit. 6.

If the money was tendered or paid to the creditor, the contract of pignoration was dissolved, and the debtor might have the pledge back,

back, as a thing lent. This seems to have introduced the notion among us of the debtor's right to redemption. And with them the usufruct, or the right of prescription, did not extinguish the pledge, unless a stranger had held it for thirty years, or the debtor had held it for forty years.

In the feudal law the rule was, *Feudalia, invito domino, aut agnatis, non recte subjiuntur hypotheca, quamvis fructus posse esse, receptum est.* And the reason of this rule was, because the feud was filled with a tenant from the lord's original bounty, on whom he depended for his personal service in war and peace; and therefore the feudiary could not obtrude a tenant on him without his leave, who might be less capable of those services; and as the tenant could not originally alien without licence, so he could not mortgage. Corvin. 268.

But, when a licence of alienation was given about the time of H. 3., and it became a maxim in law, that the purity of a fee-simple imported a power of disposing of it as the owner pleased; there were two ways of mortgaging lands introduced, which *Littleton* distinguishes by the names of *vadium vivum* and *vadium mortuum*.

The *vadium vivum* is, where a man borrows 100 l. of another, and makes an estate of lands to him, till he hath received the said sum of the issues and profits of the lands; and it is called *vadium vivum*, because neither the money nor the land dieth; for the lands are constantly paying off the money, and the lands are not left as a dead pledge, in case the money be not paid. This seems to have been the ancient way of pledging lands; for they held, that lands could not be hypothecated; and therefore they used to subject the *usufructus*, which continued originally during the life of the feudiary; but when there was a free liberty given of alienation, then the feudiary could pledge the *usufructus* of the land at pleasure. But because, in this way of pledging, the lender received his money by degrees, and in small parcels, which was very troublesome; and those that put money to usury, are generally willing to receive the whole in a gross sum; therefore this way of pledging is now out of use. Co. Lit. 205. Vide Mat. Formulæ, 136.

The *vadium mortuum* is so called by *Littleton*, because it is doubtful, whether the feoffor will pay the money at the day limited or not; and if he do not pay, then the land, which is but in pledge upon condition, for the payment of the money, is taken from him for ever, and so dead to him; and if he do pay it, then the pledge is dead to the tenant of the land. Lit. § 332. Co. Lit. 205.

Of these mortgages there are again two sorts; 1st, Of the freehold and inheritance; and 2^{dly}, Of terms for years. Mat. 318, 319.

1st, Of the freehold and inheritance; and here the ancient way was to make a charter of feoffment, on condition, that if the feoffor, or his heirs, paid the sum to the feoffee, or his heirs, he should re-enter and re-possess; and sometimes the condition was contained in the charter of feoffment, and sometimes it was de-seazanced by another charter, as may be seen in the old forms.

Co. Lit.
226, 227.

For as a man might annex a condition to his feoffment, for *ejus est dare, ejus est disponere*, so he might annex a condition by another deed, bearing date and executed at the same time; for, being executed at the same time, it is really but one and the same disposition, *que incontinenti fiunt inesse videntur*. A defeazance or condition annexed indeed after the feoffment executed comes too late, because the livery *coram paribus* attesting the infeudation, in which there is no condition, the tenant must hold the land according to the tenure of the investiture: but rents, annuities, or warranties, that are things executory, may be defeated by defeazances made at the time of their creation, or any time after; because there is not any necessity of the notoriety of livery to make an investiture; and therefore, being created by deed only, they may be defeated or destroyed by deed alone.

Co. Lit.
221, 222.

These sorts of conveyances were subject to these inconveniences; that if the money were not paid at the day, so that the estate became absolute, the estate was thenceforth subject to the dower of the feoffee, and all other his real charges and incumbrances; for though if the feoffor performed the condition, then he might re-enter, and re-possess himself in his former estate, and, consequently, was in above all the charges and incumbrances of the feoffee; yet, if he did not literally perform the condition, by payment of the money at the day, then, the estate was legally subject to the charges and incumbrances of the feoffee, though the money were afterwards paid, and the estate re-conveyed to the feoffor.

Hard. 465.

But the courts of equity, as they grew in power, have set this matter right, and have maintained the right of redemption, not only against tenant in dower, and the persons who come in under the feoffee, but even against the tenant by the courtsey, and lord by escheat, that are in the *possession*; because the payment of the money doth, in the consideration of equity, put the feoffor in *statu quo*, since the lands were originally only a pledge for the money lent.

As to mortgages by way of creating terms, this was formerly by way of demise and re-demise. As for example; *A.* borrowed money of *B.*, thereupon *A.* would demise the land to *B.* for a term of 500, &c. years absolutely, with common covenants against incumbrances, and for farther assurance, and then *B.* would the day after re-demise to *A.* for 499 years, with condition, to be void on non-payment of the money at the day to come: this manner of mortgaging came in after the 21 *H. 8. c. 15.* for falsifying recoveries, when there was a fixed interest settled in terms for years; and was esteemed best for the mortgagor, to avoid all manner of pretension from the incumbrances and dower of the feoffee in mortgage; and was reputed best for the mortgagee, to avoid the wardship and feudal duties of the tenure, and was only inconvenient in this; that if the second deed were lost, there appeared to be an absolute term in the mortgagee.

But the common method now is this, *viz.* by a demise of the land for a term, under a condition to be void on the payment of the

the mortgage-money and interest; and a covenant is inserted at the end of such deeds, that, till the default shall be made in the payment of the money, the mortgagor shall receive the rents, issues, and profits, without account.

This has been ruled to create a tenancy at will (a) to the mortgagee; but if the mortgagor dies, the tenancy at will is determined, till there is a receipt of interest from the heir, which seems to make him also tenant at will to the mortgagee.

Reym. 147.
[(a) The mortgagor is only like a tenant at will to the

mortgagor: his legal interest is inferior to that of a strict tenant at will. Dougl. 22. 281-3.]

But now the last and best improvement of mortgages seems to be, that in the mortgage deed of a term for years, or the assignment thereof, the mortgagor shall covenant for himself and his heirs, that, if default be made in the payment of the money at the day, then he and his heirs will, at the costs of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to such person or persons (to prevent merger of the term) as he or they shall direct or appoint; for the reversion, after a term of 50 or 100 years, being little worth, and yet the mortgagee, for want thereof, continuing but a termor, and subject to forfeiture, &c. and not capable of the privileges of a freeholder; therefore, where the mortgagor cannot redeem the land, it is but reasonable the mortgagee should have the whole interest and inheritance of it, to dispose of as absolute owner.

[Great inconvenience having been suffered by mortgagees, from the difficulty and delay attending bills to foreclose, a mode of contracting has been invented, by which the mortgagor may, after a given time, procure his principal and interest, by a sale of the mortgaged estates, without being under the necessity of applying to a court of equity. This is done by taking a conveyance of the fee to trustees in trust for the mortgagee for a term of years subject to redemption, with remainder to the trustees in trust, in default of payment at the time stipulated, to sell the estate, and to apply the purchase-money, after defraying the expences incurred in discharging the trust, in payment of the mortgage-money, and interest, and then to pay over the residue to the mortgagor.]

1 Pow.
Mortg. 12.

(B) What shall be deemed a Mortgage, or an Estate redeemable.

HEREIN we may observe in general, that whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition or conditional purchase; yet, if, upon the whole, it appears to have been the intention of the parties, that such conveyance should only be a mortgage, or pass an estate redeemable, a court of equity will always construe it so.

Vern. 183.
268. 394.
Piced.
Chan. 95.

As, where the condition of a mortgage is, that the mortgagor shall redeem during his life, or that the mortgagor and the heirs

Vern. 33.
190.
a Chan. Ca.

147. S. C.
Howard v.
Harris.

of his body shall redeem, yet equity will admit the general heir of such mortgagor to a redemption; because this can be no purchase, since there is a clause of redemption; and when the land was originally only a pledge for money, if the principal and interest be offered, the land is free; and it would be very hard, that it should be in the power of the scrivener, or griping usurer, by such impertinent restrictions, to elude the justice of the court.

Vern. 488.
Willet v.
Winnel.

If *A.* mortgage lands to *B.* worth 15 *l.* per annum, for securing 200 *l.*, and at the same time *B.* enter into a bond conditioned, that if the 200 *l.* and interest is not paid within a year, then he to pay to *A.*, his executors or administrators, the further sum of 78 *l.* in full for the purchase of the premises, &c., and *A.* die within the year, and the 200 *l.* with interest not being paid at the day, the heir of *B.* pay the 78 *l.* the next day after the mortgage is forfeited to the administrator of *A.*, yet *A.*'s heir may redeem, paying the 200 *l.* and likewise the 78 *l.* that was paid the administrator.

2 Vern. 84.
Manlove
v. Ball.

So, where *A.* for 550 *l.* made an absolute assignment of a church lease for three lives to *B.*, and *B.* by writing under his hand agreed, that if *A.* paid 600 *l.* at the end of the year, *B.* would re-convey; *B.* died, leaving *C.* his son and heir; two of the lives died, and the lease was twice renewed by *C.* and his father: though it was near twenty years since the conveyance was made, yet the Master of the Rolls decreed a redemption on payment of the 550 *l.* and the two fines.

2 Vern. 520.
Jennings v.
Ward.

A. lends money to *B.* to carry on certain buildings, and takes a mortgage from him to secure 1600 *l.* with interest; and, by another deed executed at the same time, takes a covenant from *B.* that he should convey to him, if he thought fit, ground-rents to the value of 1600 *l.* at the rate of twenty years purchase; and, on a bill brought to redeem, the Master of the Rolls decreed a redemption on payment of principal, interest, and costs, without regard to that agreement, but set aside the same as unconscionable; for a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any bye agreement.

Bowen v.
Edwards,
1 Rep. Ch.
222.
13 Car. 2.

[Again, where the plaintiff being seised in fee of the lands in question worth 200 *l.* per annum, mortgaged the same in 1637, to the defendant's father for 250 *l.* and agreed and also sealed a deed for the absolute sale thereof, if the money were not paid at the end of seven years; a redemption was decreed, notwithstanding; for the defendant's father, having exhibited a bill against the plaintiff for the land or the money, made it evident that it was only a mortgage originally, and being so at first, the subsequent agreement could not alter it.

And although a mortgagee have a power to mortgage or to sell the lands mortgaged absolutely, in case of failure of payment at a given time, a court of equity will, nevertheless, consider any conveyance by him to be subject to redemption, if it be evident from the *res gestæ*, that the vendee did not depend upon the power; as, if the equity of redemption be excepted in the conveyances.

Thus,

Thus, a conveyance of lands was made, by lease and release, by *A.* to *B.* and his heirs, and by a defeazance bearing date with the release, it was agreed that if *A.* repaid 1000*l.* &c. borrowed of *B.*, within a year from the date of the indenture, then *B.* should re-convey to him; but if he failed to pay the money within the year, then *B.* should mortgage, or absolutely sell the lands, free from redemption, and out of the money raised by such mortgage or sale, pay the said 1000*l.* &c. and interest, and be accountable for the overplus to *A.* and his heirs. A fine was also levied to *B.* in order to bar *A.*'s wife of dower. Afterwards, the money not being paid at the time stipulated, *B.* agreed to convey the estate for a certain sum of money, and in the agreement, and also in the conveyances, an exception was made, and in such exception the defeazance was mentioned. And afterwards a question arose, Whether the purchaser had an absolute estate, or an estate redeemable? And it was contended that he had an absolute estate, for that the estate conveyed to *B.* was an absolute estate, and though there was a defeazance executed at the same time, yet that was to have operation only within a twelvemonth, after which period, *B.* was invested with a power to sell absolutely free from all equity of redemption; consequently, it then became a trust for *B.* to sell, and where an estate was conveyed to trustees to sell, the vendee, by virtue of such sale, had an absolute fee, free from all charges and power of redemption. And the fine, it was said, passed the right of the then owners in the estate, and made it absolute. But it was answered, and resolved by the court, that the estate was redeemable, for the estate conveyed by *A.* to *B.* was, in its nature, a mortgage to him, and though the money was not paid within the year, yet the mortgagor might still have redeemed at any time while the estate continued in *B.*; and then, though *B.* had a power on non-payment within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what he might have done, but what he *had* done; and it was evident, that it was not *B.*'s intention to convey an absolute and indefeazible estate, for he had not conveyed it absolutely, and free from the equity of redemption; but had insisted upon having the defeazance inserted. If then, as was the case, *B.* on non-payment of the money within a year, stood as a trustee for *A.* subject to the defeazance, his (*B.*'s) vendee coming in with notice of that trust, would stand in his place, and must be considered as taking the conveyance, liable, in equity, to the performance of the trust; and the fine made no difference, for it only operated to strengthen the estate and free it from the dower of the wife, but it confirmed it *in statu quo*, and did not discharge it from the equity of redemption to which it was before liable.

It seems questionable whether a power of redemption can be set up upon a subsequent agreement, made after an absolute conveyance executed; for if it be a mortgage, it must be so *ab initio* on the original agreement. And therefore, where one having the reversion expectant upon the determination of a lease for life, in an

Croft v.
Powell,
Comyns
603.

Vide Copla-
stone v.
Boxwill,

1 Chan. Ca.
2. 3 Saik.
241.

estate worth 1000 *l. per annum*, conveyed it in fee to *W. R.*, in consideration of 1000 *l.* and no more, and the tenant for life died, a pretence was set up that this conveyance was no more than a mortgage, because *W. R.* had declared that he did not know how long he should enjoy the estate, and that he would take his money again with interest: *sed dubitatur per curiam*; and one reason was, because matter subsequent will not make it a mortgage, if it was not so upon the original agreement.

Orby v.
Trigg,
2 Eq. Ca.
Abr. 599.
24. S. C.
9 Mod. Ca.
in Law and
Eq. 2.

But although courts of equity will not suffer the mortgagee to clog the redemption with any stipulation for a purchase, at a specific price agreed upon at the time of the loan, because the admission of such a practice would furnish an inlet to great fraud and imposition upon the mortgagor; yet, a mere agreement that, in case of sale, an opportunity of pre-emption should be given to the mortgagee, would, it seems, be decreed; but it must be claimed at a reasonable time; for, where *A.*, the plaintiff's brother, died, having previously mortgaged lands to *B.* by deed, containing covenants to re-convey upon six months notice of payment of the principal and interest, and that in case the estate should be sold, *B.* should have the pre-emption; *B.* got the counterpart into his hands after *A.*'s death; then the plaintiff gave him six months notice that he would pay off the mortgage, which he refused to accept; upon which, the plaintiff exhibited his bill for a re-conveyance of the estate, having entered into articles for the sale of it; *B.* in his answer, insisted on the covenant for pre-emption; but it appearing that neither the plaintiff nor purchaser knew any thing of this covenant, the counterpart of the deed having been in *B.*'s custody; that the plaintiff, on application for it, had been denied it, the mortgagee insisting only on payment, alleging the security was too narrow for the money lent, and threatening to foreclose, never having mentioned his claim to pre-emption until after the estate was sold; it was said, he ought not to set it up to the prejudice of the purchaser, having had time to claim it, if he had pleased, before the estate was sold; and it was decreed accordingly.

Barrel v.
Sabine,
1 Vern. 268.

A distinction hath been made by the court of Chancery, between contracts originally founded upon lending and borrowing money, with an agreement for a purchase in a certain event, and cases where, after a mortgage, a new agreement hath been entered into and executed by the parties for an absolute purchase, although there be a subsequent declaration that the mortgagor may have his estate upon payment of interest, principal, and costs; or, where a release of the equity of redemption is given with a collateral agreement to re-convey, upon repayment of the purchase-money; and, in the latter cases, it hath been determined that no re-purchase shall be had, unless upon strict performance of the conditions stipulated. Thus, *A.* a joint-tenant with *B.* her sister, made an absolute conveyance to *C.* in fee for 104 *l.* which was admitted to be intended only as a mortgage; some time after, in 1708, those deeds were cancelled, and then *A.* in consideration of 184 *l.* (including the 104 *l.* paid by *C.*) conveyed

Cotterel v.
Purchase,
Ca. temp.
Talbot. 61.

veyed the estate *ut supra*, but with a farther covenant not to agree to any partition without C.'s consent. B. was in possession till 1710, when C. ejecting her out of the moiety, enjoyed it quietly till 1726, at which time A. brought a bill for redemption, to which C. pleaded himself an absolute purchaser. The receipts given for the money, mentioned it to be purchase-money. In 1710, there was an agreement that A. might have the estate again, if desired, on payment of principal, interest, and charges. It was first heard before the Master of the Rolls, who dismissed the bill. Afterwards it came on before Lord Chancellor Talbot, who observed the case was very dark; the first deed was admitted to be a mortgage, the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case; for to suppose that it was an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vague and ridiculous; but that it would be equally so, if the deed was supposed to be an actual conveyance, so that it was of no great weight, and ought to be laid out of the question; that he was inclined, upon the whole, to think the conveyance in 1708 was at first an absolute conveyance. The agreement, in 1710, for the repurchase, shewed it was not redeemable at first; the acquiescence of sixteen years upon C.'s possession, was a strong evidence of it; and his Lordship, upon the circumstances of the case, affirmed his Honour's decree.

So, lands in *Wales* were mortgaged for 400*l.* and afterwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor, upon payment of 350*l.* more; a note was given at the time of executing the release, that the releasee, on payment of the 750*l.* and all charges of repairs within a year by the releasor, should sell and convey to him the premises. Payment having been neglected for sixteen years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey the premises upon the terms therein mentioned, but not that the releasor should be at liberty to redeem the same.]

But if a man borrows money of his brother, and agrees to make him a mortgage, and that, if he has no issue male, his brother shall have the land; such an agreement, made out by proof, will be decreed in equity.

A., in consideration of 1000*l.*, made an absolute conveyance to B. of the reversion of certain lands after two lives, which, at that time, were worth little more; and by another deed, of the same date, the lands were made redeemable any time during the life of the grantor only, on payment of 1000*l.* and interest; A. died, not having paid the money; and it was held by my Lord Nottingham, that his heir might redeem, notwithstanding this restrictive clause; and that it was a rule, *once a mortgage and always a mortgage*, and that B. might have compelled A. to redeem in his lifetime, or have foreclosed him. But, on a re-hearing, Lord Keeper

Endsworth
v. Griffith.
15 Vin. Abr.
462. pl. 18.
2 Eq. Ca.
Abr. 595.
pl. 6.
1 Brown's
Parl. Ca.
149.

Vern. 193.
per North,
L. K.

Vern. 7.
214. 232.
Newcomb
v. Bonham,
2 Vent 364.
S. C. where
it is said,
that Lord
North's
decree was
affirmed in
the House
of Lords.

North

North reversed the decree on the circumstances of this case; for it appeared by proof, that *A.* had a kindness for *B.*, and that he had married his kinswoman, which made it in the nature of a marriage settlement: he likewise held, that *B.* could not have compelled *A.* to redeem during his life, which made it the more strong.

King v.
Bromley,
2 Eq. Ca.
Abr. 595. 8.

[Another exception hath been made to this general rule, namely, where a conditional conveyance is made, to be void upon payment of a sum certain, within a stipulated time, in contemplation of a settlement, or family provision. Thus, *A.* seized of a copyhold in fee, surrendered it, upon his marriage, to the use of himself and his wife in special tail, remainder to her in fee, upon condition that, if he paid 50*l.* at a day certain, to the daughter that the wife had, then the whole surrender would be void: The day elapsed, the 50*l.* not paid, and the husband died without issue. On a bill to redeem, brought by his heir against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration without notice; and it was resolved, that this was not originally designed for a mortgage, but that the party, by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand; he had chosen the latter, and the plea was allowed.

Sir Nich.
Woolston
v. Aston,
Hardr. 511.

One, upon his marriage, covenanted that his wife should be paid 1000*l.*, within two years after his death, and, for performance thereof, entered into a statute; but, prior to the covenant and statute, he had mortgaged part of the lands for 500*l.* for certain years. Afterwards he devised these lands to his wife and her heirs, if the 1000*l.* were not paid to her, according to the marriage-covenant, she paying off the said 500*l.* He died, leaving his wife executrix, to whose hands assets came; the 1000*l.* not being paid to the wife, she paid off the 500*l.* and had the mortgage-lands assigned to her. She then conveyed over the mortgage-lands in fee by fine and deed. The question was, Whether the heir of the covenantor could redeem, paying the 1000*l.* and the 500*l.* with interest upon discount of the profits? And the Lord Chief Baron was of opinion he could not; for the devise to the wife was absolute, if the 1000*l.* were not paid at the time appointed.

Floyer v.
Levington,
1 P. Wms.
268.

A distinction hath been likewise taken, between mortgages, and defeazible purchases, subject to repurchases within a *time limited*, where the interest is taken by way of rent-charge; for, in the latter cases, the stipulations made between the parties must be strictly adhered to, or the estate of the grantee will become absolute. Thus, *I. S.* granted a rent-charge in fee of 48*l.* a year to *B.*, upon condition, that if *I. S.* should, at any time, give notice to pay in the consideration-money (being 800*l.*) by instalments, *viz.* 100*l.* at the end of every six months; and should, pursuant to such notice, pay the same and interest at any time during his lifetime, then the grant to be void. There was no covenant for *I. S.* to pay the money, and the rent-charge was much less than what the interest came to (interest being then 8*per cent.*); *B.* had conveyed

it over after *I. S.*'s death, to a purchaser with collateral security for quiet enjoyment, and the purchaser had afterwards made a marriage settlement upon it. The question was, Whether it was redeemable after sixty years? And it was decreed, by Lord Cooper, that it was not. His Lordship observed, it was material that at the time of making the mortgage, interest was at 8 per cent., the rent-charge, therefore, was much less than the interest of the money; consequently, the payment of the rent-charge could not be taken as the payment of the interest; that several circumstances occurred in this case, which, though each of them singly might not be of force to bar the redemption, yet, joined together, were strong enough to prevail over it; that the mortgagee seemed to have allowed a consideration for purchasing the equity of redemption after the death of the mortgagor; first, by taking the rent of 48 l. per annum; secondly, by agreeing to have his money by instalments; thirdly, by leaving it only at the election of the mortgagor, whether he would redeem or not; that there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased; that length of time, where so great as in the present case, was a good bar of redemption of a rent-charge, as well as of land; and that the mortgagor was not bound to pay the money by any covenant.

The reporter observes upon the last case, that it was thought length of time was the principal objection to the redemption; but, in the case of *Mellor v. Lees*, which came on before Lord Chancellor Hardwicke, upon an appeal from the rolls, the doctrine that such limited agreements for redemption, or rather repurchase, were legal, was confirmed. In this case a mortgage was made of an estate by the plaintiff's grandfather, *Thomas Mellor*, in 1689, to *John* and *James Whitehead*; the *Whiteheads* afterwards, on the 5th of June 1689, mortgaged the same estate to *Cartwright* and *Haywood*, and their heirs, for securing 200 l., to which *Thomas* and his son, *John Mellor*, were parties; and *Cartwright* and *Haywood*, in order to secure themselves the interest, made a lease to the plaintiff's father, and to his assigns, dated the 12th of June 1689, for five thousand years, at the rate of 12 l. a year, for the three first years, and 10 l. a year for the remainder of the term; and if, in the space of three years, the 200 l. was paid with interest, then the premises were to be reconveyed. Receipts had been given sometimes for interest, and sometimes for a rent-charge; the last receipt was in 1730: The 200 l. lent, was money left under one *Sutton's* will in 1687, and directed to be laid out in the purchase of lands in fee, in *Lancashire* or *Cheshire*; the rents to be applied towards clothing twenty-four aged and needy housekeepers. The estate, at the time of the mortgage, was worth 500 l. only, but was now valued at 900 l. The plaintiff, on the 20th January 1738, had given notice that he would pay in the money; but the defendant, a new trustee of the charity, had refused to take it, insisting that it was an absolute purchase. And it was so decreed by *Fortescue*, Master of the Rolls, which decree was upon appeal to the Chancellor confirmed, his Lordship saying, that

that the bill was properly dismissed at the Rolls, not so much upon general rules, as upon the particular circumstances of the case, and the similitude of it to the case of *Floyer v. Livingston*.

Tasburgh v.
Echlin et al.
4 Brown's
Parl. Ca.
242.

It seems, from the determination in the case of *Tasburgh and M'Namara v. Sir Robert Echlin et al.* that such a contract respecting lands, limiting the payment of the money advanced and interest thereupon to a particular period, would be considered in the nature of a conditional purchase, and no redemption allowed thereof, after the time stipulated.

This case came before the House of Lords upon an appeal from a decree made by the Lord Chancellour of Ireland, in the year 1732, on the following circumstances, viz. King James I. by his letters patent under the great seal, dated the 17th of June 1608, granted divers lands to John King and John Bingley, and their assigns, for 116 years, to commence from the 18th of May then last past, at a certain yearly rent. The residue of this term, by deed dated the 26th of May 1677, became vested in John Tasburgh, father of Henry Tasburgh, the appellant in the cause. King Charles I. by his letters patent, dated the 25th of March 1647, granted the same premises to Sir Maurice Eustace and his heirs at a like rent, but without reciting or taking any notice of the term of 116 years. Sir Maurice, by his will dated the 20th of June 1665, devised the premises, *inter alia*, to his nephew Sir John Eustace in fee; who by virtue thereof, or as heir at law of the testator, became entitled to the reversion and inheritance of the premises, expectant on the determination of the term of 116 years. The premises being only of the clear yearly value of 200*l.*, Sir John, in consideration of 200*l.*, paid him by the said John Tasburgh, did by lease and release, dated the 30th and 31st of May 1681, grant and convey the same to Charles Tasburgh and his heirs, in trust for John Tasburgh; in which indenture of release there was a proviso to the following effect, viz. that if Sir John Eustace, his heirs, executors, or administrators, should pay to Charles Tasburgh, his executors, administrators, or assigns, at the end of five years, to be accounted from the date of the release, the sum of 200*l.* with full interest for the same, at the rate of 10*l.* per cent. per annum, according to the custom of the kingdom of Ireland; that then it should be lawful for him and his heirs, into the premises to re-enter, and the same to repossess and enjoy as in his and their former right. But if Sir John, his heirs, executors, or administrators, should fail in payment of the money with interest, at the time limited, that then the estate of the said Charles Tasburgh should be absolute and indefeasible, as well in equity as in law; and that Sir John, his heirs and assigns, should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said release. And Sir John did thereby, for himself and his heirs, release unto Charles Tasburgh, his heirs and assigns for ever, all his right in equity to redeem the premises, in case of failure of payment as aforesaid: and there was no covenant in the deed, on the part of the grantor, to repay the 200*l.*, or the interest thereof, as is usual in mortgages. The five years

years mentioned in the proviso being elapsed, and no part of the 200*l.*, or the interest thereof having been paid, *John Tasburgh* (having no remedy at law to compel the payment, the estate being only a reversion expectant upon the determination of a term of which there were then 43 years unexpired) exhibited a bill, in April 1687, in the name of *Charles Tasburgh*, against Sir *John Eustace*, setting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional estate of *Charles Tasburgh* in the premises (in case it should be adjudged to be a defeasible or redeemable estate) should be made absolute to him and his heirs; and that in that case Sir *John Eustace* might be foreclosed of all right or equity of redemption of the premises, and might make farther absolute conveyances and assurances to the said *Charles Tasburgh*, according to the tenor and true meaning of the indentures of lease and release. Sir *John*, being served with a *subpena* to answer this bill, stood out all process of contempt to a sequestration, and in May 1688, appeared by his six clerk, and prayed a commission for taking his answer in *England*, which was granted by consent. But it was ordered that, unless the same was returned by the 22d of *June* following, the cause should be set down to be heard, and the bill taken *pro confesso*. Sir *John* having neglected to answer at the time limited, farther time was given him; but he still neglecting to answer, a decree was made the 11th *December* 1688, that he should be foreclosed, unless the principal, interest, and costs were paid before the 11th *December* 1689. Afterwards Sir *John Eustace* returned to *Ireland*, and lived until the year 1706, when he died without issue; but he never took any one step to impeach these proceedings or decree; nor did he ever attempt to seek a redemption of the premises, but acquiesced under the decree for 18 years. *Henry Tasburgh*, the appellant, succeeded to his estate on the death of his father, in 1691, and entered thereupon. And not imagining that, after an acquiescence of 34 years under the decree, any person would set up a claim thereto under Sir *John Eustace*, he by indenture, dated the 24th of *April* 1722, in consideration of a fine of 300*l.*, demised the same to the appellant *George M^cNamara* for the term of 31 years, at the clear yearly rent of 250*l.* But the value of lands in *Ireland* rising considerably, a bill was exhibited in the court of Chancery there, in *September* 1723, by several persons in right of their wives, (nieces and coheireses of Sir *John Eustace*,) alleging, that the decree of foreclosure was obtained by surprise, fraud, and imposition; and praying it might be reversed. Afterwards, in *April* 1729, the appellant *Henry* put in a plea and answer to this bill, (which having abated, they claimed a right to revive,) insisting on the title as before set forth; and farther pleading the lease and release executed, in 1681, by Sir *John Eustace*, the declaration of trust executed by *Charles Tasburgh*, the decree of foreclosure, and the proceedings had in that cause, and the great length of time and acquiescence under that decree. And *George M^cNamara* denied notice of the respondents' title, and insisted, that he was a purchaser, for a valuable consideration, of his said

term

term without any notice. But it was decreed, that upon the respondents paying the appellant *Henry* the principal, interest, and costs due to him, he should reconvey the same; and as to *M^r Namara*, an issue was directed to be tried, whether he, at any time, and when, had notice that the coheiresses of *Sir John Eustace* had or claimed any and what right to the lands in question, after the lease to *King* and *Bingley* should expire? From this decree an appeal was brought, when it was ordered and adjudged, that the proceedings, orders, and decrees complained of by the appellant should be reversed, and the respondents' bill dismissed.]

Preced.
Chanc. 160.
Jory v. Cox.

But though these and such like restrictions are relieved against, to make them answer the primary intention of the parties; yet, if *A.* on a mortgage lends money at 5 *l. per cent.*, but agrees in the deed, that, if the money were paid within three months after it became due, he would accept of 4 *l. per cent.*, and the mortgagor neglects to pay the interest within the time, equity will not relieve him, but he must pay 5 *l. per cent.*; for though the court relieves against unreasonable penalties, yet this is not so, for the mortgagee might have refused to lend his money under 5 *l. per cent.*

Chan. Rep.
32-

So, if the mortgagee devises, that the mortgagor should be remitted part of his mortgage-money, provided he pays the principal and interest within three days after his decease; if the condition be not performed, the remittance is lost; because this being a voluntary bounty, and not *ex debito justitiae*, the party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the court cannot relieve in this case after the day.

2 Salk. 449.
Pl. 1. Lord
Offulston v.
Lord Yar-
mouth.
2 Atk. 331.
Thornhill
v. Evans,
S. P.

But where in a mortgage there was a proviso, that, if the interest was behind six months, then the interest should be accounted principal, and carry interest; this, by my Lord *Cowper*, was decreed to be a vain clause, and of no use; and he said, that no precedent had ever carried the advance of interest so far: and that an agreement, made at the time of the mortgage, will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal.

Strode v.
Parker,
2 Vern. 316.
Holles v.
Wyfe,
2 Vern. 289.
Nichols v.
Maynard,
3 Atk. 520.

[But where, on a bill to foreclose a mortgage, the interest, by the deed, was to be 5 *per cent. per ann.*, payable half-yearly, and if not paid by the space of two months after the time of payment, then to be raised to 5 *l. 10 s. per cent. per ann.* for increase of interest; the interest being run greatly in arrear, the question was, After what rate it should be computed on redemption of the mortgage? And it was decreed to be computed at the rate of 5 *per cent. per ann. only*: for, where the interest was to be increased, if not paid at the day, that was but in the nature of a penalty, and relievable in equity.]

Marquis of
Halifax v.
Higgins,
2 Vern. 134-

But it seems, that if there be a covenant for payment of the additional 1 *per cent.*, the court will not relieve against it. Thus, where money was lent on mortgage at 5 *per cent.*, and the mortgagor covenanted to pay 6 *per cent.* if he made default in payment of interest for the space of sixty days, after the time of payment; the court decreed, that, from default made, the mortgagor should

pay 6 per cent.; for that this covenant was the agreement of the parties, and not to be relieved against as a penalty.

And, if an indulgence be given by the mortgagee, such agreement will be good to raise the interest, upon the ground of forbearance; such additional interest not being considered, in that case, as a penalty, but as a liquidated satisfaction fixed and agreed upon by the parties. So, where a mortgage was given, in *Ireland*, to trustees, by way of securing debts to creditors, and no money actually passed, but the sum nominally lent was to be paid by instalments; an agreement that the interest of those sums should rise, on non-payment at the time appointed, or within three weeks after, from 5 to 8 per cent., was held good, upon an appeal to the House of Lords.

And, in a similar case, where a long arrear of interest had accrued, and the mortgagee had sent an account thereof to the mortgagor, who returned an answer, admitting the account, *desiring forbearance*, and promising to make satisfaction for the same; Lord Chancery *Parker* allowed the additional 1 per cent. reserved, as a satisfaction; saying, that though the proviso, obliging the party to pay 6 per cent., was generally looked upon as a penalty, and in *terrorem*, and therefore to be relieved against, if only a very short lapse had happened; yet it might not be relievable against, in case of a long arrear of interest; and that if no reservation of 6 per cent. had been made, and a great arrear of interest had incurred, the court, on such a promise, in writing, to make a satisfaction for forbearance, would have given the mortgagee some allowance in that respect.]

Pre. Ch.
161.

Burton et al.
v. Slattery,
3 Brown's
Parl. Ca. 68.

Brown v.
Barkham,
1 P. Wms.
652.

(C) Of the Nature of a Mortgage, as to the distinct Interests of the Mortgagor and Mortgagee.

THE mortgagor before forfeiture, and whilst it remains uncertain whether he will perform the condition at the time limited, or not, hath the legal estate in him: also, after forfeiture he hath an equity of redemption; so that he is still considered as owner and proprietor of the estate, until the equity of redemption be foreclosed, and therefore may make (a) leases, or (b) any settlement thereof, which will bind his equity of redemption.

[(a) The mortgagor being considered in the nature of a tenant at will, it follows, that if he makes a lease sub-

sequent to the mortgage, the mortgagee may treat the lessee as a wrong-doer, or not, at his election. Cro. Ja. 660. Cro. Car. 303. If the mortgagee permits the lessee to enjoy his lease, the mortgagor may, thenceforth, be considered as a receiver of the rent, or, in some sort, a trustee for the mortgagee, who may at any time countermand the implied authority, by giving notice to the tenant not to pay the rent to the mortgagor any longer. 1 Atk. 606. But if the mortgagor elects the other alternative, the lessee may be turned out by an ejectment, he being in under a person who had no power to under-let, but subject to eviction by the mortgagee. Keech v. Hall, Dougl. 21. But if there is tenant from year to year, and the landlord mortgages pending the year, the tenant is entitled to fix months notice from the mortgagee. Birch v. Wright, 1 Term Rep. 378.—Though the tenant be in possession under a lease prior to the mortgage, yet the mortgagee, after giving notice, is entitled to the rent in arrear at the time of the notice, as well as to what shall accrue afterwards, and he may distrain for it after such notice. Moss v. Gallimore, Dougl. 279.]—(b) It is said, that a tenant in tail of an equity of redemption, may devise it for payment of debts. Vern. 41. Turner v. Gwinn.—[A. being seized of the lands in question in fee, mortgaged the same for two several terms of 1000 years each, and afterwards made his will, by which he devised those lands to L., his heir at law, and to the heirs male of his body, remain-

des

der to B. for life, with contingent remainders to his first and other sons in tail, remainder to G. D. life, with remainder to his first and other sons in tail, remainder to his own right heirs, and *as* Afterwards L. L. being seized of the lands in question under the will, and also of other lands in fee of very considerable yearly value, made his will, by which he bequeathed to his mother the sum of 200*l.* and then directed and appointed, that his executor should pay off and discharge all mortgages and incumbrances laid and charged upon his estate in Sussex, being the lands in question, and particularly mentioning the two aforesaid mortgages for years, and then directed and appointed that the said several mortgage monies should be kept on foot; and upon payment of the several sums of money due upon the same, *that* he assigned by the mortgagees to his mother dame M. S., for her sole use and benefit, during the remainder of the several terms, in the said several mortgages contained; and farther devised a yearly re-charge of 100*l.* to his mother for life, to be issuing out of all his manors, &c. in the several count of Hertford and Bedford. Then the will went on—"and as for and concerning all and every my manors, messuages, lands, tenements, and hereditaments, which I the said L. L. am now seized of in law, equity, or which I have a power to give or charge, I do give and dispose of the same in manner following"—and then he appointed, that if his wife proved with child, and such child should be a son, *that* his son should have all his aforesaid manors, &c. in tail, remainder to his cousin W. L., the defendant in the original cause, and to his heirs: And if the said after-born child should prove a daughter, appointed that 5000*l.* should be raised out of the profits of his said estate for such daughter; and if his wife were not with child at the time of his death, then he devised all his said manors, &c. to his cousin W. L., and his heirs for ever. The testator died, his wife not having been with child. S. and G. D. both died without issue. Then the plaintiff, as representative to dame M. S., brought a bill praying an assignment of those terms; and the defendant brought a cross bill, praying to be let into the same as devisee of the reversion by the will of L. L. And the question was, Whether the equity of redemption, which the testator had, incident to the reversion in fee, as heir at law of the mortgagor, severed from the reversion by the devise, and given to dame M. S.; and so those terms vested in her as deemed by the devise of the reversion? or, whether those terms were devised to her only as security for the original mortgage-money, and so subject to be redeemed by him, that should have the inheritance? And it was decreed by the Lord Chancellor, King, assisted by Lord Chief Justice Raymond, and Mr. Justice Denton, that the devisee of the reversion under the will of L. S., should be let into redemption for that the testator did not otherwise intend these mortgages for his mother, than as securities for such money. *Amburst v. Linton, Fitzg. 99.*]

Sid. 460.
Vent. 82.
Lev. 274.
Carth. 101.
414.

Therefore, if a man mortgages his land, and, as is usual, it continues in possession, and levies a fine, and five years pass, y the mortgagee is not barred; for though the mortgagee be, reality, out of possession, yet when that is done by the consent both parties, and the nature of the contract requires it should be so while the interest is paid, it is against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security, and is less than a fraud, which the law will not countenance.

Palm. 135.
Cro. Jac.
593.

And as the mortgagor, being considered only as tenant at will to the mortgagee, cannot, by his act, defeat the interest of the mortgagee, otherwise than by payment of the mortgage-money, so neither can the mortgagee defeat the mortgagor of his equity of redemption: therefore, if a mortgagee in fee suffers a recovery this, even at law, shall not bind the mortgagor's right of entry upon performance of the condition. But if the mortgagor has been a party to the recovery, then his right had been bound, not only on account of the recompence in value, but because he is stopped by the recovery to claim the land against the recovery or his heirs, when he was called in before the judgment given to defeat his title, and could not do it.

Flow. 373.
2.

So, if a mortgagee be disseised, and the disseisor levy a fine and five years pass after the proclamations, though the mortgage is hereby barred, yet, if the mortgagor pay, or tender his money, he has five years to prosecute his right, by the second saving in the statute of 4 H. 7. c. 24. because his title did not accrue until payment of the money.

And as the mortgagor, till the equity of the redemption be foreclosed, is considered as owner of the land, it was ruled, where a bill for a redemption was brought against a mortgagee in possession, and a decree accordingly, that the mortgagee, before the account taken, having presented to a church that became void, should revoke his presentation (*a*), and present such a person as the mortgagor, or his vendee (he having contracted to sell) should appoint.

144. *Robinson v. Jago*, Bunb. 130. (*a*) *Qu.* How is the presentation to be revoked?] Preced.
Chan. 71.
[That the
mortgagor
shall present,
see *Gally v.*
Selby, 1 Str.
403. *Ken-*
ney v. Lang-
ham, Ca.
temp. Talb.

[In the case of *Gardiner v. Griffith*, the mortgage was of a long term in a naked advowson, and therefore a distinction was attempted; because the mortgagee could have no other satisfaction than by providing for a child, relation, or friend, on the advowson becoming void; and the rather, for that it was expressly so agreed in the mortgage deed; but the court gave no opinion thereupon. And, in the case of *Mackenzie v. Robinson*, which was the case of a mortgage of a naked advowson, Lord *Hardwicke* doubted the legality of such a covenant, *that the mortgagee should present*, it being a stipulation for something more than principal and interest; and the mortgagee, not being able to find any precedent in his favour, gave up the point of presenting; in consequence whereof, an order was made, that the mortgagor should have liberty to present, and the mortgagee was obliged to accept of his nominee.

But, if the mortgagee present to an advowson, a bill by the mortgagor, to compel the incumbent to resign and to deprive him of his living, will be dismissed, unless brought within six months after the death of the last incumbent. In such case the mortgagee, instead of bringing a foreclosure, should pray a sale of the advowson.

A mortgagee takes the estate mortgaged in the same plight that it is in, in the hands of the mortgagor. If the mortgagor therefore has done any act that amounts to a forfeiture, the mortgagee will lose his security. Thus, tenant for life, with remainder to his wife for life, remainder to his sons in strict settlement, remainder over, having occasion for money, together with his wife, mortgaged the estate settled by way of lease and release and fine, *come ceo*, &c. which mortgage was afterwards assigned to the plaintiff, and another lease and release and fine levied and executed by the husband and wife for making good the assignment. The husband died, and a bill was brought against the widow and eldest son to compel them to redeem or to foreclose them, and to be relieved against the forfeiture. The defendant, the son, pleaded the marriage-settlement of his father and mother, who were but tenants for life, and insisted on the forfeiture; and the court allowed the plea; the Lord Chancellor saying, that this was a contrivance to destroy the settlement and disinherit the son; and his Lordship said, he had so decided in many cases, particularly in the case of Sir *Harry Peachy* and the Duke of *Somerset*.

Gardiner v. Griffith,
2 P. Wms.
404.

Mackenzie v. Robinson, 3 Atk.
560.

Gardiner v. Griffith,
2 Will. 405.
3 Atk. 458.

Lady Whetstone v. Sainsbury,
Pro Ch.
591. See
Willis v. Fineux,
Id. 1082

Hungerford
v. *Clay*,
9 Mod. 1.
3 Eq. Ca.
610.

A mortgagee, before foreclosure, cannot exercise any act of ownership over the property which may incumber the mortgagor. He can make no lease of the lands for years to an undertenant. Thus, in the case of *Hungerford v. Clay*, the bill was for redemption on payment of principal and interest. The substance of the answer was, that the defendant, the mortgagee, had made a lease of the house for five years at a rent reserved with a covenant, that the lessee should have the option of a farther lease for four years after the expiration of the said term; that the term for five years was now expired, and the lessee desired to take the premises for four years longer; that, if the plaintiff would grant such lease, the defendant would reconvey on payment of principal and interest. On hearing this case at the Rolls, the defendant had a decree; but, on appeal to the Chancery, his Lordship was of opinion, that the mortgagee, before foreclosure of the equity of redemption, could not lease the premises for years to bind the mortgagor, unless, to avoid an apparent loss, and merely in necessity: and the decree at the Rolls was reversed.

Hanson v.
Derby,
2 Vern. 392.

And as a mortgagee cannot, before foreclosure, exercise any act of ownership that will attach on the estate, but ought to reconvey the premises free from all incumbrances; so neither can he justify, in equity, the commission of any act which may injure the estate; therefore, though at law, a mortgagee in fee may commit waste, yet he will be restrained in equity. Thus, on a bill to redeem a mortgage, wherein an account was decreed, and 250 *l.* reported as due, and exceptions taken to the report; it being, on motion and reading affidavits, shewn, that the defendant had burnt some waifcot and committed waste, the defendant was ordered to deliver up possession to the plaintiff, who was a pauper, he giving security to abide by the event of the account.

Withering-
ton v.
Banks,
Sel. Ca.
Ch. 31.
3 Atk. 518.

So, where the mortgagee of an estate in fee had cut down trees, on application to the court it was decreed, that an account should be taken of what was cut down, and the produce applied in the first place to the payment of the interest, and then to the sinking of the mortgage; and an injunction was granted to stay selling any more.

But a distinction is made where the security is defective; for, in that case, the court will not restrain a just creditor from his legal privileges; but then the timber, when cut down, must be applied to ease the estate, and not to the mortgagee's benefit.

However, although the mortgagee cannot, to better his security, do any act to incumber the estate mortgaged, which will be valid against the mortgagor after redemption, nor will be justified in committing waste; yet he will be entitled to such expences as he shall incur in necessary repairs, or other acts for the preservation of the estate mortgaged, and may, certainly, add this to the principal of his debt, and it will carry interest.

3 Atk. 4.
Lucan v.
Martins,
1 Will. 34.

Thus, if a leasehold estate be mortgaged, and there is no covenant on the part of the mortgagor, that he should procure the lives to be filled up, the mortgagee cannot compel him to do it; but must pay the expence of renewing, and reimburse himself by adding

adding it to the principal of the mortgage, and it shall carry interest. So it was determined in the case of *Manlove v. Ball* and *Bruton*, which was a mortgage of a church lease for three lives, two of which died during the time the estate was in mortgage, and were renewed on fines paid by the mortgagee.

Manlove v. Ball et al.
2 Vern. 84.
Supra.

A term assigned in trust to attend the inheritance will, in equity, follow all the estates created thereout, and all the incumbrances subsisting upon such inheritance, and is so connected with it, that equity will not suffer it to be severed to the detriment of a *bond fide* purchaser. Therefore, a mortgagee shall have the benefit of all the interests which the mortgagor had at the time the mortgage was made, unless against an intermediate purchaser without notice, and, consequently, if there be a term in a mortgaged estate held in trust for the mortgagor, when the mortgage of the inheritance is made, the concealment of it will be a fraud upon the mortgagee, and the trustees of such a term assigned to attend the inheritance, will, in equity, become trustees for the mortgagee of the inheritance.

Vide 3 Aek.
476, 477-
Charlton et al. v. Low et al.
3 P. Wms. 328.

If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his representatives, with a good title; the mortgagee will be entitled, in equity, to the benefit of it; for it will be considered there as a graft upon the old stock, and as arising in consideration of the former title.

As, where houses and lands were demised for a long term, and an assignee of the lease, believing he had a good title, mortgaged it for 100 l. afterwards the title turned out to be bad, the estate belonging to another person. Then the real owner of the estate, out of compassion to the assignee, who had built upon it, leased the premises for a long term to trustees for his wife, he being run away. And on a bill filed, the trustees were decreed to make a new mortgage to the mortgagees; the Master of the Rolls saying, that this was a graft on the old stock, all the benefit of it, except the rent reserved, arising in consideration of the former title.

Seabourne v. Seabourne,
2 Vern. 12.

If a mortgagee procures a grant of a new term after the old one be actually expired, yet this will be a trust for the mortgagor, and redeemed with the principal; for it is supposed to have proceeded from having had the original term: and, although there be nothing in fact in having a tenant-right, yet, as such regard is had to it, in the estimation of the world, it will be looked on as the occasion of the lease.]

Rakestraw v. Brewer,
Sel. Ca. in Ch. 35.
Lee v. Lord Vernon,
7 Brown's Par. Ca. 432.

By the 7 *W. & M. c. 25.* it is enacted, "That no person or persons shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust estate or mortgage; unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits of the same estate, but that the mortgagor, or *cestui que trust* in possession, shall and may vote for the same, notwithstanding such mortgage or trust."

And by the 9 *Ann. c. 5.* which requires, that knights of the shire should have 600 l. *per annum*; and every other member 300 l.

per annum, it is enacted, "That no person shall be qualified to " sit in the House of Commons, within the meaning of the act, " by virtue of any mortgage, whereof the equity of redemption " is in any other person, unless the mortgagee shall have been in " possession of the mortgaged premises for seven years before the " time of his election."

[On the assignment of a term by way of mortgage, the mortgagee, before actual possession, is not liable to the reversion and arrears of rent, and other covenants in the original demise.

Eaton v.

Jacques,

Dougl. 455.

Walker v.

Reeves, 11. 461. note.

Traherne et

al. v. Sad-

leir et al.

1 Brown's

Par. Ca. 105.

Webb v.

Ruffell,

3 Term

Rep. 393.

But, if the mortgagee enters into possession, he becomes liable to all covenants that run with the land, for he takes it *cum onere*, and, enjoying the profits, he must submit to the losses.

And if a mortgagor, by a mortgage of a term vested in him, devests himself of all interest therein, in the consideration of a court of law, he retains only the equity of redemption, which he must pursue in a court of equity; and therefore, if he join with his mortgagee in a lease, in which the lessee is made to covenant with the mortgagor, for rent, repairs, &c. such covenants will be merely collateral to the mortgagee's interest in the land, and the assignee of the mortgagee, cannot maintain an action for the breach of them on the statute of 32 H. 8. c. 34.

These covenants, therefore, must be considered as *covenants in gross*, upon which, of course, the mortgagor may maintain an action. And so it was determined on the same instruments, and between some of the same parties, in the case of *Stokes* against *Ruffell*, in the court of King's Bench.

If a mortgagor commit waste, whether it be a mortgage in fee or for a term of years, the court, on a bill by the mortgagee to stay waste, will grant an injunction; for they will not suffer a mortgagor to prejudice the incumbrance.

Stokes v.

Ruffell,

3 Term

Rep. 678.

Barant v.

Lovel,

3 Atk. 723.

Cowp. 601.

A mortgagor is never permitted to dispute the title of his mortgagee; because no man is permitted to dispute his own solemn deed.

Doug. Rep.

610.

A mortgagor *in possession* gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, the mortgage being only a pledge to him for security of his money, and the original ownership of the land still residing in the mortgagor, subject only to the legal title of the mortgagee, so far as such title is requisite to the end of his security.

Rea v. Ca-

llington,

3 Term

Rep. 771.

But, if the mortgagee evict the mortgagor and take possession, the mortgagor, though afterwards occupying permissively for a particular purpose, will not thereby gain a settlement.]

(1) Of the legal Performance of the Condition.

THE condition must at law be strictly performed, otherwise the mortgagor loses all benefit of redemption; but, if upon a mortgage a tender be made of the money, at the place, at any time

2 P. 4. 1.

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time of the day specified in the condition, and the mortgagee refuse, the condition is saved for ever.

Plow. 173.
5 Co. 114.
Co. Lit. 209.
Co. Lit. 209.

And upon such refusal the land is discharged, because upon the tender the demise is void; and if it be upon a feoffment, the condition is performed, and the feoffor may re-enter. But the money lent doth yet remain a debt or duty, because it was a debt by the original lending of the money, whether it had been so secured or not; and though the security fails, according to the words of the agreement, yet there is the same natural justice that the money should continue: but, if a feoffment were made, on condition of payment of a sum gratuitously, to re-enter, if it were refused, there is no remedy.

The legal tender, or payment, must be made to the parties mentioned in the condition; because, to make such a tender as will be a legal performance, it must be made according to what the parties have expressly agreed on in the condition.

Therefore, if a man bargains and sells lands, with proviso, that if the vendor, before such a day, pay so much money to the vendee, his heirs or assigns, that the sale shall be void; the vendee before the day makes his executors, and dies, and the vendor tenders the money to the executors, this is not good, because the word *assigns* must be understood to be assigns of the land, in its primary and original signification; and where there is an express provision to whom the tender and payment is to be made, the executor is excluded; for *expressum facit cessare tacitum*.

Dyer, 180,
181.
Co. Lit. 110.

But, if a man make a feoffment in fee, upon condition, that the feoffee shall pay 20 l. to the feoffor, his heirs, or assigns; here, the primary signification of the word *assigns* fails, because there can be no assignment of the land of which he hath enfeoffed another; and since the original sense of the word fails, lest it should be wholly insignificant, the secondary sense of the word is to be taken, viz. the assignees in law, which the executors are *quoad* the personal estate; and therefore the payment is good either to the executor or to the heir.

Co. Lit. 210.
5 Co. 96.

If the condition be to pay the money to the feoffee, in mortgage, his heirs or assigns, and he make a feoffment over; it is in the election of the feoffor to pay the money to the first or second feoffee, because by the words he may pay it either to him or the assignee. So, if the first feoffee die, in this case, he may pay it to his heir or the assignee, for the same reason; nor is he obliged to take notice of the validity of the second feoffment, to which he is a stranger.

Co. Lit. 210.

But if the condition was, that the feoffor should pay it to the feoffee at such a day, and the feoffee die before the day, it shall be paid to the executor, and not to the heir, though the land descend to the heir; for during the suspension of the condition, which is till the whole time is elapsed, the land is wholly taken to be a pledge for the money, and the money to be a personal duty to the feoffee, and, consequently, is to be paid to such person as represents him; but then this payment must be to the executor of the

Lit. § 339.
Co. Lit. 209.
5 Co. 96.

whole sum ; for a partial and fraudulent payment, though accepted by the executor, is really no performance of the condition, and therefore the interest remains in the heir at law.

Lit. § 337. If the condition were, that the feoffor should pay so much money to the feoffee, without limitation of time, the feoffor hath time during life to pay the money to the feoffee during his life ; but if either die before the time, which is set by the parties for the performance of the condition, is elapsed, the feoffment is absolute ; but if the payment were to be made to the feoffee, his heirs or executors, then the feoffor hath time during life.

5 Co. 96. If a man make a feoffment in fee, upon condition, that the feoffor, within a year after the death of the feoffee, pay to his heirs, executors, or administrators, 100*l.* that then the feoffor should re-enter ; the feoffee make a feoffment over, and die ; the feoffor pay the 100*l.* within the year, and the heir pay back 30*l.* this is a partial and fraudulent payment, and no good performance of the condition, to defeat the estate of the feoffee : but if the whole money had been paid, it had been good, because the payment is to be made to the persons mentioned in the condition, and not to the assignee of the land, who is not named therein.

(E) Of the Equity of Redemption and Foreclosure ; And herein,

1. Who may redeem, and by whom the Mortgage Money shall be paid.

Hard. 465.

ALTHOUGH, after breach of the condition, an absolute fee-simple is vested at common law in the mortgagee ; yet a right of redemption being still inherent in the land, till the equity of redemption be foreclosed, the same right shall descend to and is vested in such persons as have a right to the land, in case there had been no mortgage or incumbrance whatsoever : and as an equitable performance as effectually defeats the interest of the mortgagee, as the legal performance doth at common law, the condition still hanging over the estate, till the equity is totally foreclosed ; on this foundation it hath been held, that a (a) person, who comes in under a voluntary conveyance, may redeem a mortgage ; and though such right of redemption be inherent in the land (b), yet the party claiming the benefit of it, must not only set forth such right, but also shew that he is the person entitled to it,

(a) Vern.
293.

(b) Vern.
18. Chan.
Ca. 74.

2 Chan.
Ca. 5.
Vide tit.
Heir and
Ancestor,
and tit. Ex-
ecutor.

As the heir at law is regularly entitled to the benefit of redemption, he is also entitled to the assistance of the personal estate of the mortgagor for that purpose ; according to the doctrine established in the courts of equity, that the personal estate, in the hands of the executor, shall be employed in case of the heir, by whatever means the heir becomes indebted as heir ; for the personal estate having received the benefit by contracting the debt, and

and the real being considered only as a pledge for it, it is but reasonable that satisfaction should be made out of it; according to the common rule, *Qui sentit commodum sentire debet et onus*.

And on this foundation it hath been frequently held, that if a man mortgage lands, and covenant to pay the money, and die, the personal estate of the mortgagor shall, in favour of the heir, be applied in exoneration of the mortgage.

v King, 3 P. Wms. 360. Galton v. Hancock, 2 Atk. 476. Robinson v. Gee, 1 Ves. 251. Earl of Belvedere v. Rochfort, 6 Br. P. C. 520. Philips v. Philips, 2 Br. Ch. Rep. 273.]

Also it is held by some opinions, that this benefit shall not only extend to the heir at law, or *heres natus*, but also to an (a) *heres factus*, from a presumption, that it is the intention of the testator, that he should have all the privileges of the *heres natus*: And (b) some even hold, that an ordinary devisee shall have this benefit: but as to this last point it hath been (c) held otherwise; and that if a man mortgages his land, and then devises it to J. S. or to A. for life, the remainder in fee to B., that there the charge doth pass with the estate, there appearing no intention of the testator that he should have it discharged (d).

ing made a mortgage of his lands for a considerable sum of money, by his will appointed them to be sold for payment of his mortgage-money, and afterwards devised the lands so in mortgage, as to one moiety thereof to the plaintiff, &c. and made the defendant executor, and devised the personal estate to his executor for the payment of his debts: The single question was, Whether the personal estate should be applied to discharge the mortgage for the benefit of the devisee? And it was decided at the Rolls, that the personal estate should be so applied for the advantage of the devisee, and that decree was confirmed by the Lords Commissioners. Johnson v. Milkrop, 2 Vern. 112. In the case of Pockley and Pockley, 1 Vern. 36. it was determined, that such debt on mortgage would lessen the widow's customary moiety in the province of York; for the custom cannot take place until after the debts paid.—So, a mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part of the custom of London. Bail v. Bail, cited 1 P. Wms. 335.—And where lands are subject to, or devised for, payment of debts, such lands shall be liable to discharge mortgaged lands either descended or devised. Bartholomew v. May, 1 Atk. 487. Marchioness of Tweedale v. Coventry, 1 Br. Ch. Rep. 240. Even though the mortgaged lands be devised, expressly *sub j. a. to the incumbrance*. Serie v. St. Eloy, 2 P. Wms. 365. So, lands descended shall exonerate mortgaged lands devised. Galton v. Hancock, 2 Atk. 424. So, unincumbered lands and mortgaged lands, both being specifically devised, (but expressly “after payment of all debts,”) shall contribute in discharge of such mortgage. Carter v. Barnardiston, 2 P. Wms. 505. 2 Br. P. C. 1. In all these cases, the debt being considered as the personal debt of the testator himself, the charge on the real estate is merely collateral.]

So, if the mortgagor conveys away the equity of redemption, the purchaser shall not have the benefit of the personal estate, but must take it *cum onere*.

It has likewise been held by some opinions, that the heir of the mortgagor shall have the benefit of the personal estate to pay off the mortgage, though there be no covenant in the mortgage-deed for the payment thereof; because the mortgage-money is a debt, whether there be any express covenant for the payment of it or not.

necessary: the law is now clearly settled as here laid down. For, by Lord Talbot, in King v. King, 3 P. Wms. 358. every mortgage implies a loan, and every loan implies a debt; and though there be no covenant or bond, yet the personal estate of the borrower of course remains liable to pay off the mortgage. Hence, a decree of Lord Harcourt in the case of the mortgage of a ship, where the ship was taken at sea, and there was no covenant for payment of the money; and though the ship could not properly be said to be in nature of a pawn or *depositum*, since the mortgagor had sailed with the same for sea; nevertheless the executors of the mortgagor were decreed to pay the money for which the ship

2 Salk. 449.
Pl. 3. [So,
Pockley v.
Pockley,
1 Vern. 36.
King v.
251.]

(a) 2 Chan.
Ca. 84.
(b) Vern.
36.
(c) Chan.
Ca. 271.
[(d) In a
later case a
contrary de-
termination
was given.
There, the
defendant's
testator hav-

2 Salk. 450.
Vern. 37.

2 Salk. 449.
Vern. 456.
Preece.
Chan. 61.
[(c) This
guarded
statement
is no longer

was mortgage. So, it is in the case of Welsh mortgages (*Howell v. Price, infra*), where no day is appointed for the payment, but the matter is left at large. And see *Balsh v. Hyham*, 2 P. Wms. 455.

But where a mortgage in fee was made, redeemable at *Mich.* or any other *Mich.* day following, on six months notice; and there was no covenant for payment of the mortgage-money; it was held by my Lord Chancellor *Cowper*, that the mortgagor having devised his personal estate to his wife and daughter, and having during his life paid the interest of the mortgage, the personal estate should not be applied in case and exoneration of the real estate, for the benefit of the heir at law; for, as he said, there being no covenant for payment of the money, there was no contract in it between them, neither express nor implied; nor would any action lie against the mortgagor to subject his person, or estate, to pay this money; but this was in the nature of a personal purchase, subject to be defeated on payment by the mortgagor or his heirs, of the sum stipulated between them, at any time, at the election of the mortgagor, or his heirs; so that there was an everlasting subsisting right of redemption, devolving on the heirs of the mortgagor, which could not be forfeited as in the case of a mortgage; and therefore there could be no application, on any occasion for the assistance of the court, but the personal estate might even at law defeat the conveyance, by satisfying the terms and conditions of it; which were not limited to any particular time, but might be performed on any day, until the end of the world; and since here was no covenant or contract, either express or implied, to charge the personal estate of the mortgagor, he thought there was no reason to lay the load of this debt upon that which was given to other persons.

The court entered the trial of an issue that had been directed by the court. Upon that issue the court was divided of opinion, that the personal estate should be applied in exoneration of the real estate; but the majority of the court, that his executors should, by his personal estate, pay the mortgage-money being a debt, his Lordship decreed accordingly. (*See the case of the Heir and Ancestor (E), pl. 7.*)

And if the grandfather mortgages, and covenants to pay the mortgage-money, and the lands descend to his son, and his son dies leaving a personal estate and a son; the son's personal estate shall not go in aid of this mortgage.

And if an heir has lands descended to him, incumbered with a mortgage, and he, before any application made by him to have the personal estate, disposes of them, he cannot afterwards come upon the personal estate; for the equity, which he has in, that the lands may descend clear to the father.

Where the real estate is originally, or afterwards becomes *primarily*, the real estate shall be first applied, though a covenant or bond is given, for such covenant or bond is only intended as a collateral security to the land, and cannot alter the rule. In *Steger v. Ogden*, 1 P. Wms. 347. land descended to the wife

wife subject to a mortgage made by her father; on an assignment of the mortgage, the husband covenanted for the payment of the money to the assignee: it was decreed, that the husband's personal estate was not liable to exonerate the mortgaged premises, for the debt was *originally* the father's, and *continuing* to be so, the covenant was an *additional* security for the satisfaction only of the lender, and not intended to alter the *nature* of the debt.

George Evelyn, the defendant's father, and grandfather to the plaintiffs, had three sons, *John*, *George*, and the defendant *Edward Evelyn*; *George*, the father (being tenant for life, remainder to his eldest son *John*, in tail male of part of the premises) together with his eldest son *John*, on the 20th October 1698, by deed and recovery, settled certain estates in strict settlement, with a power to *George*, the father, by deed or will, to charge by lease, mortgage, or otherwise, the premises limited to himself for life, with raising or paying any sum not exceeding 6000*l.* *George*, the father, in pursuance of the power, mortgaged part of the said land for 1000*l.* for the term of 1000 years. This mortgage afterwards, by mesne assignments, became vested in Sir *Thomas Pope Blunt*, with a covenant, from *George Evelyn*, the son, for payment of the mortgage-money, and, on the same assignment, Sir *Thomas*, the mortgagee, covenanted to re-assign to *George Evelyn*, the son. Afterwards *George Evelyn*, the father, died; then *John Evelyn*, the eldest son, died without issue, upon which *George*, the second son, entered upon the premises comprised in the settlement, and died intestate, leaving the defendant, *Mary*, his widow, and three daughters. Then *Edward Evelyn* and his son (the next remainder-man in tail) instituted a suit against Mrs. *Evelyn*, the mother (afterwards married to Governor *Bohun*) being the administratrix of her former husband, *George Evelyn*, praying, that the personal estate of her late husband should be applied towards paying off the mortgage of 1500*l.* and in exoneration of the real estate. But it was held by the Lord Chancery, assisted by the Lord Chief Justice *Raymond*, and the Master of the Rolls, that the personal estate of the son should not be applied to pay off this mortgage, made by the father; because the charge was made by the father in pursuance of the power contained in the settlement; and as he had such power, the defendant *Edward* must be contented to take such land *cum onere*; and notwithstanding that the son did afterwards, on the assignment to Sir *Thomas Blunt*, covenant to pay the mortgage-money, yet, since the land was the original debtor, this covenant from the son would be considered *only* as a security for the land.

Gilbert, the late Earl of *Coventry*, on his marriage with the daughter of Sir *Strensham Masters*, (the Earl being but tenant for life, with a power of making a jointure of lands, not exceeding 500*l. per annum*, on any wife he should marry) covenanted, in consideration of the intended marriage, that he, or his heirs, would, after the marriage, according to the power given him by his father's will or otherwise, settle 500*l. per annum* on his wife for her jointure; and it being in proof, that the late Earl directed his steward to look over the rent-rolls, for a fit part of the estate

Evelyn v. Evelyn,
2 P. Wms.
91. Fittg.
131. S. C.
Sel. Ca.
Ch. 20.

Earl and
Countess of
Coventry,
2 Will. 222.
Strange,
556. S. C.

estate to make good the jointure, and that afterwards the jointure-deed was engrossed, but not executed; though this depended only on a covenant, yet the jointure of *land* being the *chief thing* in view, the decree was, that the *land* should be settled, and the covenant not made good out of the *personal estate*.

Freeman v.
Edwards,
2 Will. 435.

And so in the case of *Edwards* and *Freeman*, though the wife's jointure, and the daughter's portion were secured by articles, which were never completed by a settlement, yet those articles being to settle lands, and the covenantor leaving lands sufficient to answer them, it was decreed, that the daughter's portion should be raised out of the lands, and that the personal estate of Mr. *Freeman*, the covenantor, should not be applied in exoneration thereof. But it is to be observed, that in the latter case, particular lands were agreed to be settled, and consequently, that the covenant was a lien upon those lands.

Leman v.
Newnham,
1 Vez. 51.
So, Lacam
v. Mertins,
Id. 312.
Robinson
v. Gee,
Id. 251.

The son, tenant in fee, on an assignment of the ancestor's mortgage, covenanted with the assignee for payment: yet it was determined, that the personal security was only *auxiliary*, and both principal and interest were charged *primarily* on the land; for although the interest had accrued during the possession of the son, the interest must follow the principal, and be charged on the same fund.

Parsons v.
Freeman,
before Lord
Hardwicke,
25th Oct.
1751. Vide
2 P. Wms.
664. note 1.

A. purchased an estate for 90*l.* which was at that time mortgaged for 86*l.*, and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor; the court admitted the rule of law above mentioned, but, in this particular case, thought that, although the covenant was with the vendor only, and the vendee's personal estate not liable in that respect to the mortgagee, yet the words were sufficiently strong to shew an intention in the vendee to make it his personal debt.

Lewis v.
Nangle, be-
fore Lord
Hardwicke,
7th Nov.
1752. Vide
2 P. Wms.
664. note 1.

N. was, before her marriage, indebted to sundry persons, and entitled to the inheritance of lands, charged with the payment of sundry sums; and before her marriage entered into articles, whereby the estates were to be settled to the husband for life, *sans* waste, remainder in like manner to wife, remainder to the issue of the marriage, remainder to the wife in fee; the marriage took effect, and the husband being pressed for payment of the wife's debts, and having also occasion for a farther sum of money, they borrowed 1300*l.* of the wife's sister (the original plaintiff in the cause), and secured it by mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond conditioned for payment of the money, according to the provisos in the mortgage. Subject to this mortgage, the lands were settled on the husband for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. N. died without issue; and the plaintiff was the devisee of the sister, who brought his bill against N.'s husband for the payment of the mortgage-money. But the Lord Chancellour held, that although part of the money was raised for the husband's use, yet the mortgage being a single transaction, he must suppose the intention of the parties to be uniform, and that such intention was

to charge the wife's estate with the whole debt; and his Lordship dismissed the bill, so far as it sought to compel the husband to exonerate the land, but directed him to keep down the interest during his life.

L. had purchased several estates, subject to mortgages, with regard to one of which, he entered into a covenant to pay the mortgage-money, for the purpose of indemnifying a trustee; and as to another, which was only part of an estate subject to a mortgage, upon splitting the incumbrance, both parties covenanted to pay their respective shares, and indemnify each other; Lord *Hardwicke* thought, that these covenants would not have the effect of making the mortgages personal debts of the vendee, they having been entered into for particular purposes, and declared his opinion accordingly in the decree.

Sir *W. O.*, by his will of the 5th *February* 1739, taking notice, that his daughter *C.* was deaf and dumb, and that *B.* had taken care of her, devised certain real and personal estate to *J. B.*, her heirs, executors, and administrators, in trust, by sale, or selling time to pay all his debts, and directed that *J. B.* should receive the rents and produce of his real and personal estate without account, during his daughter's life, she maintaining his daughter; and after the death of his daughter, he gave all his real and personal estate whatsoever to *J. B.* in fee, and appointed her sole executrix; Sir *W. O.* died, *March* 1740, and *J. B.* proved the will; Sir *W. O.*, in his lifetime, mortgaged part of his estate, for securing 1500*l.* and interest, which remained a charge at his death. *J. B.* paid off 500*l.*, part of this 1500*l.*, and afterwards borrowed a farther sum of 2500*l.* on mortgage of the estates, which money was, in the mortgage-deed, expressly recited to have been borrowed, to enable her to discharge Sir *W. O.*'s debts. *J. B.* afterwards died, and on the disposition made by her, and those claiming under her, of the property of Sir *W. O.*, this cause was instituted. The cause was first heard before Lord *Bathurst*, on the 19th *February* 1777, when the court declared, that the sum of 1500*l.*, part of the 3500*l.* was not to be considered as a debt of the said *J. B.*, but was to remain a charge on the real estate, and directed an account of her personal estate. By an order made on rehearing, on the 13th of *August* 1781, that part of the decree was reversed, and, instead thereof, it was declared, that the said sum of 1500*l.* appearing to have been a charge made on the estate of the said Sir *W. O.* in his lifetime, and remaining such at his death, was to be considered as a continued lien thereon; and that the subsequent charge made on the estate by the said *J. B.*, being expressed in the mortgage-deed to have been made for the purpose aforesaid, the same together, with the 1500*l.*, amounting in the whole to the sum of 3500*l.*, was to be considered as remaining a charge on the said estates.

G. D. mortgaged lands to *W. C.*, to secure payment of 5000*l.* with interest, at 5 *per cent.* and by will, of 22d of *May* 1723, devised the lands to his nephew *G.*, in tail-male, remainder to the plaintiff in tail-male, remainder over, and died in the same month.

Forrester
v. Leigh,
23d, 25th
June 1773.
Vide 2 P.
Wms. 664.
note 2.

Perkins v.
Baynton,
2 P. Wms.
664, note 2.

Shafto v.
Shafto, be-
fore Lord
Thurlow,
Feb. 1786.

2 P. Wms.
664. note 1.

In 1725, G. S. suffered a recovery to himself in fee. The mortgagee calling for his money, W. G. agreed to advance 5000 *l.* at 4 *per cent.* on assignment of the mortgage, which accordingly, by indenture of 4th of June 1725, was assigned to him, with provision for redemption on payment of the principal and interest at 4 *per cent.*; and G. S., for himself, his heirs, executors, and administrators, covenanted with W. G., that he, his heirs, &c., or some one of them, would pay to W. G. the said principal and interest in manner therein mentioned. In 1779, G. S. agreed to raise the interest to 5 *per cent.*, and by deed covenanted with the mortgagees that the estate should remain a security for the 5000 *l.*, with interest at 5 *per cent.*, and that he, his executors, &c. would pay such interest for the same. In January 1782, G. S. died, the interest or the mortgage being in arrear for about 10 months; and the bill was brought (amongst other things) to have the 5000 *l.* and interest paid out of the personal estate of G., or at least the arrear of interest due at his death, and the additional 1 *per cent.* charged by the deed of 1779; but the Lord Chancellor was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the primary fund. His Lordship also thought that the interest must follow the principal, and that the contract for the additional interest, turning upon the same subject, must be in the nature of a real charge.

So, Earl of Tankerville v. Fawcett, 2 Br. Ch. Rep. 57.

Wilson v. Earl of Darlington, at the Rolls, Feb. 1785.

A real estate charged with a sum of 200 *l.* as a bounty, was holden to be *primarily* liable, though the personal estate was also subjected by the covenant of the donor.

Duke of Ancafter v. Mayor, 1 Br. Ch. Rep. 454.

A leasehold estate had been mortgaged by the testator's father to N., for 6500 *l.*, and had, subject to that mortgage, devolved upon him on the death of his father; afterwards the mortgage was assigned by the desire of the testator to H., who advanced him a farther sum of 100 *l.* upon it, and the testator conveyed other estates as an additional security to the mortgagee. The testator then made his will, and thereby devised as follows:—"I give and devise to A. and B., their executors, administrators, and assigns all those my manors, lands, &c. in L., to have and to hold to them, from the time of my decease, for the term of 99 years upon the trusts hereinafter mentioned." He then gave the real estate subject to the term, and, in default of issue of his own body to the plaintiff for life, remainder to his first and other sons, in strict settlement, with remainders over, and afterwards declared as follows:—"I do hereby declare, that the term and estate, so as aforesaid limited to them the said A. and B., &c., is upon the special trust and confidence, and to the intents and purpose following; that is to say, upon trust, that they the said A. and B., &c. shall, out of the rents and profits, or by mortgage assignment, or demise, of all or any part of my before-mentioned manors, &c., or any of them, for all or any part of the said term of 99 years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient to pay and satisfy all the debts I shall

"*now at the time of my decease*, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs, &c., the said term shall cease and determine." He then devised as follows:—"I give and devise to my brother *M. B.*, his executors and administrators, all that the manor of *East and West Deeping*, holden by lease from the crown, subject to the yearly rent and covenants reserved in the said lease, and also subject to the mortgage thereon to *N.*, for 6500 *l.*; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations of this my will." And towards the end of his will he devised as follows: "*Item*, I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever, unto my said brother *M. B.*, if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will." &c. *M. B.* died in the lifetime of the testator, and the plaintiff became entitled under the limitations in the will to the real estate. And one question was, Whether the term bequeathed by the testator for payment of debts was liable to the mortgage-debt on the leasehold estate? *Et per curiam*, with respect to the leasehold estate, *the charge under which it came to the testator was prior to his purchasing it, and inherent in the estate*, and the estate itself was left liable to answer it, and neither the personal estate, nor real estate, ought to be charged with that debt; for when a man purchaseth an equity of redemption, subject to incumbrances, that should be a real incumbrance following the land, and *not a personal one*. And the difference between an estate descended and one purchased was nothing, unless the circumstance of purchasing created the difference, but that afforded *no* argument. The question then was, Whether assigning the mortgage from *N.* to *H.*, and covenanting for payment of debts, altered the case, and made it the debt of the testator? and it was clear that it did not; for although where a man transferred a mortgage, and covenanted for the payment of the debt, according to the *rule of law*, he made it his *own* debt, and made himself liable to be sued upon that covenant; yet the case of *Evelyn v. Evelyn* had decided, that though he might be at law *liable*, yet, while there were *real assets* sufficient for the payment of the incumbrance, they should be applied for *that purpose*; and it was to be understood, with respect to such transaction, that the party did it by way of *accommodating the charge*, and not of making the debt *his own*. *Infra.*

Another question in the preceding case was, Whether, when the testator mortgaged an estate of *his own* as an *ulterior* security, that circumstance

circumstance would create a difference? and it was held that it would not; for nothing made it his debt so effectually as the covenant to pay, for it did not create the debt, but only operated as collateral to the debt. A man mortgaged his estate without covenant, yet, because the money was borrowed, the mortgage became a simple contract creditor, and in that case the mortgage was a collateral security; and if there were a *bond* or a *covenant*, then there was a *collateral* security of a *higher species*, but no higher by means of the mortgage merely; therefore having security amounted to nothing.

Lawson v. Hudson,
2 Br. Ch.
Rep. 58.

Again, where *L.* being seized in fee by *descent* of an estate at *C.* and other real estates both freehold and copyhold, by his will devised the estate at *C.*, which was subject to a mortgage for 1500*l.* contracted by his ancestor, and also another estate, to be sold; and charged the same, and also his personal estate (except 300*l.* due on bond, which was originally part of his wife's fortune, and specifically bequeathed to her by the will) with his debts and legacies and devised the residue of his real estate in trust for his brother *B.* in strict settlement, subject to a charge of 100*l.* a year to his wife upon the copyhold estate; and made his wife executrix: the question was, Whether, under this will, the personal estate of the testator should be applied in exoneration of the real, towards the discharge of the 1500*l.*? And it was held by Lord *Thurlow* that it should not; but that the same should come out of the estate originally liable to it. And this decree was afterwards affirmed in the House of Lords.

Vide 7 Bro. Par. Ca.
511.

Basset v. Percival,
21st July
1786.
Note (a)
2 P. Wms.
665.

M. D., by will of 15th of January 1746, devised estates to trustees for a term of 500 years, to raise money for payment of his debts and legacies, in aid of his personal estate; and subject to that term, he devised the estate in strict settlement with the ultimate limitation to his own right heirs, and he gave the residue of his personal estate to his executrix *C. P.* The executrix applied the personal estate in payment of some of his debts, and all the legacies, except a legacy to herself of 1000*l.*, and then died; while the limitations in strict settlement subsisted, and after the death of *C. P.*, her representative filed a bill to have a debt due to *C. P.* and her legacy, raised; and the only person then entitled under the limitation in strict settlement dying, pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against *M. D.* and *M. D. F.* the coheirs of the testator. To stop this suit, the coheirs liquidated the demands of the representative of *C. P.*, at 2070*l.*, and gave their joint and several bond for that sum; this demand was afterwards assigned to *A. B.*, who also bought in debts to the amount of 3270*l.* remaining due from the testator *M. D.*, and the coheirs gave another joint and several bond to *A. B.*, for that sum also; so that *A. B.* became the sole creditor on the estate *M. D.* being dead, and a bill being filed by *A. B.* for payment of these sums of money, the question was, Whether a moiety thereof should be raised in the first place out of the personal estate of *M. D.*, or out of the real? and his Honour was of opinion

that the real estate was the original debtor, and ought to bear the burden.]

If one devise lands which are in mortgage to *A.* for life, remainder to *B.* in fee; *A.* shall contribute one-third towards the discharge of the mortgage, and *B.* the other two-thirds.

[Cornish v. Mew, 1 Ch. Ca. 271. Rowell v.

Walley, 1 Ch. Rep. 223. Ballet v. Spranger, Pr. Ch. 62. Verney v. Verney, 1 Ves. 418.]

[And if the mortgage-money is payable on a contingency not arrived, he in remainder or reversion may exhibit his bill *quia timet*, against the tenant for life, and the tenant for life shall be decreed to contribute.

Hayes v. Hayes, 1 Ch. Ca. 223.

And if the tenant for life of the equity of redemption pays off the mortgage, and has the term assigned over in trust for himself, and makes improvements, and dies; and afterwards the remainder-man or reversioner comes to redeem; the representatives of tenant for life shall have the allowance of two-thirds of the lasting improvements, but nothing for the other third, because he received the benefit thereof during his life; and no interest shall be allowed during the life of tenant for life for the money he paid, for he is bound to keep down the interest during his estate.

Newling v. Abbot, East. Geo. 2 Eq. Ca. Abr. 596. 11. [refers to VI. Ab., but the Editor finds no case of this name in that book.]

In the case of *James* and *Hailes*, it is laid down that, if an estate in mortgage be settled on *A.* for life, and then on *B.* in tail or in fee, the tenant for life shall bear two-fifths of the principal and interest, and the remainder-man three-fifths.

James v. Hailes, Prec. Ch. 44.

But where he who is possessed of the equity of redemption hath such an interest in the estate, as he can *secure* the money laid out by him to redeem upon, the remainder-man shall pay him, or his representatives, *all* he hath advanced. As, where a *tenant in tail* of a mortgaged estate, under the will of his father, upon the death of his two brothers, paid off a debt originally on the estate by mortgage term for years, but neglected to have an assignment of the term to himself, and afterwards devised the same lands; and the plaintiffs, the remainder-men under the will, claimed the estate, as not barred, discharged of the incumbrance: the Lord Chancellor held, that there being a term for years in the mortgage, which stood in point of law as it did before, no assignment in law being made thereof, none of the parties before the court had the legal estate, for a conveyance of which the plaintiffs came; and therefore *that* conveyance must be upon equitable grounds. That, so far as it appeared, tenant in tail paid it off with his own money; that he might have taken an assignment of the term, either in trust, to attend the inheritance, which would have ended this question, or in trust for himself, his executors, or administrators, which would, notwithstanding the remainder over, have kept this incumbrance on foot for the benefit of his personal estate and those entitled thereto; or, that he might have called for an assignment of it in his life, if he had found out this limitation in remainder, that it might have been made for the benefit of his executors, *not* of the remainder; but his not doing any of these, clearly proved, that he took himself to have had the absolute ownership and disposal of it. And the court could not decree, to persons

Kirkham v. Smith, 1 Ves. 258.

persons claiming this, in contradiction to his apprehension and intent, a conveyance of the inheritance, and likewise of this term, without making a satisfaction to the personal estate of the tenant in tail; as that would be contrary to the maxim, *that be who would have equity, must do equity*; and the plaintiffs were decreed to have the estate, subject to the money paid by the tenant in tail in discharge of the mortgage.]

Vern. 404.
Clyat v.
Battison.

But, if lands in mortgage are devised to *A.* for life, remainder to *B.* in fee, and *A.* takes an assignment of this mortgage in a trustee's name; though *B.* might have compelled *A.* to contribute one-third towards payment of the mortgage, in respect of his estate for life; yet if *A.* be dead, and the bill be brought against his executor, he shall be obliged to contribute only in proportion to the time that *A.* his testator enjoyed it.

Cro. Car.
87.
Co. 99.

A. mortgaged his lands upon condition, that if he or his heirs repaid 100*l.* at such a day, he should re-enter; before the day he dies, leaving issue a daughter, his wife *enfeint* with a son; the daughter pays the money at the day, and then the son is born; the daughter shall keep the lands, and the son shall not recover against her; for the daughter is in nature of a purchaser, where she hath regained the land by her own vigilance, which otherwise had lapsed at law to the mortgagee.

Tweddel v.
Tweddel,
2 Br. Ch.
Rep. 101.

[If one purchase an estate subject to a mortgage, his personal estate will not be liable to exonerate the real estate from payment of the mortgage-debt, although he covenant with the vendor to pay the mortgage, and indemnify him from all costs and charges in respect of it. Thus, *A.* agreed to purchase an estate of *B.*, which was then subject to a mortgage of 2000*l.* to *D.*, and accordingly by indenture of lease and release between *A.* of the one part, and *B.* of the other part, reciting the mortgage, and that *B.* had contracted with *A.* for the purchase of the inheritance of the said estate, and had agreed to pay the sum of 3500*l.* for the same in manner therein mentioned, that was to say, to the mortgagee all such sums as should be due to him upon the said mortgage, on the first of *May* next ensuing, as also to pay such sum of money as should remain after deducting the money due to the mortgage of *D.*; it was witnessed that the said *A.*, in consideration thereof, did grant, &c. to the said *B.*, his heirs and assigns for ever, all the said premises, &c.; and in the covenant against incumbrances, the mortgages and securities were excepted. And the said *B.* did covenant, that he, &c. would well and truly pay, or cause to be paid, to the said *D.*, the said sum due in manner aforesaid, and would indemnify the said *A.*, his heirs, &c., and his goods and chattels, land and tenements, from all costs and charges, &c. in respect of the said mortgage. *A.*, after completing the purchase of *B.*, made his will, and died, and then a question arose between his personal representatives, and the devisees of this estate under the will, Whether, from the nature of the contract, the personal estate of *A.* (respecting which he had made no disposition in his will) was liable to be applied in discharge of the mortgage? *per curiam*, it is a clear rule that the personal estate is never charge

charged in equity where it is not a law; and if not chargeable at law, there is no principle or case in this court to warrant its being chargeable in equity, contrary to the order of the law. Where it is a debt payable by executors *at law*, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims. In respect of the rule of marshalling assets, it is that it must be a debt affecting both the real and personal estate; so in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove that the executors are accountable at law, and not in equity. In this case, the personal estate never was liable, either by action against the party himself, or against his executors.

Sir John Napper's estate was in mortgage, and he died, leaving Sir Theophilus his heir, who, upon his intermarriage with Lady Effingham, settled a jointure upon her, and covenanted to pay his father's debts, and then died, possessed of a considerable personal estate, which came to his wife, having disposed of a real estate, which was settled by an act of parliament, in trust to pay his father's debt: the heir at law brought his bill against the wife, to have the personal estate of the husband, upon his covenant, applied to discharge the father's mortgages, and it was so decreed. But the reason was, because the heir had disposed of the estate so settled in trust, and then it was but just and equitable, that his personal estate should be applied to exonerate the mortgaged estate, descended to the heir at law, because he was answerable for the trust estate, settled for that purpose.]

If a man enter into a bond, in which he binds himself and his heirs, and dies, leaving a real estate to descend to his heir, subject to a mortgage for years, and the heir sells the equity of redemption, the obligee cannot redeem the mortgage, without first having a judgment at law against the heir.

A dowress may redeem a mortgage, paying her proportion of the mortgage-money; and as to the rest, she may hold over till she is satisfied.

So, if a jointure is made of lands which are mortgaged, the wife may redeem, and her executor shall hold over till repaid with interest; because such tenant for life ought to be reimbursed the money she paid to set her estate free, and in the condition she ought to have been in.

But, if a jointress after marriage join with her husband in a fine, and mortgage the land, and the husband die; there, her land is charged, and she shall pay her part towards the disburdening of the land; and her executors shall not hold the land till satisfied thereof, because she herself concurred in laying on the charge, and therefore must join in the disburdening of it, according to the value of her interest.

If the wife joins in a mortgage, and levies a fine, with an intent to bar her dower; and in consideration thereof the husband agrees, that she shall have the equity of redemption in lieu of her dower, and he afterwards mortgages the same estate twice

Napper v.
Lady Effing-
ham, Fitzg.
142. 144.

Abr. Eq.
315.
Bateman v.
Bateman.

Abr. Eq.
219.
Palmer v.
Danby.
Chan. Ca.
271.
2 Vent. 243.
2 Chan. Ca.
100. 161.

Chan. Ca.
271.
2 Chan. Ca.
99, 100.

Vern. 294.
Dolin v.
Coltman.

more; though this agreement be fraudulent against the subsequent mortgagees, so far as to entitle the wife to the whole equity of redemption, yet she shall have her dower, if she survives her husband, and shall not be put to her writ of dower, because the estate may be so conveyed away by some of the mortgagees that possibly she may not know against whom to bring her writ of dower.

Vern. 213.
Brend v.
Brend.
[In this
case, as re-
ported by
the name of
Brend v.
Brend,
2 Ch. Ca.
98. It is
stated, that
there was an
agreement,
that the wife
should not
be preju-
diced, but
should redeem,
paying the interest of the money borrowed, and that the court resolved, that the wife having suffered the representatives of the husband to remain in possession, and pay off his debts, without exhibiting her claim for a long period of time, should not be allowed any profits received by the husband's representatives, but from the time of filing the bill, which was the first notice to them of such agreement.]

If a man marries a jointress of houses which are burnt down, and the husband and wife borrow 1500*l.* to build on the ground, and levy a fine *sur concessit* for ninety-nine years, if the wife lives so long, and a deed is made between the conusee and the husband, wherein the husband covenants to repay the mortgage-money, with interest; and the equity of redemption is limited to the husband and his heirs, and the husband expends 3 or 4000*l.* in building on this ground, and dies; the wife shall redeem, and not the heir of the husband; for the wife was no party to the deed of redemption, by which the redemption was limited to the husband; and the wife being a jointress, and having granted a term for years only, out of her estate for life, there rests a reversion in her, which naturally attracts the redemption.

2 Vern. 480.
Afon v.
Pierce.

A. on his marriage agreed to leave his wife 1000*l.* if she survived him; the drawing of the agreement was left to the parson of the parish, who made a bond from *A.* to his intended wife in 2000*l.* conditioned to leave her 1000*l.* if she survived him: The marriage was had, and *A.* died, leaving a freehold and copyhold estate in mortgage, and which were mortgaged together; and it was held, that the wife should redeem as well the freehold as copyhold, and hold over till she was satisfied.

2 Vern. 437.
The Earl v.
the Countess
of Hunting-
ton.

A. joins with *B.* her husband in making a mortgage for years of her inheritance for 4500*l.* to supply the husband's occasions, and to pay for the place of captain of the band of pensioners; and subject to the mortgage, which was for a term of years; the estate was settled on *A.* for life, remainder to her son in tail: *B.* in the mortgage-deed covenants to pay the money, and the proviso was, that on the payment of the mortgage-money the term was to cease: the mortgage was several times assigned, and particularly in 1683, and the wife joined in it, and there the proviso was, that on payment of the money by them, or either of them, the mortgage-term was to be assigned as they, or either of them, should direct or appoint: a few days after the mortgage was made, *B.* by letter thanked his wife for having sealed it, and added, that the profits of the office should be religiously applied to pay off the incumbrance: but afterwards when money came in, though he paid off the mortgage, yet he took an assignment thereof in trust for himself; and by will devised his personal estate, and the benefit of this mortgage, to his second wife. On a bill by the son of the

first wife, to have this mortgage assigned him, it was declared by my Lord Keeper, that he could not decree for him, but upon the usual terms of redemption, on payment of principal, interest, and costs, discounting profits. But upon an appeal to the Lords, the son obtained a decree to have the mortgage assigned to him.

So, where *A.* and his wife mortgaged the wife's estate, and *A.* covenanted to pay the money, but the equity of redemption was reserved to them and their heirs; the husband dying, it was decreed, that the mortgage should be discharged out of the husband's estate.

[Again, a husband, seized in right of his wife, borrowed 500 *l.* to supply his occasions; for securing which, he and his wife levied a fine of her inheritance, and raised a term of 500 years, which was limited to the person lending the money, with remainder to the wife in fee, to be void nevertheless upon payment of the money borrowed, with interest; and in the deed, the husband covenanted to pay it off. Afterwards, the husband made his will, by which he gave several charities out of his personal estate, and then died, without having discharged the mortgage, indebted by simple contract. The assets not being sufficient to pay the mortgage-money, and also the charities given by the will, the widow exhibited her bill to have the former discharged out of her husband's personal estate. And so it was decreed; for his personal estate would be liable to pay debts, before legacies, though left to a charity, they being still but legacies.

Where a man made a voluntary deed, and afterwards mortgaged the same lands, and the *first deed*, on trial at law, was found fraudulent against the mortgagee; yet, on a bill exhibited by the person to whom the deed was made to redeem the mortgage, it was held, that, though the first deed was fraudulent, because voluntary, as to the mortgage, yet it was good as to the equity of redemption, and would pass that; for a voluntary deed would bind the party that made it, and his heirs.

Assignees of a bankrupt may redeem, or assign an equity of redemption.

So, likewise, a tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it.

The assignee, in equity, may redeem a mortgage.

And an assignee of the equity of redemption, which has been deferred for a time, but not for that period which is a bar to a redemption, will, if there are circumstances which would induce the court to decree a redemption in favour of the mortgagor or his representative, be entitled to the benefit of it. Therefore, Lord *Hardwicke*, in a case, where a prowling assignee had bought an equity of redemption, which had been abandoned for fifteen years, for a very inconsiderable sum, imagining, that from some knowledge of the law, he might be able to unravel a great number of circumstances, and by that means entitle himself to a redemption, was of opinion, that he was entitled to a decree to

1 Br. P. C.
1.

2 Vern. 604.
Pocock 24.
Lee.

Tate v.
Austin,
1 P. Wms.
264.
2 Vern. 689,
S. C.

Ran v.
Cartwright,
1 Ch. Ca. 59.
1 Vern. 193.
Nelson, 101.
E. Ca. Abr.
315. 1.
Barthrop
v. West,
2 Rep. Ch.
62.

1 Ch. Ca.
71.

Dougl. Rep.
22. Keech
v. Hall.

Howard v.
Harris, 1 Vern. 33.

Anony-
mous,
3 Atk. 314.

redeem. But his Lordship held him entitled only upon these terms, viz. that the assignee, in taking the account before the Master, should be confined to surcharge, and falsify only, and the interest upon the mortgage be computed at five *per cent.* though at that period money bore a higher rate of interest.

A mortgage by a popish heir may be redeemed by the next protestant heir.

Jones v.
Meredith
et al.

Bunb 346. Com. Rep. 661.

2 Ves. 304.

An equity of redemption will follow the custom as to the legal estate. In borough-english lands, if mortgaged, the equity of redemption will descend to the youngest son to whom the lands descend.

Ibid.

So, in mortgages of gavelkind, lands which descend to all the children equally, the equity of redemption descends to all likewise.

Phillips v.

Hele,

2 Ch. Rep.

190. *et vide*

2 Burr. 978.

And it may be devised. Thus, where one, seised in fee-simple, mortgaged his lands, with a proviso for repayment by him, his heirs, or assigns, and then devised the same premises, the court decreed, on a bill by the devisee to redeem, that the equity of redemption belonged to him and not to the heir.

2 Chan.

Ca. 8.

But, if a mortgagor, before the condition broken, devise, it will be void; for a condition is not devisable.

2 Ves. 431.

Every devisee of a mortgaged estate, that brings a bill to redeem, need not make the heir at law party; if the devisee claims to have the will established, it is necessary: if only a title under the will, it is not.

Shirley v.

Watts,

3 Aik. Rep.

200.

Angel v.

Draper,

2 Vern. 399.

King v.

Marshall, cited in the principal case.

A judgment creditor may redeem against a mortgagee of a leasehold estate, who is likewise a bond creditor: but, before the bill is brought to redeem, a writ of execution must be sued out; for until that be done, the judgment creditor hath no *lien* on the leasehold estate, and, for want of its being taken out, the bill in the principal case was dismissed.

Bunb. 147.

2 K. C.

Abr. 194. notes.

Tenant by *eligit*, statute merchant, or staple, may redeem.

Stonshower

v. Thompson,

5 Aik.

440.

And the law is the same as to a judgment creditor, though the judgment be with stay of execution. Thus, *H.* in 1693, confessed a judgment, with a defeasance, by which it was not to take effect until after the death of a woman, who lived until 1726. The estate, subject to this judgment, descended in the mean time from *H.* to his heir, who mortgaged it to *T.* The mortgagee had no notice of the judgment at the time: the heir afterwards, in 1721, about five years before the woman died, became bankrupt; and the mortgagee was appointed assignee. After her death, the representative of the judgment creditor brought his bill against the assignee to redeem the mortgage, upon payment of principal, interest, and costs. The question was, Whether, as there was no actual *eligit* taken out by the judgment creditor before the commission of bankruptcy issued, the assignee under the commission, *qua* such, or the judgment creditor, should redeem? And it was contended

contended on the side of the assignee, that the heir was chargeable only as *terre-tenant*; and therefore the person who claimed under the judgment was not a creditor of the bankrupt. *Sed per cur.*—The judgment creditor is entitled to redeem the whole (for it must be entire) and to have the estate of *H.* exonerated out of that of his heir, if the heir's is sufficient. As to the point which had been laboured, in order to make this person come in as a creditor under the commission of bankruptcy, there was nothing in it. If it had been merely a bond creditor from the ancestor, there might have been some colour to insist upon this under the statute of fraudulent devises; because that act made it a debt against the heir himself, as well as the ancestor. But it was entirely different here, as this was a judgment which was a *lien* upon the land, a *fortiori* a *lien* upon the lands in the hands of the assignee under the commission, who stood only in the place of the bankrupt.

The crown may redeem estates mortgaged, forfeited by the mortgagor by his being indicted and outlawed for high treason.

Attorney General v. Crofts et al.

1 Brown's Par. Ca. 22.

If an estate descend to an infant subject to incumbrances, the guardian may, without the direction of a court of equity, apply the profits to discharge the incumbrances, *viz.* to pay the interest of any real incumbrance, and the *principal* of a mortgage; because that is a *direct and immediate* charge upon the land; but *not* the principal of any other real incumbrance.]

Palmer v. Danby, Pre. Ch. 137.

2. To whom the Mortgage-Money shall be paid.

Mortgages, being part of the personal estate, belonging to the executors or administrators; though it was formerly held, that if a feoffment in fee was made upon condition, that if the mortgagor paid the sum to the mortgagee, his heirs, executors, or administrators, that then the mortgagor should re-enter, and the day passed without payment, and the mortgagee died, whereby the lands descended to his heir; in such case, the heir being named in the condition, and no bond or covenant given to make it appear a personal matter, and no deficiency of assets to pay creditors, that the heir parting with the benefit descended to him, should have the money in the mortgage.

Chan. Ca. 88.
Smith v. Smoult.

But afterwards it was truly settled by the Lord Chancellor *Finch*, that the money should go to the executors or administrators, and not to the heir; and the reason was, because equity follows the law. And at common law, if conditions or defeasances of mortgages are so penned, as no mention is made either of heirs or executors, in that case, the money ought to be paid to the executors, because the money came out of the personal estate, and therefore ought to return thither again. But if the defeasance appoints the money to be paid to the heir or executor disjunctively, there, by the common law already mentioned, if the mortgagor pay the money precisely at the day, he may elect (*a*) to pay it either to the heir or to the executor. But where the precise day

Chan. Ca. 283.
2 Chan. Ca. 50, 51, 220.
2 Vent. 348.
351.
Hard. 467.
Vern. 170.
412. Preced. Chan. 11.

[(a) If the mortgage be in fee, own-

ditioned, that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns; and the mortgagee die before the mortgage is forfeited, though the mortgagor has in this case his election to pay the money to either; yet it will belong to the executor. 2 Ventr. 351.]

is paid, and the mortgage forfeited, all election is gone in law for in law there is no redemption. And when the case is reduced to an equity of redemption, it were perfectly against equity to revive the election of the mortgagor; because that would only tend to the delay of the payment of the money as long as he pleased, and in compositions to pay the money into that hand which would use him best. And to say that the election should be in the court would be to place an arbitrary power in it, which would tend to the inconvenience of the subject; since no man could safely pay the money in such cases, without a suit in equity. And, therefore, since there ought to be a certain rule, a better cannot be chosen, than to come as near as can be to the rule and reason of the common law. Now the law always gives the money to the executor, where no person is named, and where the election to pay either to the heir or the executor is gone and forfeited in law it is all one, as if neither heir nor executor were named in the condition. And then in natural justice and equity, the principal right of the mortgagee is to his money, and his right to the land is only as a deposit or pledge for his money; and therefore the money ought to be paid into the proper hand, that the mortgagee hath appointed receiver of his money, and that is his executor. And then the heir, who is only a trustee to keep the pledge ought to deliver it back to the mortgagor; for though the heir has the use and benefit of the land till redeemed, yet he has it only as a pledge, and therefore is a trustee to restore it when the money is paid to the proper hand; and the heir himself, though he be proper to keep the pledge, being land, yet he is not proper to receive the money, it being purely personal. Nor is it hard, that the heir should part with the land, without having the money that comes in lieu of it; because we are to consider, that the money was originally parted with from the personal estate, and had immediately come into the hands of the executor, had it not been placed out on this real security. Whether, therefore, the executor has assets or not, the mortgage-money should be paid to him. But the mortgagee, by any conveyance in his lifetime, or by his last will and testament, may dispose of it otherwise to whom he pleases.

2 Vern. 66. If the heir of the mortgagee forecloses the mortgagor, the executor being no party, upon a bill by the executor against the heir of the mortgagee and the mortgagor, the land will be decreed the executor.

2 Vern. 67. But if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the benefit of the mortgage, the heir, if he thinks fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage-money and interest.

Ellis v.
Guavas,
2 Ch. Ca.
50.

And, if the mortgagor doth not redeem, the administrator shall have the land. Thus, where the mortgage was forfeited, the heir in possession by descent, no want of assets, and the mortgagor did not offer to redeem; the heir of the mortgagee was decreed to convey the lands to his administrator; for as the money, being part

part of the personal estate, would have gone to him, so would the land, which was in lieu thereof.

If there be a mortgage in fee of a long standing, and there be two descents cast since the mortgage was made; though the mortgagor, by answer, says, he will not redeem, yet the mortgage shall go to the executor, and not to the heir, the equity of redemption not being foreclosed or released. 2 Vern. 367.
Taber v.
Graves.

[Although a mortgagor, the mortgage being forfeited, releases to the heir of the mortgagee in fee, yet the administrator shall have the benefit of that estate, even though there be no debts. And so it is in case a mortgagor be foreclosed, or that the mortgage be of so ancient a date, as in the ordinary course of the court, it be not redeemable; for, in case the mortgagee be not actually in possession, it will be looked upon to be personal estate. 2 Vern. 1938

And, where there was husband and wife, and the wife, having a mortgage in fee of a copyhold, died leaving issue, which issue was admitted, and died, and then the husband, as administrator to his wife, claimed title to the copyhold, being a mortgage, and so part of his wife's personal estate: it was decreed to him against the heir at law, although the latter had been admitted. Turner v.
Crane,
1 Vern. 170.

So, a mortgage of an inheritance, to a citizen of London, hath been held to be part of his personal estate, and divided according to the custom. 1 Ch. Ca.
285.
1 Vern. 4.

But where a mortgage was devised as real estate, after a decree of foreclosure nisi, it was held to be personal estate for payment of debts, if assets fell short, though considered as real estate between devisor and devisee. Garrett v.
Evers,
Mofel. 364.

But a mortgage will not pass as land under a general description, applicable to it in point of locality, if there be other circumstances sufficient to shew, that the owner considered it as personal property. Martin v.
Moulin,
2 Burr. 969.

Where money secured by a mortgage (to which the executor was legally entitled) was articulated to be laid out in land, and settled on the issue of the marriage, it was by Hale, Chief Justice, on a special verdict, adjudged to be bound by the articles. Laurence v.
Beverley,
ci ed 3 Will.
217.

If two persons advance a sum of money on mortgage, and take the mortgage to themselves jointly, without inserting in the deed the words, *to be equally divided between them*, and one of them dies; when the money comes to be paid, the survivor shall not have the whole, but the representative of him that is dead shall have a proportion, because, from the nature of the transaction, the court presumes this to be the intention of the parties. Thus, N. and S. lent 2000 l. to G. on mortgage, 1450 l. whereof was the money of S., and 550 l. the residue, the money of N., and it appeared, by a note under both their signatures, that the 1450 l. was delivered by S. to N., and that, if the mortgage was paid off then the 1450 l., with interest thereon, was to be redelivered into the hands of S., for the uses of his will. Afterwards, and before the day of redemption, S. made his will, reciting the above memorandum, and disposed of his share thereby. The lands were redeemed on the day, and the whole money and interest paid to N., 2 Vez. 258.
Petty v.
Styward,
1 Ch. Rep.
58.
S. being

S. being dead, and he claiming it by survivorship. But, on a bill exhibited by his executor, the court was clearly of opinion, that by equity, there ought to be no survivorship in a case of this nature; and that the note, under the hands of both the parties, and the will of S., shewed plainly that there was a trust between them, that, on repayment, each of them was to have his money with interest.

2 Ves. 258. And if two persons, being mortgagees, foreclose the mortgagor the mortgaged estate shall be divided *between* them, because their *intent* is *presumed* to have been, that it should be so divided.]

Vern. 271. But, if a mortgagee in fee enter for a forfeiture, and after several years enjoyment absolutely sell the land to J. S. and his heirs, the estate shall not be looked upon to be a mortgage in the hands of J. S. so as to make it part of his personal estate, but it shall be for the benefit of his heir.

Preced. Chan. 265. *Noys v. Mordant.* A., being in possession of an estate that was a mortgage in fee, by will devises it to his daughters B. and C. and their heirs, and dies: B. marries, and dies: the question was, Whether the share of B. should be decreed real or personal estate, and, consequently, go to her heir, or to her husband as her administrator? It was decreed against the husband; and my Lord Keeper put this case: A man seised of lands in fee, which were only mortgaged to him, devises them to his son and heir, and his heirs; surely these lands shall descend as an inheritance; or, though the mortgage be paid off, shall not the money be considered as lands, and go to the heir and his heirs, as the lands would have done, and this purely by the intention of the testator; and did not the testator, who had a governing power, intend in the present case, that the mortgaged lands should be considered as any other lands of inheritance, and be subject to, and be directed by, the same rules which other estates are?

3. Of the Precedency and Right of Redemption, where there are several Mortgagees or Incumbrancers; and herein of their Remedies against each other, as well as against the Mortgagor.

Abr. Eq. 320. Herein we must observe, as a sure and established rule, that he who hath the first mortgage, having the legal estate, shall prevail before all other subsequent mortgagees and incumbrancers. But if a man mortgages land by a defective conveyance, and afterwards mortgages by an assurance which is good and effectual, without notice, the second shall prevail, because that carries the legal title; and equity will not interpose, when both are equally upon valuable consideration. But, if a man mortgages by a defective conveyance, and there are subsequent debts that do not originally affect lands, there, the defect of such a conveyance shall be supplied against a subsequent incumbrancer, who acquires a legal title afterwards; for since the subsequent incumbrancer did not originally take the lands for his security, nor had in his view an intention to affect them, when afterwards the lands are affected, and he comes under

under the very person that is obliged in conscience to make the security good, he stands in his place, and shall be postponed to such defective conveyance.

This rule and distinction being grounded on the following case, we shall here insert it at large.

Henry Francis, father of the defendant *Henry*, in consideration of 400*l.* money lent, by feoffment, 17 July 1665, mortgaged to the plaintiff's testator in fee, a piece of ground called *Pursefield*, in the parish of *Gibb*, but no livery thereon, and covenanted for him and his heirs, that he was lawfully seised in fee of the premises, and for quiet enjoyment, free from incumbrances against him and his heirs, and all persons claiming under him, with covenant for farther assurance within seven years. *Henry Francis*, the father, Mich. 1669, borrowed of the testator 77*l.* on bond, and promised that the mortgaged premises should be security for it. *Henry Francis*, the father, in 1670, made his will, and thereof made *Henry Francis*, his son, executor. The testator, *Robert Burgh*, died, and the plaintiff *Eleanor* proved his will. The defendant, *Henry Francis*, confesses several judgments, on bonds, entered into by his father (to wit) seven judgments, as heir, and one, as executor to his father. One of these seven judgments was obtained by *Heyman*, a defendant, on an action brought the first or second day of *Hilary* term 1670, for 400*l.* and all the other judgments were entered about the same time. This cause came to be heard by Sir *Heneage Finch*, Lord Keeper, assisted by Judge *Wylde*, who declared, that the court was fully satisfied, that the plaintiff ought to be relieved, and that the said judgments ought not to incumber the premises, till the mortgage-money was fully paid; wherein the court did not ground its judgment upon the manner of obtaining the judgments all in a term, and most of them together, nor on the special way, whereby the heir charged the lands, by pleading *riens per descent*, nor on the priority of the *teste* of the *subpoenas* before the *teste* of the original, on which the judgments were grounded; but upon the true nature of the case the court declared, that the debt due by the mortgage, did originally charge the lands, which the bond did not, till they were reduced to judgments; and it ought not to be in the heir's power, by confessing judgments, to charge the lands in prejudice of that equity; and the rather, because of the covenant for further assurance. And though the mortgage was defective in law, for want of livery, yet equity, which supplied that defect, charged the lands: and though the creditors had no notice, yet they shall be bound in this case, because they are put in no worse condition than they ought to be, *viz.* to be postponed to the mortgage. Therefore it was decreed, that the defendant *Henry*, the heir, should convey to the plaintiff, or her assigns, in fee, in manner as a Master should direct, but redeemable on the payment of the said 400*l.* due on the former defective mortgage, and the premises to be held quietly against the plaintiffs, and all claiming under them, since the date of the mortgage; and he who has the equity of redemption, may, in convenient time, bring a bill to redeem; and in default thereof,

the

*Eleanor
Burgh & al.
v. Henry
Francis & al.
19 Decemb.
1670.*

the now plaintiffs may bring one to foreclose. And a perpetual injunction was also awarded, to quiet the plaintiffs and their signs in possession against all the defendants and the aforesaid incumbrances, and to stay all proceedings at law, but the plaintiffs to have no costs of this suit, unless some come to redeem; the now plaintiffs to have all the costs of this, and such suits, is usual in the redemption of mortgages.

From this case, which hath been a governing case in the court of equity, they have stated the difference before mentioned; for these bond creditors did not originally pitch upon the land as pledge and security for their money; and when they came afterwards, and reduced their securities into judgments, to affect the lands; yet, since they affect it in the hands of the heir, who was subject to this equity, and obliged in conscience to supply the defect in the execution of the deed, they can only stand in his place and therefore must be subject to the defective security. But other wife it had been, if there had been a subsequent mortgage duly executed, and without notice of the former; because the lands being then originally pledged for the money, and the mortgagee having the legal title, the defective securities that could not prevail at law should not overturn, in equity, a security that was equally upon valuable consideration. But the bonds in the former case did not originally take hold of the land at all; and when they were reduced to a judgment, they only took hold of the land, together with other things; and therefore equity doth not look on them, as such charges on the land as are to take hold so immediately on it, that a prior defective security is not to be relieved and set up against them; especially, since such incumbrancers did not take the land as an original security, but came in afterwards, under the person who was obliged in conscience to supply that defect; for the difference between the two cases turns upon this, that in the case of a second valid mortgage, we must, in all manner of justice suppose, that the mortgagee would not have lent, if the land had not been offered to secure his money; and therefore when he hath the title at law, it is no equity to overturn it, or to postpone him to a defective security; but in the case of the bonds, the obligees lent their money upon the personal security, and not on the credit of lands; and therefore when they come to affect the lands, they must stand in the place of the person that had made himself liable, in a court of equity, to answer and make good the defective security.

2 Vern. 564.
2 Salk. 449.
pl. 2.
Taylor v.
Wheeler.

Thus, it was also ruled by the Lord Cowper, where the case was, *A.* surrenders his copyhold by way of mortgage for money lent, and the surrender is not presented at the next court, according to the custom of the manor; *A.* becomes a bankrupt, and the assignees, &c. are admitted, and bring their ejectment, and the surrenderee of the copyhold brings his bill in equity to be relieved. And in this case, the court decreed a perpetual injunction in behalf of the surrenderee. For though it was said, that the creditors of the bankrupt were equally valuable as the surrenderee, and having the title at law, they ought to be preferred; yet it was

over-

over-ruled, because the other creditors of the bankrupt did not lead on the credit of the land, as the mortgagee did; and therefore, when such creditors come under the bankrupt to charge the land, they ought to stand in his place, and come under the same obligation of conscience to make good the defective security.

The case of *Oxwick* and *Plumer* turns upon the reverse of this judgment, and was thus: *Richard Wiseman*, esq. son and heir apparent of Sir *Richard Wiseman*, intermarried with *Winesfred Barrington*, entitled to a portion of 4000 *l.*, and brings his bill against the trustees of his wife; whereupon a decree was had, to pay unto him the fortune of his wife, upon making a competent settlement; and upon failure thereof, the fortune to be invested in lands by the approbation of the Master. But upon the Master's report, that no competent settlement could be made by *Richard* the son, it was, by choice of parties, invested in lands of Sir *Richard* the father, of equal value, part of which lands happened to be eight acres of copyhold, which in the settlement were limited, and declared apart from the freehold, to be to the use of the issue of the marriage, in common form, and afterwards in fee to the son, with a covenant from Sir *Richard* to surrender the copyhold. The wife dies without issue, and the son mortgages both copyhold and freehold together, for a valuable consideration, to *Oxwick* and others, plaintiffs; but without any surrender: the son dies, and the lands descend to *Eliz.* his sister and heir at law: the mortgagees foreclose *Eliz.* by a decree of the court, and enter and take possession; to whom being in possession *Eliz.* releases, and confirms the estate in fee. Sir *Richard* the father being then out of possession of the premises from the time of the settlement, which was made thirteen years past, surrenders the copyhold land to the defendant *Plumer*, for a valuable consideration. *Plumer* is admitted, and brings his ejectment; and the mortgagees bring their bills to be relieved. The Master of the Rolls, on solemn argument, dismissed their bill with costs; and held, that this court would not supply the defect of a surrender against a person that came in by title, upon surrender of the same premises. The case coming on to be reheard before my Lord *Cowper*, he was of the same opinion; and he took this difference, that when there are two persons that have equal equity, there, those that have the legal title shall prevail, because there is no equity to take from such persons the title that they have gained at law; as, where *A.*, *B.* and *C.* are three mortgagees, and *C.* purchases in the mortgage of *A.* to secure his own money *bonâ fide* lent; equity will never take from him the legal interest he hath gained. But if the contending parties in equity have not equal equity, then those that have the greatest equity shall prevail against the legal title; as, if a creditor takes hold of the land by a feoffment in mortgage, with livery, equity will supply the defective conveyance against a subsequent judgment creditor; because the judgment creditor not relying on the land for his security, he hath not equal equity to have it applied for the payment of his debt, as he that took it in mortgage. But in this case, where *Plumer* had equally lent money,

Oxwick
& al. v.
Plumer &
al. Pasch.
3 May 1708.

and

and taken hold of the estate by a mortgage made with a legal tender; so that the legal interest was in him; the covenant surrender, though prior, cannot be set up against him who has no notice of it; but *Oxwick* must pursue his remedy at law, the breach of the covenant.

Churchill
v. Grove,
1 Ch. Ca.
36.

A precedent mortgagee discounts his mortgage-money by purchase of parcel of the land, and the subsequent mortgagee, having also a judgment, comes to be relieved; the precedent mortgagee pleads this purchase; and without notice it is good; for having a legal title by the first mortgage, kept on foot precedent to the second, this court will not destroy it; and the judgment on record is no notice, without express notice from the party in interest.

Rand v.
Cartwright,
1 Ch. Ca.
59.

If a man makes a voluntary deed, and mortgages the said lands; this deed, though fraudulent as to the mortgagee, is good to pass the equity of redemption, because the voluntary conveyance binds the party and his heirs.

Goddard v.
Complin,
1 Ch. Ca.
119.

Tenant in tail demises the lands for ninety-nine years, by way of mortgage, under a condition of redemption; and on his marriage suffers a recovery, and in consideration of the portion settled a jointure; then the husband borrows more money of the mortgagee, and appoints the term as a security. The recovery enures to make good the term; and if the mortgagee had no notice of the jointure, he shall be allowed his whole money, for the entail destroyed by the recovery; because every recovery places the fee in the recoverer; and neither the husband nor wife, that comes in by title under him, can vacate this act precedent; so that the subsequent recovery of tenant in tail makes good all precedent incumbrances.

Roscarwick
v. Barton,
1 Ch. Ca.
217., &c.

A man makes a mortgage, and afterwards makes a marriage settlement of the equity of redemption, wherein he limits it on the wife; and then on the issue of his body, with remainder in tail to his brother; the mortgagee exhibits his bill against the mortgagor, to have his money, or that he may stand foreclosed, without making the brother a party; and has a decree accordingly; and afterwards the mortgagor dies without issue, and the lands remain to the brother by the marriage settlement, who prefers his bill to redeem. The bill was dismissed; for having made those parties to the bill of foreclosure, that were parties to the mortgage, the mortgagee did as much as was possible; and since at law a fine, or other conveyance, extinguishes an equity of redemption, which is but a *chose in action*, though the modern course hath allowed it to be transferred; yet it ought not to be so allowed, that the mortgagee should not know from whom to seek a foreclosure, in order to keep him an eternal bailiff to the mortgagor; therefore, after length of time, and in behalf of a mere volunteer, they would not open the account, after such decree to foreclose had against the person that was party to the mortgage; for possibly the mortgagee, since the foreclosure, had kept no account, since he was not bound to do it.

Reynoldson
v. Perkins,
Amb. Rep.
364.

[*H.* being seised in fee, mortgaged for years, and afterwards, in 1734, made his will, and devised his estate to his son and his heirs,

heirs, subject to an annuity to his wife for life, and to the incomes upon the estate; and in case his son should die without issue, to be divided amongst his three daughters, or such of them as should be living at the death of his son; and if his son and daughter should all die without issue, then to his wife for life, remainder to his own right heirs. A bill was brought by *P.*, as assignee of the original mortgagee, against the widow of the mortgagor, and her son, who was then an infant, to foreclose the equity of redemption; but the daughters were not made parties. In 1746, the cause was heard, and a decree made for an account and foreclosure, unless redeemed by the mother or son. The account was taken before the Master, and the time for redemption being several times enlarged, and at last elapsed, the son, having attained 21, released the equity of redemption; so that the foreclosure was not made absolute against him, but was made absolute against the wife. The son afterwards died without issue, and *R.* having bought the daughters' interest for a trifle, in 1765, filed a bill to redeem. But the Lord Chancellor was clear of opinion, that *P.* was not entitled to redemption. That the first tenant in being a party to the foreclosure was sufficient. That he sustained the interest of every body, and those in remainder were considered as cyphers. That it would be very inconvenient if the remainder-men were necessarily to be parties. There might ever be an absolute foreclosure. The account would be endless, and the foreclosure would be open to every contingent remainder-man. That nobody would lend money upon such terms. That the release in this case was equal to an absolute foreclosure by order. That the accounts were taken, and the time for redemption elapsed, and that this case was not so strong as that of *Roscarick* and *Barton*.

If a man mortgages lands, and then confesses several judgments, and some of the persons, who have judgments, give the mortgagee notice, and afterwards he obtains, against the mortgagor, a decree to foreclose; such persons, that give notice of their interest, shall notwithstanding, redeem; because they are creditors for a valuable consideration, and the mortgagee had notice of them, that he might have made them parties to his bill; but the persons, who gave no previous notice of their judgments, are totally barred of all redemption, by the former decree.

A second mortgagee may redeem the first, after a decree obtained by him to foreclose, although the first mortgagee had no notice of the second mortgage, before the decree.

But the first mortgagee shall be allowed all his expences out of pocket. Thus, where *L.* a second mortgagee, came to redeem *H.* who had been at great expences in law-suits to foreclose the mortgagor, and otherwise, in relation to the estate; the court ordered, that his costs should not be taxed, as in an adverse suit, but that he should be allowed all his costs and expences, as was done in the case of a solicitor, who laid out and disbursed money for his client; and farther, that the profits of the estate in question should be

Greswold v. Martham,
2 Ch. Ca.
170.

2 Vern. 601.
Et vide
Morret v. Westerne, *supra*.

Lomax v. Hide,
2 Vern. 185.

be applied, in the first place, to pay and satisfy what was due such costs, charges, and disbursements, before it was applied to sink the principal; for that it was not reasonable he should pay for it, and be allowed it only on the foot of the account (as has been usually done) whereby he might lose the interest thereof, ten or more years together.

Lloyd v.
Mansell, 2 P.
Wms. 74.
2 Ch. Ca.
223. Brent
v. English.

And a decree to foreclose, though made absolute, signed, and enrolled, is no plea to redeem, if surreptitiously procured.]

A. mortgages to *B.*, and *C.* obtains a judgment in debt against *A.*, and then *A.* mortgages to *D.*, and then *B.*, *D.*, and *A.* account together for what was due to *B.*, and *D.* pays the money, and assigns the mortgage to *D.* *C.* sues for his debt, and to have account of what was really due to *B.* and *D.* on both securities *D.* pleads the account thus made up in bar to *C.*; but it was allowed; because their account, being voluntary, shall never exclude a third person, so that he shall not come into the redemption; for it were unjust, that their accounts should shut him out of his security, where he had no opportunity to litigate or examine the account.

2 Ch. Ca.
299.
Needler v.
Deeble.

But it hath been held, that if a first mortgagee brings a bill to foreclose the mortgagor, and an account is directed and taken between them, such account shall bind the second mortgagee, though he was no party to the bill, if there was no fraud or collusion in the taking of it.

1 Chan.
Rep. 57. 58.
Petty v.
Styward.

If a man mortgages his estate to two, who each of them lend several sums upon the estate, as appears by notes under their hands, and one of them dies, there shall be no survivorship; but it is considered as a sum of money still subsisting apart, for which the lands are only a pledge and security; so that the money be distinct sums, and the interest in it being distinct and separate there can be no survivorship between them.

Pr. Ch. 30.
Bentham
and Hain-
court.

If a mortgagee, after notice of a subsequent mortgage, joins with the mortgagor in a sale of the lands to a stranger, the money received by either for the purchase shall sink so much of the purchase money: and in this case the mortgagor, being son-in-law to the mortgagee, and he having entered, and afterwards suffered the mortgagor to take the profits for several years, without requiring interest, it was held by the court, that the interest of the first mortgagee should not affect the lands, so as to keep out the second mortgagee longer than he would have been, had the interest been duly paid.

Ibbotson v.
Rhodes,
2 Vern. 554.

If *A.*, being about to lend money to *B.* on a mortgage, send *C.* to inquire of *D.*, who had a prior mortgage, whether he had any incumbrance on *B.*'s estate, and it is proved that *C.* went to him, and spoke to him accordingly, and *D.* denied having any *D.*'s mortgage shall be postponed.

Berrysford
v. Millward,
Bernard.
Rep. 101.
2 Atk. 49.
S. C. *Vide*

[On a treaty of marriage between *A.* and *B.* his wife, *C.* the father of *A.*, and *D.* the father of *B.*, had a meeting together; at which meeting *M.*, who had a mortgage upon *C.*'s estate, was accidentally present; *C.* and *D.* discoursed together on the subject

and talked of making a settlement upon the estate on which the mortgage to *M.* was secured: *M.* never mentioned to the father of *B.* that he had such mortgage, but called out *C.* and reminded him thereof. *M.* then agreed with *C.* that he would take his personal security for the money, and they returned into the room together, when an agreement was entered into between *C.* and *D.*, in the presence of *M.*, to settle the estate in strict settlement. Afterwards, the marriage took effect, and *M.* brought an ejectment to recover the possession of this estate as mortgagee; whereupon *A.* and *B.* his wife brought a bill against *M.* and *C.*, in order to have a perpetual injunction: *M.* admitted all the facts, but pretended not to remember any thing of the agreement to accept *C.*'s personal security for the money lent. *C.* was examined as a witness in the cause for both parties, and swore to the fact of that agreement: and the Lord Chancellor was of opinion, that the plaintiffs were well entitled to a perpetual injunction, and ought to be relieved under the head of *fraud*; for that *M.* having voluntarily concealed his mortgage at the time of the treaty of marriage, was not entitled to have any benefit from it against the plaintiff.

Sheph. Prac. Counf. 482. pl. 9. a *qua.* if such cases do not avoid prior claim at law as fraudulent.

D., N., and H., having lent *B.* 8000 *l.* upon a mortgage in fee of the manor of *F.*, and on a statute in 1650 *l.* penalty as a farther security; and *H.* being a counsellour, and afterwards consulted by *J.* as to a loan of 200 *l.* to *B.* on a mortgage of the manor of *G.*, encouraged him to lend his money, drew the mortgage-deed, and inserted therein a covenant that the estate was free from incumbrances, making no mention of the statute which was taken, because *F.* was supposed to be deficient. The question was, Whether *H.* should be admitted to take advantage of the statute to lessen *J.*'s security upon the manor of *G.*? And it was held he should not; for if he, who only concealed his incumbrance, should be postponed, much more ought *H.*, who was intrusted as counsel by the mortgagee, promoted the loan, and drew the conveyance with covenants that the estate was free from incumbrances.

Draper et al. v. Borlace et al. 2 Vern. 370.

And if a first mortgagee be a witness to a second mortgage-deed, and, knowing the contents thereof, do not acquaint such second mortgagee with his former mortgage, this will give the latter a preference. It is likewise said, that it will make no difference, although it be not in proof that the witness knew the contents of the second mortgage; for, since it does not appear but that he might have known them, the law will presume that every witness, who can write or read, is acquainted with the substance of a deed or instrument which he, having attested, undertakes to support by his evidence.

Mocatta et al. v. Murgatroyd, 1 Will. Rep. 393. [But Mr. Cox, the editor of Peer Williams's Reports, in a note added to the above observation,

doubts the truth of the proposition, and questions whether the bare attesting a subsequent incumbrance, without other circumstances of presumptive notice, will postpone a prior incumbrancer, since, at that rate, a prior mortgagee or incumbrancer may, without any fraud, or ill intention on his side, be liable to be cheated of his security.—And so (he observes) he found it said by Lord King, in the author's (Peer Williams) report of an anonymous case, in Mich. term, 1732. And Lord Hardwicke, before whom this point was agitated, in the case of Wilford and Bezzly, 1 Vez. 6. said, "that he did not think that the bare attesting a deed as a witness would create such a presumption of his knowledge of the contents, as to affect him with any fraud therein; for a witness is only to authenticate it, and not to be privy to the contents."—And Lord Thurlow, in the case of Becket and Cordery,

Cordley, 1 Br. Ch. Rep. 357. seems to have been of a similar opinion with Lord Hardwicke in this subject; for speaking therein of the case of Mocatta and Murgarroyd, his Lordship says, "first mortgagee was a witness to the second mortgage, and was therefore postponed. I do not think this as a case, which I should determine in the same manner; for a witness in practice is not bound to the contents of the deed. The book refers to a case where Lord King denies the law to be so

Hobbs v.
Norton,
1 Vern. 136.
Vide 2 Eq.
Ca. Abr.
515. pl. 3.
9 Vin. Abr.
415. pl. 24.
Watts v.
Creswell.

N.'s younger brother, having an annuity of 100*l.* per ann charged on lands by his father's will, contracted with *H.* for 1*th* thereof; *H.* went to *N.* and informed him of his intended purchase, desiring to know of him if his younger brother had a good title to it, and whether his father was seised in fee at the time making the will, and if it had ever been revoked. *N.* told him he believed his brother had a good title, and that he had paid him 1 annuity for twenty years; but at the same time informed him that he heard there was a settlement made of his father's lands before the will, which was in the hands of *T.*, but that he had never seen it, and therefore could not tell what were its contents and encouraged the purchase, telling *H.* he had not only paid 1 brother the annuity to that time, but had also paid his sister 3000*l.* under the same will. The purchase was completed, and afterwards *N.* got the settlement into his hands, and would have avoided the annuity, the lands being thereby entailed. *H.*'s business was to have the annuity decreed or repayment of his purchase money; and though, on the hearing, there was no proof that *N.* had any notice of the contents of this settlement at the time he promoted the purchase, yet the Lord Keeper decreed the payment of the annuity merely on the encouragement *N.* gave *H.* to proceed in completing the contract; for that it was a negligent thing in him not to have made himself acquainted with his own title that he might have informed the purchaser of it, when he came to inquire of him.

Pearson v.
Morgan,
1 Bro. Ch.
Rep. 63.
2 Bro. Ch.
Rep. 388.

And such constructive fraud not only binds the party himself personally, from whose negligence it arises, but also binds the lands, &c. charged. Thus, *B.*, the elder brother of *I. B.*, was under settlement entitled to a real estate, charged with 8000*l.* by one younger child of the marriage, but subject to a proviso, that if the father should give to any of his daughters, or younger sons any money or lands, for or in advancement in marriage or otherwise, the value thereof should be deducted from the portion, unless he should by writing declare to the contrary. The father devised to *I. B.* 4000*l.* after the death of his (the son's) mother and the residue of his personal estate, and died. Then the elder son suffered a recovery by which he obtained the fee-simple in the lands. Afterwards *I. B.* applied to *P.* to lend him 3000*l.* on the security of the 8000*l.* portion, for which he assigned 5000*l.* part of the 8000*l.* as a security, and also entered into a bond in a penalty for the same. *P.*, previous to lending the 3000*l.*, applied by his solicitor to *B.*, informing him of *I. B.*'s application, and desired to be informed by him, whether the 8000*l.* was a subsisting charge upon the estate, when *B.* declared that it was, and that *P.* might safely advance his money upon the security. *B.* also afterwards applied for, and obtained a sum of money to pay off

of the 8000*l.* portion; and gave *P.*'s solicitor notice that he would pay off the 3000*l.* at the end of six months after the notice: *B.* dying soon after, the money was not paid, but from the death of his father, and down to his own death, he paid the interest of the 8000*l.* Upon his death the estate descended to his two daughters. *B.* had possession of the settlement, and knew of the advancements of the father to *I. B.*; but, supposing them not to affect the portion, did not reveal them to *P.* A bill was filed by the mortgagee against the daughters to have the 3000*l.* raised and paid out of the settled estate. They set up as a defence, that the bequest of the 4000*l.* and of the residue, was a satisfaction for the portion, under the proviso inserted in the settlement. And it being held that the bequest was a satisfaction, it then became a question, Whether *B.* had not bound himself and the land notwithstanding, by his declaration "that the portion was a subsisting charge?" It was agreed on behalf of the daughters, that if *B.* knowingly misrepresented the case to *P.*'s attorney, it certainly must bind him. All the cases were that the person misrepresenting was bound by his own misrepresentation; but this went something farther, namely, to bind the lands. If a man was guilty of a fraud, by which the land was affected, the misrepresentation would bind the land; but if there was no fraud, the land could not be affected. It was the duty of *P.*'s solicitor to make every inquiry; he ought to have made the trustees parties. It was great negligence on his part not to take a legal security. He ought to have inquired what *I. B.* took under the will. The principle the court went upon, was by acting upon the conscience of the defendant in such cases; if the defendant was acting against conscience, the court would apply a remedy, but there was in this case nothing against conscience. *B.* was ignorant of the legal effect of the legacies. If then there was no fraud, there was nothing for the court to relieve against, and the land could not be bound. But by *Buller*, Just. (who sat for the Chancellour), the only question is, Whether *P.* has a right to have 3000*l.* raised for payment of his debt, out of the estate of *James*? It is argued, that this is not to be done unless there is such a fraud as to affect land, and that here was no fraud, but *B.* acted innocently. It brings to my mind a case tried before me at *Guildhall*, by one merchant against another, for giving a false character of a third person, by which the plaintiff was induced to give him a credit, and lost his money; my direction to the jury was, that, if one man tells another a falsehood by which he is injured, the deceived person has his remedy by an action. Those who wish to maintain the daughter's case, argue, that *B.* the father was a total stranger to the case, which argument admits the principle, that if he had been interested, the declaration would bind. Here, the person of whom the question was asked, certainly had no interest. Fraud is a question of law, and of fact. It is always considered as a constructive fraud where the party knows the truth and conceals it, and such constructive fraud always makes the party liable. I think that, here, *B.* knew of the proviso and advancements, and that in this court he was obliged to take notice

of them. In fact he had express notice. It is not like the case of a latter deed referring to a former one. The inquiry was very proper one on the part of *P.*, and completely repelled an imputation of negligence in his agent, and the inquiry was properly made of the party immediately interested. *B.*, at the time of the inquiry, had the equitable interest in the estate, and, upon the application, assured *P.*, that he might safely lend his money. The inquiry was the most material *P.* could make. If *B.* admitted the term to be in existence, he must be bound by his admission. He had full notice, and induced *P.* to lend his money, which was a fraud that would affect the daughter's estate. The term must therefore, be held to be in force to secure the 3000*l.*, and the trustees must raise that sum.]

Abr. Eq.
321, 322.
Peter v.
Ruffel.

One *Goff*, being possessed of the *Thatched-House* at *St. James's* on a building lease for sixty years, mortgages it to *Dr. Lancaster*, and one *Habberfield*, for securing 600*l.*, which the defendant afterwards paid off, and advanced to *Goff* 600*l.* more, and took an assignment of this mortgage, but had not the original lease delivered to him till some days after the assignment. *Goff* afterwards being in a declining way, proposed to borrow of the plaintiff 350*l.* on a mortgage of a vault and two rooms, part of the mortgage premises; and on a treaty for that purpose, one *Remington*, who acted for the plaintiff, desired to see the original lease; *Goff* told him, that he had it not by him, but that his lawyer kept all his writings for him, as not thinking it safe to trust them in his own house, where all sorts of company resorted; upon which *Goff* goes to the defendant, who was an attorney in the city, tells him he was about agreeing with a person for the rebuilding part of the premises, at so much a foot square, which would better his security, and desired him to let him have the original lease, that he might see the dimensions of the house: the defendant would not trust him with the lease in his own power, but goes along with him to the *Thatched-House*; and after he had been there some time, *Goff* sends for the plaintiff and *Remington*, told them he had now the original lease, which they might see; and upon their coming to his house, *Goff* goes into the room where the defendant was, and desires him to let him have the lease, to shew the person he had mentioned, for that he was now in the house; and accordingly the defendant lets him have the lease, which he carries to the plaintiff and *Remington*; and they being satisfied therewith lend him the money, and take a mortgage of the vault and two rooms, insisting at the same time to have the original lease delivered to them; but *Goff* urging that it concerned much more than the plaintiff had in mortgage, and that he could not part with it, the plaintiff permitted him to keep it; and he thereupon, in about an hour's time, delivered it again to the defendant, without acquainting him with what he had done; and the defendant swore expressly in his answer, that he had no notice of this transaction, or of the plaintiff's mortgage. Afterwards, the plaintiff lent *Goff* a further sum of money, and he prevailed on the defendant to let him have the original lease a second time; but there was no proof that

that the defendant knew the occasion of it, and he, by his answer, expressly denied his having notice of it. *Goff* afterwards failed, and thereupon the defendant brought his ejectment, and recovered; and this bill was brought to have the defendant's mortgage postponed, upon pretence, that here was a manifest fraud on the plaintiff, and that the defendant was privy to it; and at the Rolls the plaintiff had a decree accordingly: but, on appeal, the decree was reversed. Lord Chancellour said, that if a man makes a mortgage, and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud will, without doubt, in equity postpone his own mortgage: so, if such mortgagee stands by and sees another lending money on the same estate, without giving him notice of his first mortgage, this is such a misprision as shall forfeit his priority. But here is no manner of proof that the defendant knew any thing of the plaintiff's lending his money; nay, if there had, yet the plaintiff appears guilty of so much a grosser neglect, that he ought not to prevail; for the defendant intrusted *Goff* with his original lease but for a very little while; the plaintiff takes his word, that he could not part with it, and leaves it wholly in his power to go on in defrauding whom else he had a mind to. Besides, it appears the defendant was imposed on by *Goff*, for he parted with the lease only to better his own security, and had the most specious pretence that could be for it; and therefore it cannot be, without manifest proof, objected to him, that he let *Goff* have the lease to shew the plaintiff, or with a design to draw in the plaintiff to lend his money. His Lordship dismissed the bill with costs, unless the plaintiff should, within such a time, redeem the defendant.

[*S.* made a mortgage of lands to *H.* who, placing a great confidence in him, lent the money, taking his word that he would deliver him the title-deeds, the mortgage being executed in London, and *S.* pretending the title-deeds were in the country. Afterwards, *S.* borrowed 2000*l.* of *E.* on a mortgage of the same lands, at the same time producing and delivering to him all his title-deeds, which were perused, and approved by his counsel. Then *H.* exhibited a bill to foreclose *E.* and to compel him to discover the title-deeds relating to the premises, and to have them delivered up to him, insisting upon them, as owner of the land. *E.* pleaded the mortgage made to him, and that he had no notice of the prior mortgage to *H.*, and insisted, that the court ought not to aid *H.* and take the title-deeds from him, without ordering him to be paid his mortgage-money; and so it was decreed by the Chancellour.

S. being seised in fee of certain estates, subject to an outstanding term of years in *R.* and *E.*, by indenture of lease and release, dated the 4th and 5th days of June 1732, conveyed them to *D.* and her heirs, for securing the payment of 1000*l.* and interest, and covenanted to produce the deeds respecting the terms for years. Afterwards, *R.* and *E.* assigned the term to other trustees, in trust for *S.*, his heirs and assigns; and then, *S.* by indenture, dated the

Head v.
Egerton,
3 P. Wms.
280.

Stanhope
v. Verney,
vide Co.
Lit. last
edit. 293. b.
in note.

19th of December 1732, conveyed the same estates to *N.* by way of mortgage, for securing to her 300*l.* and interest, with a declaration that the trustees of the term should stand possessed of the term in trust for her, and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to *D.* Afterwards, *D.* brought an ejectment; *V.*, who claimed under *N.*, defended it, and set up the term with a declaration of the trust of it in favour of *N.*; upon this, *D.* brought her bill in equity. The question was, Which should be preferred; *D.* who had the first declaration of the trust of the term, or *V.* who had the subsequent declaration of the trust, but had the custody of the deed? Lord Northampton held, that a declaration of trust in favour of an incumbrancer was tantamount to an actual assignment unless a subsequent incumbrancer, *bonâ fide*, and without notice procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it, in favour of a second incumbrancer, was equivalent (a) to an actual assignment; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him.

(a) That is in equity.

If the mortgage be of a reversion, there is no reason to postpone the mortgagee upon the mere abstract fact of his not having required or procured the title-deeds and writings; because in such cases, the title-deeds and writings do not properly belong to the reversioner, nor has he, generally speaking, any means by which he can procure them, if refused by the tenant for life, or possessor of the particular estate.

Tourle v.
Rand,
2 Ch. Rep.
650.

This question was agitated in equity, before Lord Thurlow, in the case of *Tourle* against *Rand*, which was as follows: *R.* being as supposed, entitled under the will of his father to a remainder in fee (but in fact only to a remainder in tail) expectant on the death of his mother, in certain freehold estates, conveyed his reversion and remainder, expectant on the death of his mother, to *A.* in fee, by way of mortgage. At the time of making the mortgage, the deeds and writings were in the hands of a collateral relation, but *A.*'s attorney was informed by the mortgagor, that they were in the possession of the mother, who would not consent to part with them, she being then in possession of the estate as tenant for life, which she continued until the time of her death. Immediately after her decease, *A.*'s attorney applied to *R.* for the possession of the title-deeds, to which *R.*'s general answer was, that he would send them in a day or two, or to that effect. Shortly afterwards, *R.*, being then tenant in tail in possession, (but supposing himself tenant in fee of the above estate, and being also possessed of a leasehold estate,) mortgaged both estates to *T.* At the time when the latter mortgage was made, all the title-deeds, relating to the estates, were delivered to *T.*'s attorney, and continued in *T.*'s possession. Some time afterwards, *T.* filed his bill to foreclose the mortgaged premises, and among other things, charged that *A.* ought not to have permitted the title-deeds and writings to have remained in the hands of *R.*, that he left them in his hands for the purpose of enabling him to raise more money on the security

security of the premises, and that the same was a fraud on T., and that therefore A. ought to be compelled to redeem T.'s mortgage, or ought to be debarred of any interest, which he might have in the premises, till T.'s mortgage should be satisfied. It was contended on the part of T. that, where a prior mortgagee leaves the title-deeds in the possession of the mortgagor, it is a fraud upon the second mortgagee, as he is induced, by the title appearing on the deeds, to lend his money; that the second mortgagee therefore having the deeds, should be preferred. But Lord *Thurlow*, Chan. said, that he did not conceive that a first mortgagee, not taking the deeds, was *alone* sufficient to postpone him; if it were so, there could be no such thing as a mortgage of a reversion. In *that case*, the deed being in the hands of tenant for life, is not sufficient to turn him round. The first cases where the prior mortgage was postponed, were cases of fraud, then the same was done in cases of gross negligence (a). Here was no *laches*; the mortgagee could not compel the tenant for life to give up the deeds: though a dowress, upon a confirmation of her title, might be compelled, the tenant for life could not, although, after her decease, he might have filed a bill. But that was not sufficient to charge the mortgagee.

In the case of *Goodtitle* against *Morgan*, Mr. Justice *Buller* considers it "as an established rule, in a court of equity (b), that a second mortgagee who has the title-deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lends money upon mortgage, without taking the title-deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity, (says the learned Judge,) it ought to be adopted in a course of law." *Quere.*

Although a deposit of title deeds for the security of a debt amount to an equitable mortgage, yet, if a creditor of the mortgagor, fearing his immediate insolvency, take a conveyance of the same estate, without notice (c) of the incumbrance, equity will not prevent him from availing himself of his legal estate.

either actual or constructive. *Birch v. Ellames*, 2 Anstr. 427.

By the 4 & 5 W. 3. c. 16. reciting, that great frauds and deceits are often practised by necessitous and evil-disposed persons, in borrowing money, and giving judgments, statutes, and recognizances privately, for securing the re-payment of the said money; and the same persons do afterwards borrow money, upon security of their lands, of other persons, and do not acquaint the later lender thereof with the same; whereby such late lender is very often in danger to lose his whole money, or forced to pay off the debts secured by the said judgments, statutes, and recognizances, before they can have any benefit of the said mortgages; and that divers persons do many times mortgage their lands more than once, without giving notice of their first mortgage; whereby lenders of money upon second or after-mortgages do often lose their money, and are put to great charges in suit and otherwise; for remedy whereof it is enacted, "That if any person shall borrow any money, or, for any other valuable consideration, for the payment thereof, voluntarily give, acknowledge, permit, or

(a) "I find
"no case,"
saith *Eyre*,
C. B. "that
"goes the
"length of
"saying,
"that a
"failure of
"the ut-
"most cir-
"cumspec-
"tion shall
"have the
"same ef-
"fect of
"postpon-
"ing a
"mort-
"gage, as
"it he were
"guilty of
"fraud or
"wilful ne-
"glect."
2 Anstr.
440.

(b) 1 Term
Rep. 762.

Plumb v.
Fluitt,
2 Anstr.
432.

(c) *Saxs*,
where there
is notice

" suffer to be entered against him, or them, one or more judg-
 " ment or judgments, statute or statutes, recognizance or recog-
 " nizances, to any person or persons, creditor or creditors; and
 " if the said borrower or borrowers, debtor or debtors, shall af-
 " terwards take up or borrow any other sum or sums of mone-
 " of any other person or persons, or, for other valuable consider-
 " ation, become indebted to such person or persons, and for se-
 " curing the re-payment and discharge thereof, shall mortgage
 " his, her, or their lands or tenements, or any part thereof, to
 " the said second or other lender or lenders of the said money,
 " creditor or creditors, or to any other person or persons, in trust
 " for or to the use of such second or other lender or lenders,
 " creditor or creditors, and shall not give notice to the said mort-
 " gagee or mortgagees of the said judgment or judgments, sta-
 " tute or statutes, recognizance or recognizances, in writing,
 " under his, her, or their hand or hands, before the execution of
 " the said mortgage or mortgages; unless such mortgagor or
 " mortgagors, his, her, or their heirs, upon notice to him, her,
 " or them given by the mortgagee or mortgagees of the said lands
 " and tenements, his, her, or their heirs, executors, administra-
 " tors, or assigns, in writing, under his, her, or their hands and
 " seals, attested by two or more sufficient witnesses, of any such
 " former judgment or judgments, statute or statutes, recogni-
 " zance or recognizances, shall, within six months, pay off and
 " discharge the said judgment or judgments, statute or statutes,
 " recognizance or recognizances, and all interest and charges due
 " thereupon, and cause or procure the same to be vacated, or dis-
 " charged, by record; that then the mortgagor or mortgagors of the
 " said lands and tenements, his, her, or their heirs, executors, ad-
 " ministrators, or assigns, shall have no benefit or remedy against
 " the said mortgagee or mortgagees, his, her, or their heirs, exe-
 " cutors, administrators, or assigns, or any of them, in equity or
 " elsewhere, for redemption of the said lands and tenements, or
 " any part thereof; but the said mortgagee and mortgagees, his,
 " her, or their heirs, executors, administrators, and assigns, shall
 " and may hold and enjoy the said lands and tenements, for such
 " estate and term therein, as were or was granted and settled
 " to the said mortgagee or mortgagees, against the said mort-
 " gagor or mortgagors, and all person and persons lawfully claim-
 " ing from, by, or under him, her, or them; freed from equity of
 " redemption, and as fully, to all intents and purposes whatsoever,
 " as if the same had been purchased absolutely, and without any
 " power or liberty of redemption."

§ 3.

" And it is further enacted, That if any person shall mortgage
 " any lands or tenements to any person or persons, for security of
 " money lent, or otherwise accrued or become due, or for other
 " valuable considerations; and if the said mortgagor or mort-
 " gagors shall again mortgage the same lands or tenements, or
 " any part thereof, to any other person or persons for valuable
 " consideration, (the said former mortgage being in force, and
 " not discharged,) and shall not discover to the said second or
 " other mortgagee or mortgagees, or some or one of them, the
 " former

" former mortgage or mortgages, in writing, under his, her, or
 " their hands, that then, and in these cases also, the said mortgagor
 " or mortgagors, his, her, or their heirs, executors, administra-
 " tors, or assigns, shall have no relief, or equity of redemption,
 " against the said second or after-mortgagee or mortgagees, his,
 " her, or their heirs, executors, administrators, or assigns, upon
 " the said after-mortgage or mortgages; but that such mortgagee
 " or mortgagees, his, her, or their heirs, executors, administrators,
 " and assigns, shall and may hold and enjoy such more than once
 " mortgaged lands and tenements, for such estate and term there-
 " in, as were or was granted and conveyed by the said mortgagor
 " or mortgagors, against him, her, or them, his, her, or their
 " heirs, executors, or administrators respectively, freed from all
 " equity of redemption, and as fully, to all intents and purposes,
 " as if the same had been an absolute purchase, and without
 " any power or liberty of redemption.

" Provided always, and be it further enacted by the authority § 4.
 " aforesaid, That nevertheless if it so happen that there be more
 " than one mortgage at the same time made, by any person or
 " persons, to any person or persons of the same lands and tene-
 " ments, the several late or under mortgagees, his, her, or their
 " heirs, executors, administrators, or assigns, shall have power to
 " redeem any former mortgage or mortgages, upon payment of
 " the principal debt, interest, and costs of suit to the prior mort-
 " gagee or mortgagees, his, her, or their heirs, executors, admini-
 " strators, or assigns.

" Provided always, That nothing in this act contained shall be § 5.
 " construed, deemed or extended to bar any widow of any mort-
 " gagee of lands or tenements from her dower and right in or to
 " the said lands, who did not legally join with her husband in
 " such mortgage, or otherwise lawfully bar or exclude herself from
 " such dower or right."

It hath been held, that if a man mortgages certain lands to one 2 Vern. 589.
 man, and mortgages those lands with some others to another;
 though this seems to be a case omitted out of the above statute
 against clandestine mortgages, yet if it appears to be a contrivance
 to evade it, as, if an acre or two of land were only added, this will
 not exempt it: also, a person, who will take advantage of the
 statute, must be an honest mortgagee; and therefore if a man has
 used any fraud or practice in obtaining a second mortgage, he shall
 not have the benefit of the statute.

4. How far the Purchasing in a precedent Mortgage or Incum- brance will protect such Purchaser, and entitle him to a Prece- dency of Redemption.

It hath been established as a rule in the courts of equity, that if 2 Vent. 337.
 a man mortgages lands to A., and afterwards makes a subsequent Chan. Ca.
 mortgage to B., without notice at the time of his making the 36. 149.
 mortgage, and B. purchases in a precedent mortgage, which stands 152. 166.
 out at law, though nothing on it be due in equity, or a statute Haid. 73.
 whereon money is due, which he extends, he shall hold the land 2 Chan. Ca.
 till 208.
 Vern. 187.
 2 Vern. 157.

till he is satisfied what is due upon both securities, though he ha notice of *A.*'s mortgage before his second purchase of the pri^r security; because, having at first innocently lent the money, I may do what he can to secure that money from being lost; an when he hath purchased in the prior incumbrance, it is but ju that equity should leave it in the same manner that it stood at law for there is no room for equity to interpose, to take away th security the law had given, where the person that has the securi comes into the title without any corruption at all; and it we^r partiality, and not equity, to interpose, where the security giv^e the fair lender a good and legal title. And it is all one, wheth^r such third lender or purchaser takes in a mortgage, that is a interest vested, or a statute, that is only a charge; for both ar real liens, and sufficient to overthrow the title of the mesne in cumbrancer, whether money be due on the first security or not since that does not alter the legal title.

Chan. Ca.
201.
3 Chan.
Rep. 67.
S. C. Sir
Ralph Bovey
v. Skipwith.

A man mortgages the manor and rectory of *D.* to *A.*, an afterwards mortgages the rectory to *B.*, without notice of th mortgage to *A.*, and then *B.* purchases in a precedent incumbranc on both the manor and rectory; and the question was, When *B.* had received all the money due on the first security, whether h^e should receive any more profits of the manor, or only keep th incumbrance on foot to protect the rectory? This was argu^ed before Sir *Heaneage Finch*, Lord Keeper, in the presence of *Wil^k* and *Twissden*; and the two Judges held, that *B.* should not receive the profits of the manor after the first incumbrance was satisfied, because he had taken the rectory only for his security of that sum; and it would be unreasonable to give him a security beyond what he had in his original intention. But the Lord Keeper over-ruled it; for that when he had purchased the precedent incumbrances, which comprehended both the manor and the rectory, and were forfeited at law, it was but reasonable that the estate should not be taken away by the mesne incumbrancer here in a court of equity, which by no methods could be evicted at law, unless such person that seeks relief would do equity, and pay the whole money due on both securities.

Wyndham
et al. v. Lord
Richardson
et al. 2 Cha.
Ca. 212.

[Again, *R.* being seised in fee, acknowledged a statute of 1000*l.* to *I. S.* in 1663, and, on the 20th of *June* 1665, mortgaged the manor of *A.* to the plaintiffs *W.* and *K.* for 2000*l.*, and two days afterwards mortgaged part of the same to the defendant *B.*, and then died, leaving the defendant *H.* his heir; *B.*, the second mortgagee, agreed with *M.*, another defendant, executor of *I. S.*, to put the statute in execution at his costs, and to pay *M.* the debt due on the statute, after such time as the statute should be extended, and an assignment made thereof by *M.* to *B.* The statute was extended in *August* 1672. The plaintiffs' bill was, that on paying the debt on the statute, it might be set aside and assigned to them, and for a decree against *H.* to pay or be foreclosed of redemption. One question was, Whether the plaintiffs should be admitted to set aside the extent on payment of what was due on the statute without paying off the 2000*l.* due on the second mortgage to *B.*, until the statute was satisfied, not according to the justice

justice of the debt in equity, but according to the extended value ? It was objected, that the defendant *B.* had not, in his mortgage made after the plaintiffs' mortgage, all the lands mortgaged before to the plaintiffs, but only part thereof, and that the statute covered the whole ; and that, although the defendant *B.* might, by the purchase of the statute, defend himself against the plaintiff, as to what was in his mortgage, yet he could not, as to such lands as were not therein. But the Chancellour was strongly against the plaintiffs on this point, and a question of fact arising, the case went off upon propositions.

And if a puisne incumbrancer or purchaser get in a satisfied judgment, or a prior statute, or judgment, or recognizance, although it be paid off, yet, if he can make *use of it at law*, equity will not interfere to hinder him. Edmunds v. Povey, 1 Vern. 187. 2 Ch. Ca. 208. Hard. 318. See vide Hard. 172. cont.

So, where the plaintiff was a jointress, and the defendant a mortgagee subsequent, who had gotten an assignment of a statute that was precedent to the jointure, but was satisfied, and extended it on the lands mortgaged ; the bill was to set aside the extent : but the Master of the Rolls decreed, that it should not be set aside, but upon payment of principal, interest, and costs. Sadler v. Bulb, 2 Vern. 30.

But, if *B.*, the second mortgagee, had notice of the mortgage of *A.* at the time of his first lending the money, then he could not purchase in a prior incumbrance, so as to crowd out *A.*, because he lent it on the prospect that *A.* was first to be paid, and under that immediate expectation ; and though the estate would bear more money at the time of the loan, yet, if by prior debts appearing, or any accident, it is likely to fall short, it seems, he cannot crowd out *A.*, of whose interest he had notice, since he took the estate, with his eyes open, under notice of *A.*'s interest ; and therefore, on his original taking the security, ran all the hazards of that nature ; for it is corruption in *B.* to purchase after such notice, with an ill intention of destroying *A.*'s prior security. Chan. Ca. 166.

A man mortgages lands (subject to an annuity) to *A.* and then mortgages the same lands to *B.* : The mortgagor and annuitant borrow more money of *A.* for which the annuity is assigned, and the lands farther charged ; *A.* shall be allowed the money if he had no notice of *B.*'s mortgage ; if he had, then only what was paid to the annuitant. 2 Chan. Ca. 20.

[Where a judgment creditor, or creditor by statute or recognizance, buys in a first mortgage, he cannot tack or unite this to his judgment, so as to gain a preference thereby ; because such creditor cannot be called a purchaser, nor hath he any right to the land ; he hath neither *jus in re*, nor *jus ad rem* ; and therefore though he release all his right to the land, he may extend it afterwards. All that he hath by the judgment, is a lien upon the land ; but it is not certain whether he ever will make use thereof ; for he may recover the debt out of the goods of the conusor by *scire facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Besides, the judgment creditor doth not lend his money upon the immediate view or contemplation of the conusor's real estate ; for lands afterwards purchased, may be extended upon the judgment ; nor is he deceived or

Brace v. Duchess of Marlborough, 2 P. Wms. 491. Anon. 2 Ves. 662. See vide Wright v. Pelling, Gilb. Eq. Rep. 151. & Pr. Ch. 494.

till he is satisfied what is due upon both securities, though he had notice of *A.*'s mortgage before his second purchase of the prior security; because, having at first innocently lent the money, he may do what he can to secure that money from being lost; and when he hath purchased in the prior incumbrance, it is but just that equity should leave it in the same manner that it stood at law; for there is no room for equity to interpose, to take away the security the law had given, where the person that has the security comes into the title without any corruption at all; and it were partiality, and not equity, to interpose, where the security gives the fair lender a good and legal title. And it is all one, whether such third lender or purchaser takes in a mortgage, that is an interest vested, or a statute, that is only a charge; for both are real liens, and sufficient to overthrow the title of the mesne incumbrancer, whether money be due on the first security or not, since that does not alter the legal title.

Chan. Ca.
201.
3 Chan.
Rep. 67.
S. C. Sir
Ralph Bovey
v. Skipwith.

A man mortgages the manor and rectory of *D.* to *A.*, and afterwards mortgages the rectory to *B.*, without notice of the mortgage to *A.*, and then *B.* purchases in a precedent incumbrance on both the manor and rectory; and the question was, When *B.* had received all the money due on the first security, whether he should receive any more profits of the manor, or only keep the incumbrance on foot to protect the rectory? This was argued before Sir *Heaneage Finch*, Lord Keeper, in the presence of *Wild* and *Twisden*; and the two Judges held, that *B.* should not receive the profits of the manor after the first incumbrance was satisfied, because he had taken the rectory only for his security of that sum; and it would be unreasonable to give him a security beyond what he had in his original intention. But the Lord Keeper over-ruled it; for that when he had purchased the precedent incumbrances, which comprehended both the manor and the rectory, and were forfeited at law, it was but reasonable that the estate should not be taken away by the mesne incumbrancer here in a court of equity, which by no methods could be evicted at law, unless such person that seeks relief would do equity, and pay the whole money due on both securities.

Wyndham
et al. v. Lord
Richardson
et al. 2 Cha.
Ca. 212.

[Again, *R.* being seised in fee, acknowledged a statute of 1000*l.* to *I. S.* in 1663, and, on the 20th of *June* 1665, mortgaged the manor of *A.* to the plaintiffs *W.* and *K.* for 2000*l.*, and two days afterwards mortgaged part of the same to the defendant *B.*, and then died, leaving the defendant *H.* his heir; *B.*, the second mortgagee, agreed with *M.*, another defendant, executor of *I. S.*, to put the statute in execution at his costs, and to pay *M.* the debt due on the statute, after such time as the statute should be extended, and an assignment made thereof by *M.* to *B.* The statute was extended in *August* 1672. The plaintiffs' bill was, that on paying the debt on the statute, it might be set aside and assigned to them, and for a decree against *H.* to pay or be foreclosed of redemption. One question was, Whether the plaintiffs should be admitted to set aside the extent on payment of what was due on the statute without paying off the 2000*l.* due on the second mortgage to *B.*, until the statute was satisfied, not according to the justice

Banking's were made parties, yet they might be brought in before the Master.

[But where *A.*, the plaintiff, had lent money on several notes of different dates, each of them in words to this effect; "Received of *A. — l.*, to be secured on mortgage of my *Stokehall* estate;" and the drawer had, previously to his drawing these notes, made a mortgage of his estate to the defendant; and *A.*, to cover the sums lent on the notes, bought in a mortgage which was made prior to the defendant's: Lord *Hardwicke* was of opinion, that *A.* should thereby protect himself against the defendant's mortgage; and should be paid the money lent upon the notes, as well as what was due to him upon the assignment of the first mortgage.

A prior mortgage purchased in will be no protection to a *paisne* mortgagee, unless it be forfeited; for, until then, the estate remains, as it was at common law, redeemable upon performance of the condition stipulated.

And a *paisne* mortgagee, who purchaseth in a prior security to protect his own, shall not only hold it until he be paid his debt, and reimbursed the money advanced by him to purchase it; but until he has received all the money, and arrears of interest, due on the security bought in, as well as upon his own.

And, as a *paisne* mortgagee may tack a prior incumbrance, that hangs with it the legal estate, to his own, and thereby protect himself against intervening charges thereon; so, a mortgagee *eigne*, having the legal estate, may tack a subsequent sum advanced by him upon the former security, to his prior mortgage, and thereby protect himself against *mesne* incumbrances.

Thus, where *A.* had an annuity charged on the manor of *S.*, and *B.* an estate therein liable to the annuity, and *C.* an interest subsequent to both by mortgage; *B.* having no notice of *C.*'s interest, treated with him in the reversion in fee, who desired to borrow money of him, and thereupon purchased *A.*'s interest, and for that, and by way of money lent to the reversioner, paid 900*l.*, but there was no more than 500*l.* due to *A.*; *C.* exhibited his bill against *A.* and *B.*, to redeem them on payment of their debts; the question was, Whether *C.* should pay *B.* any more than the mortgage-money he had originally lent, and the 500*l.* paid by him, which was due to *A.*? And it was decreed, that he should pay the whole 900*l.* advanced.

So, if there be first and second mortgagee, and the first lend money after the last mortgage made, taking a *judgment* as security, he may tack this to his mortgage to protect himself against the second mortgagee, for he hath the legal estate and the judgment which, though it passeth no interest, presently, in the land, operates as a *lien*.

of Marlborough, 2 P. Wms. 494.

But the farther sum advanced must be to one who has a right to charge the estate in question. Thus, *I. C.*, the grandfather of *C.*, made a mortgage of lands in fee to *H.*, and then having two sons *A.* and *B.*, devised the equity of redemption to his youngest son *B.*, and his heirs, and died; *B.* entered into the mortgaged lands,

Matthew v. Cartwright, 2 Atk. 347.

Hitchcock et al. v. Sedgwick et al. 2 Vern. 159.

Darcy v. Hale, 1 Vern. 49.

Goddard v. Camplin, 1 Ch. Ca. 119.

Blackstone v. Moreland, 2 Ch. Ca. 20.

Shepherd v. Titley, 2 Atk. 352, 4th resolution in Brace v. Ducels 2 Vez. 662.

Cooper v. Cooper, Nelson's Rep. 153.

or defrauded, although the conusor of the judgment hath before mortgaged his real estate, as in the case of a mortgagee, if the mortgagor hath before mortgaged his land to another.]

Breerton
v. Jones,
June 8,
17c9. Per
Master of
the Rolls.
1 Eq. Ca.
Abr. 325.
S. C.

A. mortgaged his estate to *B.*, and then assigned the equity of redemption to *C.*; afterwards *D.* obtained a judgment against *A.*; then *B.* the mortgagee assigns to *D.* his mortgage; and then *C.* tenders the money due on the mortgage to *D.*, who had notice of the assignment of the equity of redemption, upon his purchasing in of the mortgage. It was here objected, that *D.* having the legal estate in him by the assignment of the forfeited mortgage, and *C.* having only an equitable interest, not supported by the legal estate, that if *C.* would have equity, he ought to do equity, by paying off both monies to *C.* But it was answered and resolved by the court, that *C.* should redeem, paying only the money due on the mortgage, and not what was due on the judgment; because the equity of redemption was never bound by the judgment; for the judgment was not confessed, so as to become a real lien upon the estate, at the time when the equity of redemption was conveyed away; but it only subsisted upon bond, which was a security *in personam*, not *in rem*, at the time when this equity was assigned; and therefore the judgment could never charge nor affect it; and, consequently, *C.* purchased an estate not bound by the judgment; and, by consequence, the judgment creditor, by purchasing in the prior mortgage, could never defeat the interest of *C.* It was also declared, that if a person who has a first mortgage, purchase in a subsequent judgment, without the consent of the mortgagor, that a mesne mortgagee, or assignee of the equity of redemption, shall not be obliged to pay the money due on both securities, in order to redeem, because such transaction of the mortgagee is only to load the estate without the consent of the owner, and he has no prospect of bettering his own security, as in the case where a mortgagee at a third hand purchases in the first incumbrance.

Stephenson
v. Hayward,
Feb. 9,
1710. per
Lord Keeper
Harcourt.

Pre. Ch.
310.

Beeching made a mortgage of his estate, and became indebted to *Hayward* in 60 *l.*, and then conveyed to *Streater*, another defendant, in trust to pay a debt to *Streater*, and then all his other debts in average; then *Streater* tendered the money to the mortgagee, which he refused, and afterwards assigned the mortgage to *Hayward*; and then *Hayward* obtained judgment against *Beeching*, on his bond of 60 *l.*, and then *Streater* sold to the plaintiffs, who not having paid their purchase money, preferred their bill against the mortgagees and *Hayward* to redeem. The Lord Keeper ordered, that the plaintiffs should redeem *Hayward's* mortgage, and deduct their costs out of the mortgage money, and that the judgment should be paid but in proportion; for though *Hayward* had a title at law, and it was insisted, that his judgment would affect the resulting equity in *Beeching*, if there was more than sufficient to pay his debts; and none of the creditors of *Beeching* were made parties to the suit; yet the Lord Keeper thought, that the conveyance made for the payment of all *Beeching's* debts was a good consideration, and that being prior to the judgment, the subsequent judgment could not affect the estate; and though no creditors of *Beeching's*

But, where the prior incumbrance taken in is deficient in those requisites which are necessary to give it legal efficacy, no protection can be derived from it. As, if a recognizance, bought in, hath not been enrolled in proper time. And though the court may, on application, interpose, and, by their special order, supply the defect as to persons who come *subsequent* to such interposition, yet it will not over-reach an intermediate incumbrancer.

So, if a judgment be not docketed within the time limited by the statute 4 & 5 W. & M. c. 20., it will not protect a *puisne* incumbrancer, although the *eigne* incumbrancer hath actually notice of it at the time of making the mortgage. Thus, where judgment was signed in June 1725, and a mortgage made to the plaintiff, who had notice of the judgment in 1728, but the judgment was not docketed, as appeared by an entry on the margin of the docket, until January 1730; the Master of the Rolls held, that the docket was not good, being made after the time limited by the statute, and that the mortgage had got the preference of the judgment by defect of the docket; and, as to the notice, it was not material, the statute being express, that judgments, not docketed, shall lose their preference as to *purchasers* and *mortgages*.

But this exception, as to judgments not docketed, is confined to cases where they are set up against purchasers or mortgagees, or heirs, or executors, or administrators in the administration of the effects of those of whom they are representatives.]

If a prior mortgage or statute be bought in, pending a bill brought by A. against the mortgagor, and B., who buys in such precedent statute or mortgage to foreclose; though this purchase be *pendente lite*, yet it will protect B., he being at liberty to do what he can for his own security.

[The plaintiff (after a decree had been made in a cause in which he had been a party with other creditors, and the Master had been directed to inquire into the priority of their demands,) bought in a judgment given in 1694, and made claim before the Master, to have it tacked to his mortgage and thereby to be paid before the defendants; as to which the Master refused to make any report: whereupon the plaintiff filed his bill, and one question was, Whether he could tack the incumbrance bought in after the decree to his mortgage? Lord Chancellour *Hardwicke*, as to this part of the case, said, that there was no case wherein it had been determined that a *puisne* incumbrancer, a party in a cause, and a decree made in that cause, for satisfaction of incumbrancers according to their *respective priorities*, having taken in a prior to tack to his *puisne* incumbrance, should be allowed to make use of it in any other shape, than that in which the original incumbrancer might use it, had no such purchase been made. He thought it would be most mischievous and pernicious, if the court should allow the doctrine of tacking to be carried to that extent. First, taking it upon the terms of the decree; all those decrees, where there were several incumbrances before the court, a sale directed, and every thing necessary to clear the estate, in order to that sale, proceeded

Fothergill v. Kendrick,
2 Vern. 334.
Bethomley v. Lord Fairfax,
1 P. Wms. 340.

Forshall v. Cole,
7 Vin. Abr. 54. P. C.
6. S. C.
2 E. Ca. Abr. 592. 8.

Robinson v. Harrington,
1 Pow. Mortg. 415.

Hawkins v. Taylor and Leigh,
2 Vern. 29.
Farmer v. Richmond,
Id. 81. S.P.

Wortley v. Birkhead,
2 Ves. 571.
3 Atk. 809.
S. C.

lands, and enjoyed the same two years, and then died, leaving a son an infant. After *B.*'s death, his elder brother *A.* entered on these lands, and having occasion for money, joined with the mortgagee in an assignment of the mortgage to another person, of whom he borrowed a farther sum, which the assignee advanced, having no notice of the will of *John Cooper*. Then the heir of *B.* came of age, and exhibited a bill to be let into the equity of redemption upon the foot of the first mortgage. And on his part it was insisted, that the assignee could be in no better condition than the mortgagee, and that, if there had been twenty assignments for more money, if the mortgagor or he who legally represented him had not joined, he should not be barred, but ought to be relieved. On the other side it was contended, that the assignee was a purchaser for a valuable consideration without notice of this incumbrance by the will, and that he had a good title, having taken an assignment from the mortgagee, wherein the visible heir of the mortgagor was a party, and therefore, that if the heir would redeem, he ought to pay the whole principal sum and interest. But the court was of opinion, and decreed that the heir should be let into the equity of redemption upon the foot of the first mortgage.

Smithson v. Thompson,
1 Atk. 520.

And where *A.* had a prior judgment, and a mortgage likewise on the estate of *B.*; and a subsequent judgment creditor, but prior in time to the mortgage, brought a bill in Chancery, praying a sale of the mortgagor's estate, who was likewise willing and desirous to sell; *per curiam*, here, *A.* is not a subsequent incumbrancer buying in a prior, but is the first of the incumbrancers, who has advanced more money on a second incumbrance. Where the *first incumbrancer* by judgment has likewise a mortgage upon the estate, notwithstanding there is another judgment, prior in time to the mortgage, yet, if the mortgagee had no notice of such judgment, the creditor upon the second judgment shall not come into a court of equity, and pray a sale of the estate so mortgaged, without paying off the principal and interest, both of the first judgment and the mortgage; for it would be very hard, if the defendant should be in a worse condition, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be.]

Holt v. Mill,
2 Vern. 279.

If a man lends 600*l.* on a mortgage, and afterwards, discovering that the estate is pre-mortgaged to *J. S.*, he gets in an old satisfied incumbrance, and brings his bill against *J. S.* to redeem or be foreclosed, he need not prove the actual payment of any money for such precedent incumbrance, the having the deed or acquittance being sufficient.

2 Vern. 159.
Siddon v. Chamell,
Bunb. 298.
Sherley v. Fog, case
cited,
1 Vern. 52,
53. 2 Vern.
58. reported
1 Ch. Ca. 68.

[The law is the same, although the incumbrance, set up as a protection, be obtained by fraudulent means; as, where one, being a purchaser, came into a man's study, and there laid hand on a statute that would have fallen on his estate and put it in his pocket; in that case, he having obtained an advantage at law, the court would not take it from him, though procured so unfairly, and by so ill a practice: *sed quare*.

sed contra *Gillb. lex pratoria*, 248.

But,

and pending the suit the third mortgagee bought in the first mortgage: it was determined by this he had gained a priority, and should be paid his whole money before the second mortgage.

However, in many cases a suit pending in equity against land, is a bar to alienation; for *pendente lite nihil innovetur*: therefore the vendor of lands, pending a suit in equity against them, can give no title but what will be subject to its issue; but it is the pendency of the suit that creates the notice, for as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there; and to prevent a greater mischief that would arise by people's purchasing a right under litigation and then in contest.

J. F. having only one daughter, and desiring to keep part of his estate in his name, by will, made in 1684, devised a messuage to *F.* his near kinsman, in tail male, with remainder over, and gave his lands in *Sussex* to his daughter, who married *E.*; they, with *C.* were supposed to have destroyed the will after the death of the testator. *F.* brought his bill against *D.* and his wife; and, in 1687, obtained a decree to hold and enjoy the lands according to the will against them, and all claiming under them. The estate devised to *F.* having been mortgaged by the testator, prior to his will to *B.* for 100*l.*, *N.* pending the suit, bought in *B.*'s mortgage, and purchased the equity of redemption from *D.* and his wife. *N.* was served with the former decree, and appeared, and was examined, and set out his title under this mortgage, whereupon *F.* was put to bring his bill to redeem. *N.*, by answer, alleged, that although he had been informed before his purchase that it was pretended there had been such will made, yet, upon inquiry, he had been assured and satisfied that it was destroyed by the testator in his lifetime, and therefore he proceeded in his purchase, and insisted, that the former decree, to which he was no party, was unjust in decreeing the lands to be enjoyed according to the will; but, in regard he purchased *pendente lite*, and with notice that there was a will, the court would not admit him to examine the justice of the former decree, or to try at law whether such will was cancelled or destroyed by the testator, but declared he should be bound by the former proceedings, and decreed the redemption of the mortgage to the plaintiff.

A. and *B.* were partners; *A.* died having made his will, and devised to his executors and their heirs, "all his real and personal estate, not by his will otherwise disposed of, in trust that they should, by charging, leasing, or selling his estates, or any of them, raise money for the payment of all his debts; and what should remain, he directed to be divided into equal portions, share and share alike, between his five children, and left it to his executors to make proper allowances for their maintenance, until there should be a distribution made of his estates." *A.* amongst other things had a mortgage of 3500*l.* In a cause between the executor of *B.* and *A.*'s executors, the mortgage deed was directed to be left in the hands of a Master in Chancery, till the partnership account should be finally adjusted. Afterwards *A.*'s executors conveyed the mortgage to Master *Bennet*, as security for one

Vide Worley v. Earl of Scarborough, 3 Atk. 392.

Finch v. Newnham, 2 Vern. 217. & vide Fleming v. Page, Finch, 320. & vide Herbert's case, 3 P. Wms. 116. this doctrine of notice extended to a criminal case.

Mead v. Lord Orrery, 3 Atk. 236. Id. 392. S. P.

one of the executors, on his appointment to be receiver of another person's estate. And one argument used by the children of *A.* in a suit against the holders of the mortgage, by way of security for the due discharge of the receivership, was, that there was a suit at the time of the assignment about the mortgage, who was entitled to it, and that therefore it was void, as being made *lite pendente*. But Lord Hardwicke said, that he did not see how this *lis pendens* could affect this assignment, unless it had been determined that this was the mortgage of *B.* the partner of *A.* and belonged to his creditors, who were the plaintiffs in that cause. But that as it was therein determined to be *A.*'s estate, there was an end of that objection.

Sorrel v.
Carpenter,
2 P. Wms.
482.

(a) There appears to have been an order to amend the bill in Trin. term 1728. (the term of which the reporter makes the decision to have been); Reg. Lib. B. 1727. fol. 453.; and an order of dismissal in the Mich. term following. Reg. Lib. B. 1728. fo. 18.

In this case, the Chancellor observed, that it was a difficult matter to search for bills in equity, or to get notice of them; many such being, after filing, kept in the six clerks' desk; and that though the court would oblige all persons to take notice of its decrees as much as of judgments at law, yet there did not seem to be the same reason for obliging people to take notice of the filing of a bill. *Vide* 3 Atk. 392.

Garth v.
Crawford,
Barnard.
Ch. Rep.
450.

2 Atk. 175. S. C. by the name of Garth v. Ward.

And if a purchase or mortgage be made, pending a bill, to perpetuate the testimony of witnesses to a will of land, the proceedings may be read against a purchaser or mortgagee, during the suit, although he hath not notice either express or implied.

Barnard.
Rep. 454.
2 E. Ca. Abr.
687. 13.

Searle v.
Lund,
2 Vern. 88.
3 Eq. Abr.
332. 4.
2 Ch. Ca.
48. & vide
3 P. Wms.
401.

But, in general, a bill that cannot be brought to a hearing, cannot properly create a *lis pendens*, so as to affect a purchaser, claiming under one of the parties, after filing the bill.

And it seems, that a decree in a court of equity, for money, does not bind a purchaser for a valuable consideration, without notice thereof, any more than a judgment at law; for a decree is not of superior force to a judgment; nay, its effect is inferior; and where it is said a decree is equal to a judgment, or to be paid equally therewith, this must be intended only out of the personal estate; for a decree for a debt does not bind the real estate, it affecting

ing only in *personam*, not in *rem*; and the remedy upon a decree to affect the land, is only for a contempt, whereupon the party proceeds to a sequestration, and that is but a personal process, as appears by its falling and abating by the death of the party.]

But, where *A.* made a mortgage to *B.*, and afterwards a commission of bankruptcy was taken out against him, and the commissioners made an assignment of his estate, and then *C.* lent the bankrupt 2000*l.* on a second mortgage, having no notice of the bankruptcy, though he afterwards got in the first mortgage; yet it was held by two lords commissioners against one, that this prior mortgage should not protect the mortgage subsequent to the bankruptcy; for every one is bound to take notice of a commission of bankruptcy.

And though a purchaser or mortgagee may buy an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by taking a conveyance from a trustee, after he had notice of the trust; for by taking such conveyance, he becomes the trustee himself.

[Even a fine levied by a purchaser, for full consideration, *with notice of a trust*, to strengthen his estate, will not bind the *cestui que trust*, although there be five years non-claim; for he, having purchased with notice, is but a trustee, notwithstanding any consideration paid by him; and the estate not being displaced, the fine cannot bar; but a fine and non-claim will be a bar in equity, if a purchaser hath not notice.]

And where the plaintiff's bill was to be relieved upon a trust, and charged the defendant with notice thereof, and that he had procured a conveyance of the lands upon which the trust was had, and that at or before his taking the said conveyance, he had notice of the said trust for the plaintiff; the defendant, by way of answer, denied that he had any notice of the trust at the time of his purchase or contract, and pleaded that he was a purchaser for a valuable consideration; it was insisted that the point of notice was not well answered, in that the defendant denied notice at the time of the purchase only; for, the word *purchase* might be understood to mean the time when the contract for the purchase was made, and it might be, he had no notice then, and might have notice after, before, or at the sealing of the conveyance; and if there was any notice before the conveyance to him was executed, that would charge the defendant; upon which objection the plea was overruled.

But if *cestui que trust*, tenant in tail, be the mortgagor, and join with the trustees in making the conveyance, it will be good and valid; they being considered as trustees purely for the tenant in tail to preserve his estate only, and not to stand in opposition to him, for the sake of those who are to come after him.

Previous to the case of *Willoughby and Willoughby*, a notion generally prevailed, that although a satisfied term resulting by operation of law, might, if got in, be made use of to protect a purchaser, term once assigned to attend the inheritance, could not be so

Vol. V.

F

applied;

et Ca. temp.
Tailb. 217.
2 P. Wms.
622.
1 Ves. 496.

Hitchcock
v. Sedgwick,
2 Vern. 157.
160.

Saunders v.
Debaw,
2 Vern. 271.

Cited, Bovey
v. Smith,
1 Vern. 149.
2 Ch. Ca.
125.
2 Vern. 194.
1 Atk. 475.

More v.
Mayhow,
1 Ch. Ca. 34.
Attorney
General v.
Gower et al.
2 E. Ca. Abr.
685. 11. et
Wigg v.
Wigg,
1 Atk. 384.

Elie v.
Osborne,
2 Vern. 754.
1 Eq. Ca.
Abr. 385. 3.

Willoughby
v. Willoughby,
in Chan.
June 19,
1756.

Willoughby
v. Willough-
by, in Chan.
June 19,
1756.

applied; for it could not enure to any other purpose than that prescribed, unless severed again by the owner of that inheritance; but in that case Lord *Hardwicke* explained this distinction, observing that its applicability to such purpose was an unavoidable consequence of the rule, that "*a purchaser for a valuable consideration, and without notice, shall not be hurt in equity.*" The facts of the case were as follow: *George Willoughby*, being seised in fee of an estate in *W.* (subject to a mortgage-term for 500 years) by articles dated 12th *November* 1717, made upon his marriage, agrees to settle this estate to the use of himself for life, and afterwards to the intent that his wife should, out of the rents, &c. of part, take an annuity of 250*l.* by way of jointure, with remainder, as to the whole estate, to the use of the first and other sons of the marriage in tail male, with remainder to *George Willoughby* in fee, with a power for the said *George* to charge the estate by will or deed, with the payment of 3000*l.* for the portions of his younger children. At this time the estate was subject to a mortgage for a term of years, as mentioned above, which being satisfied, the said term was by indenture, dated 17th *August* 1718, assigned to *Shelling* and *Popham* and their executors, upon trust for *G. W.*, his heirs and assigns, to attend the inheritance. A settlement was made of the estate 14th *March* 1718, pursuant to the articles: 14th *March* 1750, *George Willoughby* made his will, and thereby executed the power reserved to him, by charging the estate with 3000*l.* for the portions of his younger children, and afterwards died, leaving *Jane* his widow, *Henry* his eldest son, three daughters, and a younger son *George*. *Henry*, having attained his age of 21 years, and being tenant in tail, suffered a recovery, and limited the estate to trustees in fee, to the use of such person and persons, and for such estate as he should by deed appoint. *Henry*, in pursuance of his power, by indenture dated in *June* 1751, for securing 870*l.* which he had borrowed of *Jane* his mother, declared the trustees should stand seised, and the estate be charged with the payment of this sum and interest. The term of 500 years was still standing out in *Shelling* and *Popham*. Afterwards *Henry* borrowed 800*l.* of the defendant *Cripps*, and for securing this with interest, by indentures of lease and release, dated 14th and 15th *June* 1752, he conveyed the estate in mortgage to *Cripps* and his heirs. The same day *Shelling*, the surviving trustee, assigns the term of 500 years to *Boot*, upon trust, in the first place, to protect the estate limited to *Cripps* and his heirs from mesne incumbrances, and, subject thereto, to attend the inheritance. It appeared upon the evidence, that *Cripps* had full notice of the articles and settlement, and that, notwithstanding, in the release above, he took a covenant from *Henry* that the estate was free from all incumbrances except the 500 years term and the several mesne assignments thereof; but it did not appear that he had notice of the mortgage to the mother. The bill was brought by *Jane* the mother, and the younger children, for payment (by sale of the estate) of the arrears of her jointure, the 3000*l.* to younger children, and the 870*l.* to the mother, and that then the rest of the incumbrances might

might be paid according to their order and priority. The defendant *Cripps* insisted that, as the legal estate was in *Boot*, his trustee, and as he was a purchaser for a valuable consideration and without notice of the first mortgage, he was entitled to be preferred in payment of his mortgage upon this principle, that he had both *law* and *equity* on his side, and the mother *only* equity.

Lord *Hardwicke* was of opinion, that supposing *Cripps* to have no notice of the jointure, portions, or other incumbrances, he would in *equity* be entitled to the benefit of this term.

Jones, seized in fee of several estates, demised the same in 1761, to *Aubrey*, for nine hundred and ninety-nine years, by way of mortgage. Afterwards, in 1768, this term was assigned to *Lockwood* in trust for *Jones*, as to part of the lands, and in the mean time to attend the inheritance; in 1767, *Jones* mortgaged to *Morgan*, and in July 1769, to *David*. Both these mortgages were in fee. In December 1769, *Jones* and *Lockwood* assigned the last-mentioned lands to *Moreland*, his executors, &c., for the remainder of the term of nine hundred and ninety-nine years, in trust for *Sprigg*, for securing 10,000 *l.* lent by *Sprigg* to *Jones*. Afterwards, *Jones*, by indentures of lease and release, mortgaged the same estates in fee to *Sprigg*, for securing the 10,000 *l.* On the mortgage to *Sprigg*, all proper searches were made on his part for incumbrances, and he had all the title-deeds that could be found delivered to him at the time he advanced his money, except the demise of the term for nine hundred and ninety-nine years, and the assignments of it, which were kept in the hands of *Lockwood*, on account only of containing other premises in mortgage to *Lockwood*, and which were not included in the mortgage to *Sprigg*, nor assigned to *Moreland*, his trustee, but counterparts of them were then delivered to *Sprigg*. On these facts the question on an ejectment was, Whether *Morgan* and *David*, or *Sprigg*, should be preferred?

Goodtitle on
dem. of se-
veral v.
Morgan et
al. 1 Term
Rep. 755.

On the part of *Morgan* and *David* it was contended, that this term must be considered as attendant on the inheritance, and, consequently, at the times of the respective mortgages to them, the trustee of the term became their trustee, and the term could not be separated from the inheritance but by their consent. That if, previous to the conveyance to *Sprigg*, in 1769, *Morgan* and *David* had brought ejectments upon their mortgages, neither *Jones* nor *Lockwood*, his trustee, could have set up his term as a bar to their ejectments; then if *Jones* himself could not set up the term it was absurd to say, that those who claimed under him might, for they could not claim a greater estate than he had. Then *Jones*, having parted with the inheritance, had no power afterwards to make any appointment of it differently. His power was gone, though it were collateral, by the conveyance of the land. *Sed per alios*, Justice, no man ought to be so absurd as to make a purchase without looking at the title-deeds; if he is, he must take the consequence of his own negligence. If the first mortgagee had an ordinary precaution, he must have known that this term was then outstanding. And if he did know of it, and neglected to take an

assignment

assignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the same estate again. By this, therefore, he became *particeps criminis*, and he must suffer the consequences of the fraud; and *Sprigg*, who has got the legal estate, must be preferred.

Brothers v.
Bence,
Fitzgib.
Rep. 118.
2 Eq. Ca.
Abr. 615.
11.

Where *A.*, a copyholder in fee, mortgaged to *J. S.* who was admitted by *B.*, the steward of the manor; and afterwards *A.* made a second mortgage to *C.*, who was also admitted by *B.*, and then a mortgage to *B.*, who bought in *J. S.*'s security; it was decreed, that *B.* should not postpone *C.*; because it is presumed, from the mere act of admission, that a man of ordinary diligence and understanding, being steward of the manor, when *C.* was admitted, must know, or have notice of the *mesne* mortgage to *C.*

2 Ch. Ca.
246.
Gilb. Rep.
Eq. 8.
1 Ch. Ca.
291.
Dunch v.
Kent, 1 Vern. 319.

Where a purchaser *cannot make out a title*, but by a *deed*, which leads him to a *fact* material to it; he will not be deemed a purchaser without notice of that fact, but will be presumed cognizant thereof; for it is deemed gross neglect, that he sought not after it.

Drapers'
Company v.
Yardly et al.
2 Vern. 602.

Thus, where *B.* devised to *J.* in tail male, and if he died without issue male, to *T.* in tail male, but subject to two legacies of 500*l.* and 1000*l.* to the Drapers' Company; and *T.* afterwards levied a fine to the use of him and his heirs (on which was five years non-claim), and then granted a rent charge of 100*l.* *per annum* to *S.*, and mortgaged the premises to *L.*; the court held the fine and non-claim was no bar to the legatees; for *T.* having no title, but under the will, it was implied notice to all purchasers under him.

Dunch v.
Kent,
1 Vern. 260.
319.

So, where an annuity was granted to *A.* by the crown, by patent issuable out of the excise upon special trust, that all such of the creditors of *B.*, as would come in *within a twelvemonth*, and accept a share of this annual sum proportionate to their debts, should have the same assigned to them; and *A.*, after the year, assigned part thereof by instruments which purported to be in consideration of debts due and owing from *B.*, but were in truth for *A.*'s own debts, and the assignees had afterwards assigned the same over to others, who claimed, as purchasers, without notice, for full and valuable consideration; it was held, that although all the creditors of *A.* did not come in within the year, yet this patent was in trust for them, and not convertible to other purposes; and that those who purchased of the assignees of *A.* came in under the letters patent, in which the trust was mentioned, and ought to have taken notice of it at their peril.

Moore v.
Bennet,
2 Ch. Ca.
246.

And subsequent purchasers also are taken to have notice of the contents of a deed or will, if they must claim under it. As, if *A.* makes a conveyance to *B.*, with power of revocation by will, and, afterwards, limits other uses; if *B.* disposes thereof to a purchaser, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaser, but by the conveyance which contains the power of revocation.

But

But in the case of *Bovey v. Smith*, a will was not suffered to be set up, as presumptive notice to defeat a transaction, by a trust therein contained, that had lain dormant for many years, after a fine, and where there was room to presume, that other trusts were appointed. In that case *B.*, the mother of *A.*, being in *Holland*, and having a separate estate, about forty years previous to the time of filing the bill, made her will in *Dutch*, and thereby devised houses to *W.*, her husband's son by a former wife, and to other trustees, in trust for her four daughters and their children, and such of their children as should be alive at the last, and, afterwards, declared the trust of all her estate, thereby undisposed of, to be for her and her heirs. The trustees, apprehending that the devise carried the inheritance of the houses to the daughters, sold such inheritance in 1652, for a good consideration, and distributed the money, arising from the sale, equally amongst them. *A.* was privy to this conveyance, and made no claim, nor pretended any right to the houses; a fine was levied of them, and five years afterwards *W.* the trustee, for a full consideration, purchased them back to himself and his heirs. Then *A.* having taken advice on the will, and conceiving the daughters took only an estate for life, exhibited his bill against *S.*, who now stood in the place of *W.*, the trustee, to have an execution of the trust, and the lands decreed to him. Two decrees had been for the plaintiff.—One point argued was, that it was impossible any one should come at the land without having notice of the trust, for they must purchase under the will; and all their title was by the will by which the trust was created, and every man that had notice of the will must, at his peril, take notice of the operation and construction of the law upon it. But the Lord Keeper said, this was an application, after one-and-thirty years possession, to affect an estate with a trust, notwithstanding a release and fine, and that, upon a supposal that *B.* had made no other appointment (as she had power to do by the deed), and which, after so long a possession, it ought rather to be presumed she had done; and also upon a supposal, that this was a true copy of the will. This was only a translation; the original was lost; the difference in point of translation between the children and issue was nice, and the question was, Who should suffer? For the defendant was a purchaser, and had paid a full consideration, and was here to be affected with a notional notice only; the plaintiff stood by all the while and was silent, and, at best, passive in the breach of trust. That, therefore, though it was hard to dismiss the bill after two decrees for the plaintiff, yet his Lordship was not satisfied he could decree it for him, and the bill was dismissed.

So, likewise, this rule admits of an exception, in the case of an assignee of the estate of a testator, under an assignment made by the executor; for he will not, in favour of creditors or residuary legatees, be presumed to have notice of what is contained in the will of the deviser; because, whoever takes any thing from an executor, must always do it with notice of a will; and there-

Bovey v.
Smith,
1 Vern. 84.
144.
2 Ch. Ca.
124. S. C.

: Ves. 173.

Mead v. L. Orrery,
3 Atk. 236.
July 19,
1745. *Et*
vid. Ewer v. Corbett,
3 P. Wms.
148. *Bur-*
ling v. Stonard,
Id. 150.

fore, if this doctrine of the will being notice to the assignee was to prevail, no person would dare to purchase, or take an assignment from an executor. Besides, it would be unreasonable that a purchaser should take upon him to make out the account, as to the quantum of the debts or assets, when he is not entitled to have the vouchers for that purpose. Thus, *M.* having a mortgage of 3500*l.* made his will in 1712, and devised all his real and personal estate, not by his will otherwise disposed of, to his executors in trust, in the first place by charging, leasing, or selling thereof, or of any part thereof, to raise money to pay his debts; and then to divide what should remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldest son *I. M.*, and another person, executors, and died, leaving his widow and five children; and after payment of all *M.*'s debts, a large surplus remained to be divided. *I. M.*, having been appointed, in 1726, receiver of all the rents and profits of the real and personal estates of *E.*, procured a deed to be made, to which the other executors were parties, reciting, that there was due on the mortgage 9000*l.* and that the same was the proper money of *I. M.*, and assigning the mortgage and all due thereon to *B.*, his heirs and assigns, with a proviso to be void, if *I. M.* faithfully accounted with *B.* for what he should receive from the estate of *E.* *I. M.* afterwards died intestate, without accounting with *B.* and greatly indebted to the estate of *E.* A bill was then filed by the plaintiffs, two of the children of *M.*, against the defendants, the representatives of *E.*, to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one question was, Whether the plaintiffs, as residuary legatees of *M.*, were entitled to be relieved against the assignment of the mortgage, and to have an account; or, whether the representatives of *E.* were entitled to retain the assignment? And this turned upon the point, Whether the assignees of the mortgage were to be considered as having notice of the trust for the benefit of younger children? And the court held, the bare point of notice of the will, in this case, was not sufficient.

Mugent v. Gifford,
1 Atk. 463.
1739. 8. C.
2 Vrs. 269.
Ewer v. Corbett,
3 P. Will.
149. *Burking v. Stonard*. 2 P. Will. 150.

So, where an executor assigned over a mortgage term of his testator to *A.* as a satisfaction of a debt due to *A.* from himself; it was objected, in favour of the daughters of the testator, who were creditors under a marriage settlement, that the assignees took this assignment with notice that it was the testamentary assets of the testator. But the court held the alienation to be good.

Crane v. Drake,
2 Vern 616.
Note, Lord
Hardwicke
admits the
principle of
this case,

But where *H.*, being indebted to *C.* on bond, died possessed of a great personal estate, and made *W.* executor and devisee, who wasted the estate; *D.* having notice of *C.*'s debt, bought a leasehold estate of *W.* by discounting 200*l.* due from *H.*, 550*l.* due from *W.*, and by payment of 150*l.* in money; on a bill filed by *C.* to have satisfaction for his debt of the leasehold estate, being part of

H.'s

H.'s assets, the question was, Whether this was a good sale to bind a creditor? And it was held it was not, for *D.* was a party consenting to and contriving a *devastavit*. but doubted whether the facts warranted the application of it. *Vide* 2 Vez. 469.

So, where the devisee of an estate, in trust for payment of debts, mortgaged the estates to one of the creditors, with notice; and the question was, Whether such creditor should retain it by way of security for his own debt, as well for the old debt, as for the money lately advanced? The Chancellour was of opinion, that, though the general rule was, that though a purchaser or mortgagee need not see to the application of the money, where there was no schedule of the debts, yet this rule was never carried so far, as to put it in the power of the devisee in trust, or of the heir at law, who in equity was considered as a trustee, to favour one creditor, which would be the consequence if this was allowed. Such creditor as to his old debt, could not be put into a better condition by taking the mortgage, but must come in, *pari passu*, with the rest of the creditors; for the estate was a security in the hands of the trustee before, and such mortgage only operated to change the course, which the court would not suffer the trustee to do, considering the giving preference to one creditor, as a fraud, which the court would not allow.

If a deed, by which a prior charge is made upon an estate, be delivered, among other papers, relating to the title thereof, to an intended purchaser, he will be taken to have notice of the prior incumbrance; it being necessarily presumed, that so material a circumstance could not escape his notice, or, if it did, it must be through gross neglect.

Thus, the plaintiff's father and mother sold an estate to *C.* and his heirs, which, pursuant to an agreement made on their marriage, had been settled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the first and other sons in tail male; and the conveyance was made by deed and fine. *C.*, upon his purchase, took in a mortgage-term, which was prior to the settlement, entered and afterwards sold the estate to *H.* and *I.* It appearing, by the proofs in the cause, that *C.*, the first purchaser, *had notice of the settlement*, and that the same, amongst other writings, were delivered to him, the court decreed, that *C.* should account for the consideration-money, for which he sold the estate, with interest from the decease of the plaintiff's father and mother, discounting what was due on the mortgage made prior to the settlement.

And if it do not appear, upon the face of such settlement, whether it be voluntary, or on articles before marriage, and, in consequence, whether to be considered as binding against creditors or not, that will not alter the case; for the purchaser, having notice of the deed, must, at his peril, purchase, and be bound by the effect of it. But, in the last case, the bill was dismissed as to *H.* and *I.* who were made defendants, they having pleaded that they were purchasers without notice, and the plaintiff not being able to prove

Itbell v. Beane,
1 Vez. 215.

Ferrers v. Cherry et al.
2 Vez. 324.

any action against them, there was no foundation to presume knowledge of the settlement, C. being able to make a good title without it.

*Mortgage
of
the
estate
of
the
testator*

A creditor by judgment, in 1698, for 600*l.* came to an account with the debtor in the year 1707, and settled the remainder due upon the judgment at 420*l.*, and took a mortgage in fee for this sum, as a collateral security to the judgment; and one S. an attorney, in 1716, took an assignment of this mortgage, in which there was a recital, *that 90*l.* of the consideration of the assignment was then the full worth of the estate.* S. was likewise in possession of another mortgage made in 1688, upon the same estate which was subject to the judgment in 1698, and the mortgage in 1707. It was resolved S. should not be allowed to tack the two mortgages together, so as to defeat intermediate incumbrances between the years 1648 and 1698; and yet the mortgage in 1707 should have relation back to the judgment in 1698, and by consolidating them together, should entitle S. to receive the sum due upon that judgment, prior to creditors after the year 1698; but, as to money borrowed due since the mortgage in 1707, it should be paid only in priority to creditors subsequent to 1707. One ground of which decision was, that the words in the recital of the assignment of the mortgage in 1716, viz. "that 90*l.* the consideration-money, was the full worth of the estate at that time," naturally implied, that there were intermediate incumbrances, and therefore, to give S. the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the assignment of this second incumbrance, he must know the estate was worth no more than the very words of the recital.

*Mortgage
of
the
estate
of
the
testator*

John S. being seized of several freehold estates, had settled the same on certain uses, and being possessed of a prebendal lease for term of one year, which was usually renewed every seven years, and which he held at the time of making his will, after charging the same together with other freehold estates, with an annuity, devised it to the same uses, intents, and purposes, as were declared in the settlement of the freehold estates first mentioned. Then the testator died. The leasehold estate was several times renewed by the several persons in possession, and in one of the renewals, the then lessee was styled devisee of J.C. Afterwards there were several other renewals. Then the estate was mortgaged by one of the claimants, under the settlement and will as his own property. And the question was, Whether the mortgagee, who had no other notice of any defect in his title, except that the lease, which was assigned to him, recited, among the considerations, the surrender of the former lease, which recited the surrender of the other, in which the lessee for the time being was styled devisee of J.C., had such notice thereby, as would render the estates in his hands liable to the trusts of the settlement? And it was held, that the mortgagee was affected with notice of the settlement, and that he must convey the estate according to the uses, &c. limited and declared therein.

Where there were father, mother, and son, and the father settled an estate on himself for life, then to his wife for her jointure, and on her death, to the sons of the marriage; under which settlement, the wife and son insisted on being purchasers for a valuable consideration, without notice, and notice of a prior charge was proved against the father, by recitals on his own conveyances, and in part by his own admission; but, as to the wife and son, there was no proof, but from these deeds being in the hands of the family; this was held not sufficient to affect them with notice; because such settlement might have been made by an apparent owner without the deeds having been looked into.

Whitfield v.
Faulstich,
1 Ves. 387.

If a deed, or other paper which is deemed constructive notice of a prior incumbrance, be found in the custody of any one, it will be no objection to the charge of notice, that it does not appear when it came there; for if a person admits, or it be proved that a deed is in his custody, whether as representative of another or otherwise, it will be incumbent upon him to shew when it came there, for it is impossible for the other side to shew it.

2 Ves. 426.

Where tenant for life, remainder to his first son, mortgaged for 300*l.*, and the deed of settlement was produced and seen by the purchaser, who lent the money notwithstanding, being advised by the tenant for life, not having then any son born, could destroy the contingent remainders, though, in truth, there was a son born five days before the lending of the money; yet the mortgagee having had no notice thereof, and having got the deed of settlement, the court would not relieve against him by compelling him to produce it.

Brampton
v. Barker,
2 Vern. 159.
1 E. Ca. Abz.
333. 3.

Notice to a man's scrivener, attorney, agent, or counsel, is sufficient notice to the party himself.

Merry v.
Abney,
1 Ch. Ca. 38.
Abney, Nel-

1 Ves. 69. 2 Ves. 477. 3 Ch. Ca. 110. Ashley v. Bailie, 2 Ves. 368. Hothwall v. Abney, Nel-

Thus, *M.* suffered a recovery of an estate in *A.*, and then settled all his lands in *A.* upon his family; afterwards a tenement in *M.*, of which he had the reversion after an estate for life, descending to him in tail by the death of the tenant for life, he suffered a recovery of it, and devised it to his younger son in fee. Then *M.* mortgaged it, together with 200*l.* that he had a power to charge on the settled estate, for securing 200*l.* which he borrowed, and then he died. The mortgagee applied to the elder son for the money, who at first disputed the payment, but afterwards submitted thereto, upon the mortgagee's assigning to him the tenement so charged, that he might stand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this assignment, he having heard of the younger son's title. The eldest son then mortgaged the tenement to *B.* who had advanced the money to pay off the former mortgage. It was sworn, that *B.*'s agent was present at the execution of the assignment when the indemnity was insisted upon; and the agent deposed, that the deeds were laid before counsel, who made objections about the plaintiff's title. The assignment itself was strong evidence of notice, for it had not the face of an assignment to

Maddox v.
Maddox,
1 Ves. 61.

a Ves. 435.

to a person having the equity of redemption, but was made subject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other person had the equity of redemption, as the covenant to indemnify also supposed. One question was, Whether the last mortgagee had not notice of the youngest son's title? And the court held, here was such evidence of general notice, either to the party himself, or to his agent, to take care, as made it necessary for him to inquire into the title, which not having done, he must take the consequence.

Bootherton
v. Hatt & al.
2 Vern. 514.

Again, *E.* mortgaged his manor of *B.* to *M.* and his heirs, for securing 3000 *l.*; afterwards *G.*, the father of the plaintiff *B.*, lent *E.* 2800 *l.*, and, by deed, reciting *M.*'s mortgage, he declared, that after the 3000 *l.* and interest paid, the estate should stand charged, and be a security for *G.*'s money. *M.* was no party to this deed. Afterwards *H.*, one of the defendants, lent *E.* 400 *l.* and obtained a deed from *E.* and *M.*, that after *M.* was paid, the estate should, in the next place, stand charged with the 400 *l.*, and in like manner for *C.*, and several other defendants. All the securities were transacted at the shop of *W.* and *T.* scriveners, who were witnesses, engrossed the writings, and were in the nature of agents to all the several lenders. The question was, Whether *B.* should be paid next after *M.*, or whether *H.* and the others should be preferred, because they had got a declaration both from *E.* and *M.*, who, by that means, became a trustee for them, after his own money paid? And it was decreed, that *B.* should be paid next to *M.*, and so on, as the mortgagees stood in order of time; for notice to the agent was good notice to the party, and consequently, those that lent last, must come last, having notice of what was before lent.

3 Atk. 37.

And although a country attorney acts by an agent in causes in London, yet he will be considered as the solicitor for his clients, though he resides in the country, and what is known to him, will be constructive notice to them.

Sheldon v.
Cox et al.
Amb. Rep.
624, et vide
Dec on dem.
of Willis et
al. v. Man-
tin, Mich.
term,
32 G. 3.

A. and *B.* were empowered by act of parliament, to purchase estates in a certain district to enable them to build a square, *C.* (who was a barrister at law, and who appeared to have taken the management of the affair upon himself) purchased a parcel of ground held on a church lease, and borrowed 3500 *l.* of *D.*, and gave him a declaration of trust of the leasehold estates as a security, and delivered him the renewed leases: *C.* afterwards built several houses, some of which were erected upon the ground on which *D.* had his security, and then *C.* granted a lease of these houses to *H.*, reserving a ground rent; which was done for the purpose of establishing a rent; and *H.* declared himself in writing to be only a trustee for *C.* Afterwards *H.* assigned some of the houses in *D.*'s security to *M.*, for securing a sum of money by him lent, and then he assigned all the houses to *E.* likewise, for securing a farther loan. Neither *M.* nor *E.* had actual personal notice of the mortgage to *D.*, nor of each other's mortgage; but both *M.* and *E.* employed *C.* as their counsel and agent in these transactions, and nobody else. On a bill filed by *D.* for a sale of
the

the dates, and to be paid his mortgage-money in the first place, the question was, Whether *M.* and *E.* were to be affected by the notice to *G.*, their agent, of *D.*'s security? *Et per curiam*, It is a settled and settled point, that notice to the agent is notice to the principal. *G.*'s acting in different capacities makes no difference. It is the same as if they had been in different persons.

If one purchases in the name of another person, without any authority from him so to do, or his having notice of his intention; and if he afterwards agrees to it, he makes the former his agent *ab initio*.

Thus, *G.*, in 1699, lent *W.* 200 *l.* upon a surrender of copyhold lands, but neglected to get the surrender presented at the next court day as he ought to have done, for want of which the surrender was void, according to the custom of the manor. In 1703, *B.* agreed with *W.* to purchase the mortgaged premises for 400 *l.*, and took a surrender in the name of *M.*, who afterwards consented to become the purchaser, and paid the money. It was proved, that *B.*, whilst he was treating with *W.*, had notice of the former incumbrance, and therefore declined to purchase in his own name, and took the surrender in the name of *M.*, and procured him to become a purchaser, that *B.* might be released of a debt, which *W.* owed him, out of the consideration-money. On a bill filed by the executor of *G.*, *M.* pleaded himself to be a purchaser without notice of the plaintiff's demand; and that his surrender was presented, and he admitted tenant, without notice of *G.*'s surrender, which was kept in his pocket, and not presented till long after his purchase, surrender, admission, and payment of his consideration-money. But it was adjudged at the Rolls, that notice to *B.* was sufficient to affect *M.*; and though he did not employ *B.* to purchase for him, or knew nothing of it until after *B.* had agreed and taken the surrender in his name, yet he, by approving of it afterwards, had made *B.* his agent *ab initio*; and *M.* was decreed to pay the 400 *l.* and interest, or to surrender to the executor of *G.*

But, examining a title in one transaction, in the ordinary course of business, which cannot be supposed to make any impression, as any future event, will not operate as constructive notice to an agent in general, or counsel or attorney, to affect his client on a subsequent transaction, and in another business at a distant period; and an agent or counsel cannot be supposed to remember every particular circumstance, contained in deeds or papers that come under his perusal.

And Lord Hardwicke, in the case of *Warwick and Warwick*, expressed his approbation of the rule laid down in the case of *Fitzgerald and Falconbridge* above mentioned, that notice should be taken in the same transaction, and his Lordship said, that it should be adhered to, otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions. And in the principal case, it was held that notice, arising from

Jennings v. Moore et al.
2 Vera. 609.
S. C.
1 Brown's
Parl. Ca.
244. *Et vide*
Merry v. Abbey,
1 Ch. Ca. 32.

Case of Lord Falconbridge, cited
2 Ves. 369.
Fitzg. 211.
S. C.
Worley v. Earl of Scarborough.
3 Atk. 392.

Warwick v. Warwick,
3 Atk. 294.

from a case (stated by one who was an agent for both parties in a subsequent mortgage) stated in order to do something towards suffering a common recovery, a year and six months before the party was to be affected with this notice, was not sufficient to affect a purchaser. However, there were other circumstances in the case favourable to the purchaser.

Steed v.
Whitaker,
Barnard,
220.

So, where lands were settled by *F.* on his marriage in 1734, which he mortgaged among others, in 1736, to *W.*, who had no notice of the settlement, and *R.* was employed as agent in making both the settlement and the mortgage; one question was, Whether *W.* should be considered as having notice of the settlement, *R.* having acted as agent on both occasions? And the court held, that affecting a person with notice of the title of another, by reason of his agent's having notice of it, had not been carried so far, as to affect the principal, unless where the agent had it, at the time of his transaction with him; and that, as the notice which the attorney had of the settlement, in this case, was two years before the mortgage, the mortgagee could not be affected by it.

Gibb. Eq.
Rep. 7, 8.

It hath not been settled, whether, where one employs an attorney or counsel, and, for want of dispatch, takes the matter afterwards out of his hands, and gives it to another agent to finish, and the first agent acknowledges notice, but no proof of notice of a prior incumbrance can be had against the subsequent agent, notice to the first agent shall bind the party himself.

Fide Whalley v. Whalley et al.
3 Vern. 484.

If one take a mortgage by assignment from a mortgagee, affected with notice of an outstanding title, he will take subject to that title; for his assignor cannot transfer to him a better right than he has himself. And if such original mortgagee, in a bill filed by the person setting up an *eigne* title against the mortgagee and his assignee, and praying to be let into possession, charging notice, confess by his answer, that he had notice before the lending of the money; that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must stand in his assignor's place, and then his assignor's confession of notice will bind him.

Collett v.
Dorsets et
Ward, Ca.
temp. Talbot, 65.

T. having made mortgages of some parts of his estate, these mortgages afterwards by *mesne* assignment became vested in *W.*, and carried with them the legal estate. *T.* then became a bankrupt, but, before the assignment of *T.*'s effects to the assignees, *W.* obtained a release of the equity of redemption from *T.*, for a valuable consideration; on a suit brought by the assignees against *W.* to set aside these conveyances, it was held, that a purchaser for a valuable consideration, without notice of the bankruptcy, could not be relieved against within 21 *Jac.* 1.

Wilket v.
Bedington,
2 Vern. 599.

H. B., on May 1st, 1710, was arrested at the suit of one *S.*, for a just debt of 790*l.* secured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above six months, which, although he afterwards paid the debt and many thousand pounds to others, and appeared publicly on the Exchange, was adjudged an act of bankruptcy by the statute of *Jac.* 1. Afterwards, in 1717, *H. B.*, on the marriage of the defendant,

defendant, his son, made a settlement, by which, after reciting, that he had on his own marriage settled land, on trustees, in trust, to secure 2000 l. to his wife if she survived; *H. B.*, with the privity of the trustees, who were parties to it, assigned all his estate, title, and interest to the wife's relation for the benefit of *H. B.* for life, and of his wife for life, &c. The plaintiff *W.* was the assignee under a statute of bankruptcy, taken out against *H. B.* subsequent to the settlement. The question was, Whether a court of equity would decree the trustees of the first settlement to assign the term to the plaintiff, or suffer it to rest in them, to protect the settlement? For the defendants it was insisted, that they being purchasers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themselves at law; and that, although they had not the legal estate in them, yet the trustees of the first settlement, in whom the legal estate was, being parties to the last settlement, were become their trustees. And it was so held by the Chancery, who said, he took it to be a rule in equity, that where a man was a purchaser without notice, he should not be annoyed in equity, not only where he had a legal estate, but where he had a better title, or right, to the legal estate than another; and therefore dismissed the bill.

A. lent money on lands, the mortgage being duly registered, and afterwards *B.* lent money on mortgage on the same security, and his mortgage was also registered, and then *A.* advanced another sum on the same lands without notice of the second mortgage: it was held, by Lord Chancery *King*, that the registering of the second mortgage was not *constructive* notice to the first mortgagee before his advancement of the latter sums; for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered, than they had before.

Bedford v. Backhouse,
1 E. Ca. Abr.
615. 12.

So, in a later case, where *W.* advanced 800 l. on a mortgage in *Yorkshire*, and registered it; afterwards *K.* lent a sum of money, and took a judgment for it, which was also registered; then *W.* advanced a farther sum, but without any express notice of the judgment; and it was argued, on a bill brought by *W.* to foreclose, that *K.* ought to redeem, on paying the first mortgage; for that, where such registers prevailed, every incumbrancer should be satisfied according to the priority of his register; and that the registering *K.*'s judgment was constructive notice to *W.* sufficient to deprive him of the common benefit of a court of equity, whereby a first mortgagee, without notice, was to hold till all subsequent incumbrances due to him were discharged: it was resolved, that these statutes avoided only prior charges not registered, but did not give subsequent conveyances, registered, any farther force against prior conveyances registered, than they had before; and that to have affected *W.*, *K.* ought to have given him notice when he advanced his money; for, though *W.* might have searched the register, yet he was not bound so to do.

Wrightson et al. v. Hudson et al.
2 E. Ca. Abr.
609. 7.

But

Comper's
Rep. 712.

But a subsequent mortgagee, having notice of a prior mortgage not registered, will not gain a priority by registering, because such conduct is considered, in equity, as fraudulent, and the party hath that notice which the act of parliament intended he should have.

1^o Neve v.
Le Neve,
2 Ves. 64.
3 Atk. 646.
S.C. *Et vide*
Cheval v.
Nichols,
Str. 664. *et*
Sheldon v.
Cox, Amb.
Rep. 624.

Thus, *N.*, in 1718, married his first wife, and, on the marriage, a leasehold estate, in the possession of his father, was covenanted, in consideration of the marriage, to be settled on trustees, in trust, for *N.* for life, then for his intended wife for life, remainder to the issue of the body of *N.* by his wife, in such manner as he, by deed or will, should appoint. The marriage was had, and a settlement made, in pursuance of the articles; the wife had issue, and died. In 1743, *N.* married a second wife, but, previous thereto, entered into articles with her trustees for settling the very same estate on himself for life, then on her for a jointure, remainder to the issue of that marriage; and a settlement was made pursuant thereto. The estate was subject to the statute 7 *Q. Anne*, c. 20. which requires registry. The first marriage articles and settlement were never registered; the second were. *N.* also mortgaged this estate, as absolute owner thereof. The bill was brought by the children of the first marriage, to have the benefit of the settlement made on them, and, in order thereto, to have the subsequent articles and settlement postponed, though registered. The ground of this application was, that the agent, who made the last settlement, had notice of the first. And, notice to the agent having been fully made out, the principal question was, Whether it would affect the defendant's purchase, and oblige the court to postpone the second articles, and settlement to the first, notwithstanding the registering act? And the court determined it would; for the intent of the act was to secure subsequent purchasers and mortgagees against prior secret conveyances, by letting a subsequent purchaser, having registered, prevail against a prior secret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was vested property, that was no secret conveyance. The statute did not say, that the subsequent purchaser should not be affected by any equity whatsoever; therefore, though the manifest operation of it was to vest the legal estate according to the prior registering, yet it was left open to all equity; for there was no danger to the subsequent purchaser, who might refuse, if he had notice of the prior good conveyance.

Recited in
last case.
1 Ves. 67.
2 Brown's
Parl. Ca. 425.

And this doctrine was confirmed in the House of Lords, upon an appeal, in the case of *Lord Forbs v. Denison*, which arose in *Ireland*.

But though apparent fraud, or *clear* and *undoubted* notice are held to be a proper ground of relief in cases circumstanced like the preceding ones, *suspicion* of notice, though a *strong suspicion*, was held by Lord *Hardwicke* not to be sufficient to justify the court of Chancery in breaking in upon this *act of parliament*. And therefore, where a mortgagee of lands in *Middlesex* swore in
his

Hine v.
Dodd,
2 Atk. 275.

his answer, that, to his belief, he did not know of a judgment which had not been registered, until after his mortgage executed; this was contradicted by *one* witness *only*, who swore, that, on a conversation at which she was present, the mortgagee admitted that it was true "he knew of the judgment, but that he knew, at the same time, that it was not registered; and what were acts of parliament for, unless they were effectually observed?" Lord Hardwicke said, that, undoubtedly, this was *material* evidence, but then it was only *one* witness against the answer of the defendant, and the evidence amounted merely to a defendant's *affirmation* in contradiction to his *answer*, and was contrary to a positive act of parliament made to prevent any temptation to perjury from contrariety of evidence. His Lordship, therefore, dismissed the plaintiff's bill as to this part of the case.

It is an infallible rule, that a mortgagee may, in a court of equity, protect himself from discovery of his title-deeds if he denies notice. For, if a plaintiff brings his bill to redeem ever so strong, he is not entitled to see the mortgagee's title-deeds, because a third person may find out a flaw in them. The rule appears to be the same on motion, where there is to be a sale to raise the mortgage-money; this is a first principle, and not to be argued, and depends on the denial of notice.

See *Senhouse v. Earle*, 2 Ves. 450. *Purcut v. Ballard*, 2 Ch. Ca. 73. *Hibb.* 136, 136. *Vern.* 27. *Hall v. Atkinson*, 1 Eq. Ca. Abr. 333.

If *A.* purchases an estate, with notice of an incumbrance, or that it is redeemable, and then sells to *B.*, who has no notice, he afterwards sells to *C.*, who has no notice; by this the notice to *A.*, the first purchaser, will not be revived; for, if it were so, an innocent purchaser, without notice, might be forced to keep his estate; he could not sell, and would be accountable for all the debts received *ab initio*. But the interest must be the same in every respect, or the principle does not apply.

See *Harrison v. Forth*, Prec. Ch. 51. *Et vide* also *Lowther v. Carlton*, Ca. temp. Talb. 187. *Et vide* *Brandlyn v. Ord*, 1 Atk. 572.

Upon this ground, where *A.*, who was entitled to the equity of redemption in certain lands, had brought his bill against the representatives of *B.*, who was the *mesne* purchaser, and likewise against *C.*, who was the *puisne* purchaser; *A.* had not replied to the answer of the representatives of *B.*, and the question was, Whether they should not have been brought before the court as proper parties? *Per* Lord Hardwicke, Chancellor.—The representatives of *B.* deny he (*B.*) had any notice of *A.*'s title at the time he purchased, and it is admitted on all hands that *C.*, who purchased of *B.*, had notice of the title; now, if I should go on with this cause, I should deprive *C.* of the benefit he would have from the defence which is set up by the representatives of *B.* It is like the cases at law by warranty, &c. where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of use or advantage to him in strengthening his own case. And for this reason, his Lordship allowed the objection, for want of parties in not bringing the representatives of *B.* before the court.

See *Lowther v. Carlton*, 2 Atk. 139.

Again,

Sweet v.
Southcote,
2 Bro. Rep.
Chan. 66.

Again, where a bill was brought to discover whether the defendant, who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that the title-deed, by which this appeared, was in the defendant's hands; the defendant pleaded that he was assignee of the mortgage, for valuable consideration, and through many assignments from persons who had no notice: it was argued, that this plea was not good; for it should have stated, whether the defendant personally had notice: but the Master of the Rolls allowed the plea, holding that the plaintiff could not call upon the defendant to shew whether he had or had not notice; for whether he had, or had not, was immaterial, if those through whom he claimed had not, he having a right to avail himself of their being purchasers without notice.

Andrew
Newport's
ca. Rep. T.
Holt, 477.
Skin. 423.
S.C. *Etwide*
Shirk v.
Clark et al.
Pre. Chan.
375.

A mortgage made by K. in 1659, by divers *mesne* assignments vested in N.; it was objected, that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though N. paid a valuable consideration, yet this would not purge the fraud, and make it good against one, who was a purchaser *bonâ fide*, and for a valuable consideration. *Sed non allocatur*: for Holt, Chief Justice, said, that the first mortgage was good between the parties, and being so, when the first mortgagor assigns for a valuable consideration, this was all one as if the first mortgage had been upon a valuable consideration, for then the second mortgagee stood in the first mortgagee's place, and therefore was within the proviso of the statute 27 Eliz. c. 4. "that no mortgage, *bonâ fide*, and upon "good consideration, should be impeached by force of this act, "but it should stand in such force as before the act made;" and if this proviso did not extend to the case, to what case should it extend?]

5. Of the Equity which must be done by him, who would redeem, to the Person against whom a Redemption is prayed.

It is a rule in equity, that he, that will have equity to help where the law cannot, shall do equity to the party against whom he seeks to be relieved; and that therefore where there is an estate subsisting in law, as there is in the mortgagee after forfeiture, equity will not destroy it, unless the party redeeming will satisfy all equitable demands out of the estate.

2 Chan. Ca.
164.
2 Chan. Rep.
247.
Vern. 245.
2 Chan. Ca.
194.

And on this foundation it hath been frequently adjudged, that if a mortgagor borrows more money of the mortgagee upon bond, where the heir is bound, and dies, the heir of the mortgagor shall not redeem without paying the bond-debt, as well as that secured by the mortgage; because when the condition is broken, so that the term or interest becomes absolute in the mortgagee, if the heir of the mortgagor will have equity, he must do equity by the payment of the whole money due to the mortgagee; and this is called a rebutter. But if the bill was exhibited by the mortgagee

to foreclose, there, if the heir of the mortgagor tender principal and costs, it sufficeth, without tender of the money due on the bond, because such bond was not originally any lien on the land itself; and if that be tendered, for which the land was originally pledged, there is no reason to debar the heir of his right of redemption.

So, where a husband and wife levy a fine of the wife's land, to enable them to take up the sum of 400*l.*, and they make a mortgage for it, and after the mortgage is forfeited, the husband pays in part of the mortgage-money, but afterwards borrows again the sum of the mortgagee; it was decreed, that the mortgagee having the estate in law in him by the forfeiture of the mortgage, he should hold the land against the heir of the wife until the whole money was paid; and if the heir would not pay in the whole principal, interest, and costs, he should be foreclosed.

Vern. 47.
Reason v.
Sachetvel.

So, if a lessee for years mortgages his term, and afterwards borrows money of the mortgagee on bond, and dies, his executor shall not redeem without paying the bond as well as the mortgage.

2 Vern. 177.
Preced.
Chan. 18.
S. C.

So, where a man borrowed 200*l.* on the pawn of some jewels, which were worth about 600*l.*, and took a note from the pawnee, acknowledging the jewels to be in his hands for securing the 200*l.*, and afterwards the pawner borrowed at several times three several other sums of money of the pawnee, and gave his note for each sum, without taking any manner of notice of the jewels, and died; and his executors having brought their bill to redeem the jewels, on payment of the 200*l.* first lent thereon, and interest; it was held, that to entitle them to such redemption, they must pay all the money due on the several notes, on this foundation, that he who will have equity must do equity; and that therefore, since the plaintiffs could not have back these jewels without the assistance of this court, it is reasonable and just they should pay the defendant all monies due to him, it being natural to suppose, the pawnee would not have lent those sums, but on the credit of the pledge he had in his hands before.

Preced.
Chan. 419.
2 Vern. 691.
Demandry v.
Metcalfe.

If *A.* is bound in several bonds with *B.* as his surety for 4000*l.*, and *B.* conveys the manor of *C.* to *A.* by way of mortgage, to counter-secure him against the bonds for 4000*l.*, and *A.* dies, and after *D.* the son and heir of *A.* becomes bound with *B.* for 2000*l.* more; but there is no agreement that the mortgage should be a security to *D.* against the bond for 2000*l.*, and after *B.* dies, his heir shall not be permitted to redeem upon payment of the 4000*l.* only, but must save *D.* harmless, as well touching the 2000*l.* as the 4000*l.*, for he that would have equity to help where the law cannot, must do equity to the party against whom he seeks to be believed.

Chan. Ca.
97. St. John
v. Halford.

[Where a woman, being a bond creditor, married a mortgagee and died, and the husband took out administration to his wife, he was allowed, on a bill brought by him to foreclose, to tack the bond to the mortgage, against the heir at law.

Blackwell v.
Symes, cited
Ambl. Rep.
686.

Price *et al.*
v. Fastnedge,
Amb. Rep.
685.

So, where *F.*, seised in fee, mortgaged to *P.* for years, and *F.* died, having devised his real and personal estate to his daughter *S.*, and made her executrix; and *S.* afterwards lent *F.* 500 *l.* upon bond; the question was, Whether *S.* could tack the bond debt to the mortgage? which depended upon the question, Whether *S.* was to be considered as entitled to the bond and mortgage in different rights, the one in her own right, and the other as executrix. And it was held by Sir *Thomas Sewel*, Master of the Rolls, upon the authority of the last-mentioned case, that *S.* might tack these debts.

2 P. Will.
777.

But if one be indebted to *A.* by mortgage of a term for years and also indebted to him by bond; if on the death of the mortgagor, the executor assigns over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, he shall only pay the mortgage-money.

Cannon and
Pack, 2 Eq.
Ca. Abr.
226. 6.
6 Vin. Abr.
222. 6.

Upon the same principle, where, on a bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and interest, the defendant insisted to have a judgment, which had been assigned to him, first satisfied before he should redeem, Lord *Harcourt*, Chancellour, said, *Copyhold lands are not liable to an execution upon a judgment; ergo, the judgment shall not be tacked to the mortgage in this case, but the mortgage shall redeem upon payment of the principal, &c. without satisfying the judgment.*

Halliley v.
Kirtland,
2 Ch. Rep.
361.

Where *A.* mortgaged lands to *B.* for 60 *l.*, and was also indebted to *C.* 50 *l.* on bond, and *B.* assigned his mortgage to *C.* the court determined that, as the estate vested was a *chattel loan* liable to debts, and *C.* had an assignment of it, and the bond debt was just, *A.*, the plaintiff, ought not to be let into redemption of the mortgage, but upon payment of both debts; and it was decreed accordingly.

Wyndham
v. Jennings,
2 Rep. Ch.
247.

If the money due on the bond be lent first, and the mortgage made afterwards, yet there is the same equity for the mortgagee to have both sums paid him. Thus, where *A.* borrowed of *B.* 300 *l.* on bond, and afterwards mortgaged lands to *B.* for 2000 *l.* lent, and then died, the plaintiff, the heir of *A.*, prayed a redemption; and the defendant insisted that the 300 *l.* was agreed to be secured also by the mortgage: the plaintiff was decreed to pay the defendant both debts.

Barrett v.
Wells,
Prec. Ch.
231.

But, if the mortgagee or assignee, to whom money is due on bond, countenance a fraud upon a third person, by concealment thereof, he shall be redeemed upon payment of the principal money only: therefore, where the plaintiff, devisee of an estate subject to a mortgage term for 1000 years, let the interest run in arrear, and gave several bonds for securing it, and then died, his son and heir being about to marry, the intended wife's father applied to the mortgagee to inquire what was due on the mortgage who, being desired not to discover the bonds, said, that there was only 500 *l.* due, and that all interest was paid; and that, upon payment of the 500 *l.*, he would deliver up the mortgage; the court held, on application to redeem, that the mortgagee, by concealment,

selling the bonds, had discharged the lands from being liable to more than what was then pretended to be upon them, and decreed a redemption, upon payment of the 500 *l.* with interest from that time, and without costs.

In respect of the heir, if there be several *incumbrances* upon an estate, and the prior incumbrancer claims a bond likewise, it will be postponed to all real incumbrances, whether by mortgage, judgment, or statute; for the bond is no charge on the estate, and he hath not the same equity against a puisne incumbrancer, as against an heir at law, who is liable to the bond in respect of assets.

87. Powis v. Corbett, 3 Atk. 556. 3 Salk. 24. 7.

Upon the same principle, if the person, claiming the equity of redemption, is a purchaser for a valuable consideration, the mortgage may be redeemed by him without discharging the bond; because the lands, in the hands of the alienee, can be charged with nothing but what is an immediate lien thereon, which the bond is not.

cited in the last case, 1 Eq. Ca. Abr. 325. 10. 1 Ves. 87. Coleman v. Wynne, Prec. Ch. 511. Vide Troughton v. Troughton, 1 Ves. 87.

Morret v. V. Halke, 2 Atk. 52. Gory's case, 3 Salk. 240. Troughton v. Troughton, 1 Ves. 87. 3 Salk. 24. 7.

Bayley v. Robson, Prec. Ch. 89. Archer v. Snatt, 2 Str. 1107. Wood v. Mortimer,

Nor shall a bond be discharged on redemption of a prior mortgage, against creditors under a deed of trust of the equity of redemption; for it is only a charge upon the assets.

Anon 2 Ves. 662.

Therefore, where the question was, Whether a mortgagee, who had lent a farther sum afterwards upon a bond, should be allowed to tack it to his mortgage, in preference to the other creditors of the mortgagor, under a trust for payment of debts created by the will of the mortgagor, it was decided that the mortgagee should not tack the bond to the mortgage; for there being a devise for the payment of debts, the descent was consequently broke; therefore the mortgagee could have no priority with regard to his bond, but, as to that, must come in, *pro rata*, with the rest of the creditors under the trust.

Hearns v. Bance, 3 Atk. 630.

And a mortgagee cannot tack a bond to his mortgage, even against other specialty creditors. This point was so determined on reference to the principle upon which the rule, in respect of tacking a bond debt to a mortgage, is founded, and which furnishes an obvious solution of all the cases which we have stated as exceptions to the rule. For the only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuitry of suits; it is solely matter of arrangement for that purpose; for the right has no foundation in natural justice. A creditor's having another specifick security, cannot give him in justice any priority. It is not done in any case but that of the heir, and merely to prevent circuitry.

Lowthian v. Hasel, 3 Brow. Rep. Chan. 162.

A. purchased of B. the lands in question, and re-mortgaged them for securing part of the purchase-money, and for other part thereof gave a note payable on demand, on which 200 *l.* remained unsatisfied, and A. devised his lands to be sold for payment of his debts, and died, not leaving sufficient assets: the question was, Whether this 200 *l.* remaining due on the note, being for part of

Bond v. Kent, 2 Vern. 221.

the consideration money, should have a preference to other debts, and be looked on in equity as a charge upon the land? And it was insisted upon, that it should, because *B.*, as mortgagee, had the real estate in him. But it was held, that *B.* could have no preference, but must accept satisfaction in proportion only with the other creditors.]

Hard. 318.
Sir John
Hedworth
and Primate.

If *A.* acknowledge a statute to *B.* for payment of 800 *l.* with interest, which being forfeited, and the lands extended upon it, *A.* for a valuable consideration settle the same lands in tail, and after borrow money of *B.*, and by articles it be agreed, the statute and extent shall stand a security for the last money, and after *A.* die, and the 800 *l.* with interest be satisfied by reception of the profits; yet the issue in tail shall not be relieved against the penalty of the statute; for though the heir has an equity, by reason of the tail made upon a consideration, yet the money lent raises an equity for *B.*, so that *B.* hath both law and equity, whereas the issue in tail hath equity only till the penalty is satisfied.

2 Vern. 286.
Pape v.
Onslow. [In
Ex parte
King,
1 Atk. 300.
Lord Hard-
wicke said,
he was not
satisfied that
this was the
established

The plaintiff, as assignee of a statute of bankruptcy, brought his bill to redeem a mortgage of the manor of *Newington* in *Kent*, made by the bankrupt to the defendant: the defendant by answer insisted, that he first lent the bankrupt 200 *l.* on a mortgage of a particular tenement, and afterwards lent him 300 *l.* on a mortgage of the manor of *Newington*, which was of greater value than the money due, but the first mortgage was deficient in point of value: it was held, that if the plaintiff would redeem one he must redeem both.

rule of the court; that this case was very imperfect, and that he would not have it cited for the future, till it had been compared with the entry in the registrar's office. He said farther, he was very apt to believe that the tenements were parcel, and holden of the manor of *Dale*; and that was the reason Lord Cowper so determined.—Search has since been made for it in the Editor's book, but no minute of it has been found there.—But the rule, as here stated, is recognized in other cases, viz. *Purefoy v. Purefoy*, 1 Vern. 29. *Shuttleworth v. Lawick*, Id. 245.]

Vern. 29.

So, if a man makes two several mortgages of several lands, and dies, and one of the mortgages is of an entailed estate, or is deficient in value, the heir of the mortgagor shall not be admitted to redeem one without the other; neither shall the mortgagor himself redeem the one, and leave the defective mortgage, but he must take both together.

245.
2 Vern. 207.

Cator v.
Charlton,
21st June
1775, in the
registrar's
book, 1774-
cited in
2 Ves. jun.
577. In
Collet v.
Munden,
May 31,
1786, in the
registrar's
book, 1785,
cited also

[*Stokes* mortgaged to *Charlton* for 1400 *l.* Money was afterwards at different times advanced by the mortgagee, and different premises were added, and made redeemable on payment of 1900 *l.* with interest. These securities were registered; and afterwards the mortgagor assigned to the plaintiff the premises first mortgaged. The defendant admitted, that there was no agreement between *Stokes* in writing or otherwise, that the last-mentioned premises should be a security for more than 1400 *l.* and interest; but he insisted, that the plaintiff was not entitled to a redemption without paying the whole beyond the 1400 *l.*, and that registering the incumbrances was full notice of them. The decree was, that the assignee could not redeem without paying the whole.

ibid. Sir L. Kenyon, upon the above authority, in the same sort of case of separate mortgages, declared, that both must be redeemed. "These cases," said the Master of the Rolls, in *Jones v. Smith* 3 Ves. jun. 377. "amount to this; that if a man makes a mortgage; and afterwards makes another

"mortgage"

" mortgage for a farther sum, and then assigns the equity of redemption of one, both must be redeemed ;
 " and the case of the assignee is not better than that of the original mortgagor."

A bill was filed by the widow and executrix of *James Vanderzee* to redeem securities pledged by the testator to the house of *Moorbouse* and Co. bankers, of which the defendants were the present partners. The case was as follows: In the year 1778, the deceased kept an account with the house of *Moorbouse* and Co. as bankers; and upon the 10th of *August* in that year, he borrowed of the then partnership 1000 *l.* (having then 400 *l.* in the hands of the house,) and gave a promissory note, and deposited several bonds and other securities as a pledge for the repayment thereof. These securities he frequently changed, and as one was taken away, another of equal value was deposited in its room. In 1784, *Vanderzee*, owing the above 1000 *l.*, and above 400 *l.* on his banking account, the partnership required an assignment of the securities, and *Vanderzee*, being an attorney, prepared a bond and deed-poll for securing 1000 *l.*, although there were 400 *l.* then due; and he overdraw his account, after the execution thereof, and was, at his death, in 1785, indebted to the partnership in the sum of 541 *l.* over and above the 1000 *l.*—The bill prayed, that the plaintiff might redeem, on payment of 1000 *l.* and interest only, insisting, that the deposit was made as a security for that sum only, and the rather, as a larger sum was then due, and that the defendants had no lien on the securities for any further sum; and also stated that the personal and fee-simple real estate of the testator, were not more, or little more, than sufficient to pay his specialty debts, and that a bill had been filed by creditors against the present plaintiff and the heir at law, in which suit there had been a decree for the creditors to come in.—The defendants insisted, by their answer, upon a right to retain the securities to the amount of their whole demand, stating their practice to be, never to suffer a customer to overdraw his account more than 100 *l.* without security, and that it was intended by the partnership, that the assignment should cover as well the balance due, and to become due from *Vanderzee*, on his cash account, as the 100 *l.* and interest; and that the partnership always considered themselves to have a lien upon the securities for the whole debt. Lord Chancellor—All cases agree, that if the executor assigned the equity of redemption, it would put an end to the tacking: so it would, if the specialty creditor brought the bill. I am afraid, the rule has been laid down too broad, and that there being a decree for creditors to come in, they must redeem on payment of the 1000 *l.* with interest.

Vanderzee
v. Willis,
 3 Br. Ch.
 Ca. 21.

Sir *James Cockburne* and *Henry Douglas*, carrying on business in partnership as *West India* merchants, borrowed from *Joshua Smith* 3000 *l.*, for which they gave their joint promissory note dated April 25, 1775; and as a farther security Sir *James Cockburne* transferred 2000 *l.* *Scotch* mine stock to *Smith*, who signed a memorandum promising to transfer the same to the order of Sir *James* on payment of the note. By indentures of lease and release *December* 11th and 12th, 1775, Sir *James Cockburne*, Sir

James v.
Smith,
 2 Ves. jun.
 372.

George Colebrook, and *John Nelson*, mortgaged an estate in the island of *Dominica* to *Thomas Rumbold*, *George Wilson*, and *Joshua Smith* and by indentures of the same date it was declared, that 10,000*l.* part of that sum, was the property of *Smith*; and a trust was declared for him as to that; and the mortgagors joined in a bond to him for that sum; and *Sir James Cockburne* and *Douglas* joined in a bond to him for the interest. *Sir James Cockburne* and *Douglas* had various money transactions with *Smith* subsequent to 1775; and upon *May* 7th, 1788, *Smith* having then in his hands besides the *Scotch* mine stock, and the joint note of the partners several bills of exchange and notes delivered by them to him, an account was settled, and a memorandum signed by all parties that the balance to *Smith* was 9246*l.* 13*s.* 7*d.*, and declaring that that sum should carry interest from the 1st of the preceding *October*; and that the several bills and stock set forth in the account were paid to *Smith* at sundry times by the partners "which, when paid, are to be passed to the credit of their joint or separate notes and bills." Upon this occasion no notice was taken of the mortgage of the *West India* estate. In *October* 1788 *Douglas* died. By indentures of *March* 1, 1791, *Sir James Cockburne*, in consideration of 500*l.* lent by *Jones*, transferred to him, his executors, and administrators, all the said 2000*l.* *Scotch* mine stock, and the joint promissory note of *April* 25th, 1775, and a bill of exchange for 1575*l.*, dated *April* 6th, 1775, payable three years and a half after date, all then in the possession of *Smith*, upon trust subject to the rights of *Smith*, for satisfaction of the said 500*l.*, and all other sums then due by *Sir James Cockburne* to *Jones*; and then to pay the surplus to *Sir James*, his executors, and administrators. *Smith* having obtained judgment against the drawer and indorser upon two bills for 5000*l.* and 5250*l.* drawn by *Ninian Horne* upon *Sir James Cockburne* and *Douglas*, indorsed by *Campbell*, and delivered by *Sir James Cockburne* and *Douglas*, to *Smith*, *Horne* gave *Smith* ten other bills and notes for 10,000*l.*, and by indentures of *September* 16th, 1778, *Smith* covenanted to stand possessed of the principal sum of 10,000*l.* secured by the *West India* mortgage, subject to the payment of the securities so given to him by *Horne*, as to one moiety for *Horne*, his executors, and administrators; and as to the other, for such persons as should be then entitled thereto. Upon these bills and notes *Smith* received 4200*l.* only; and by indentures of *May* 26th, 1787, in consideration of 4200*l.* paid him by *George Horne*, he agreed to give up the remaining securities; and assigned the remaining 5000*l.* of the mortgage-money secured upon the *West India* estate. The bill was brought by *Jones* against *Smith* for an account of the money remaining due to the defendant in respect of the balance of the account of *May* 7th, 1778; and that on payment of what should be due on that account, the defendant should transfer to the plaintiff the sum of 2000*l.* *Scotch* mine stock, and deliver up the joint promissory note of *Sir James Cockburne* and *Douglas* for 5000*l.* dated *April* 25th, 1775, and the bill of exchange of *April* 6th, 1775, for 1575*l.*
upon

upon the trusts of the indentures of *March 1791*. It was admitted by the answer, that it was agreed, the defendant should retain the several notes, bills, and stock, set forth in the account of *May 7th, 1778*, by way of mortgage for payment of the balance of *9246 l. 13 s. 7 d.*, and apply the sums he should receive on account thereof, in discharge of that balance; and pay the surplus to Sir *James Cockburne*; and that pursuant to that agreement he subscribed a memorandum dated *May 7th, 1788*, acknowledging payment of the said bills and stock to him: but the defendant referred to the memorandum for certainty as to the date and contents. The answer stated, that the defendant had received interest upon the *West India* mortgage only to *December 12th, 1776*; and he claimed interest of the whole *10,000 l.* from that day to *September 16th, 1778*; and from that day he claimed the interest of a moiety of that sum, and of so much of the other moiety, as he was entitled to under the deeds of *September 16th, 1778*, to *May 26th, 1787*; and so much of the interest of the last moiety during that period, as he was not so entitled to, and the interest of the whole *10,000 l.* from *May 26th, 1787*, he claimed as trustee for *Ninian*, and *George Horne*, and *Campbell*; and he insisted, that the securities, the redemption of which was sought by the bill, could not be redeemed without paying those arrears of interest upon the *West India* mortgage; which was the only question. The Master of the Rolls—It is determined, that in the case of two mortgages, both must be redeemed; but as to sums advanced on other securities, a mortgagor cannot tack those to his mortgage, and insist on a redemption of the whole. Here is a mortgage, in which Sir *James Cockburne* is one of three mortgagors, and the defendant one of three mortgagees: afterwards, the former and his partner pledge with the defendant bills and notes for payment of an account current between them, of which account the money due upon the mortgage makes no part. If they were deposited expressly for one purpose, is there any pretence to say, the money was advanced upon security of the mortgage; and that he would not have advanced any more money but on security of the mortgage? I could not permit him to say that. What confusion would arise, if upon a bill of redemption by the mortgagors they were not to redeem without paying what was due upon the distinct transaction with Sir *James Cockburne* and *Douglas*? They are transactions totally distinct. Nothing has happened since to make any variation. This is not a case, in which the plaintiff comes to take out of a mortgagee the legal estate he has acquired; but he comes to have these personal securities; the debt, for which they were pledged, being discharged. The whole transaction proves, there was no intention of tacking at the time; and if the defendant ever could, he waived it in 1778. That transaction was an acknowledgment by him, that he had the legal possession for one sum; and then, according to *Grim v. Farmer*, (a) he cannot set up another. Therefore, these securities must be delivered over to the plaintiff on paying what is due upon that account in 1778. I rather think the defendant ought

(a) 4 Burr.
2214. and
1 Bl. Rep.
651.

ought to have his costs; for it is not a frivolous point; therefore, let the account be directed, and costs reserved.]

Abr. Eq.
325. Challis
v. Osborn.

(a) In Vern.
244. It is
held, that the
mortgagor
himself must
pay both
bond and
mortgage.

And in Prec.
Chan. 419.
It is said by

my Lord Chancellor, that if a sum be secured by a mortgage of lands, the mortgagor shall not be admitted to redeem after the day of payment is lapsed, without paying likewise all that is due to the mortgagee on notes or simple contract; but that it is otherwise, if such subsequent debts had been secured by bond. (b) But before the statute, the devisee of the equity of redemption was not obliged to pay both. Abr. Eq. 325. Prec. Ch. 89.

Prec. Ch.
511. Coleman
v. Wince.

Also it hath been held, that if the heir of the mortgagor alien the lands, the purchaser, on a bill brought by him for a redemption after forfeiture, shall not be obliged to pay both the mortgage-money, and also a bond-debt due from the mortgagor; for though the heir must have paid both in such a case, yet the reason of that is, because the heir is expressly bound, and his person is become debtor, and not the lands, and, consequently, the lands in the hands of the alienee can be charged with nothing but what is an immediate *lien* thereon, which the bond is not.

Prec. Ch.
512. per
cur.

So, if a man, possessed of a term for years, mortgages it, and dies indebted to the mortgagee in a bond-debt, if the executor brings a bill to redeem, he must pay both; because the equity of redemption of the term is affixed in his hands; but if he alien the equity of redemption of his term, though he shall be answerable for the value, as it is so far a *devastavit*, yet the purchaser shall be charged with no more than was immediately borrowed upon it.

If a bill is brought by an heir at law, or any other person, against a mortgagee, whereby the party would avoid the mortgage, under pretence his ancestor was only tenant for life, and he seeks for a discovery of deeds and writings to avoid the title of the mortgagee, he shall never have such a discovery, unless he, by his bill, submits to confirm the title, and then he shall.

2 Chan. Ca.
23. Bromley
v. Hammond.

Father tenant for life, remainder to the son in tail; the father mortgages the land, and dies; the mortgagee, by a third hand, procures the son to borrow money of him, as tenant in fee, on a mortgage of the premises: this shall not enure to make good the money lent the father; for though the mortgagee hath got the legal estate, yet it is only pledged for money lent to the son, and the money lent to the father was on another estate, to which the son is an absolute stranger; and therefore the court will not compel the son to pay the debt of the father, from whom he did not claim. But, if the tenant in tail had mortgaged without notice of the entail, and the mortgagee had got the deed into his possession,

So, equity would not compel him to discover such deed to overthrow his own possession, since his estate arises upon a valuable consideration, and the heir in tail claims under the ancestor who made the mortgage, especially if the mortgage work a discontinuance.

So, where a lunatick, before he became such, made a mortgage of a good part of his estate for 50 *l.*, and the committee transferred this mortgage, and took up 3 or 400 *l.* more upon it; by Lord Chancellour declared the mortgage should stand a security for the 50 *l.* only.

[A mortgage being assignable, a purchaser shall hold it against the mortgagor or his heirs for the sum due on the mortgage, although he bought it for less than was due, or for less than it was worth; for he stands in the place of the mortgagee who signed, and who might have given it to him *gratis*. And what was due will be the measure of allowance, not what was given, for that might be more than it was worth as well as less; and he that runs the hazard if a loss happens, ought to have the benefit in case it turns to advantage. Thus, where *A.* mortgaged his lands to *B.* and *C.*, a stranger, bought the interest for less than was due on the mortgage, and the heir of the mortgagor brought his bill to redeem, the question was, Whether *C.* should be allowed more than he actually paid? And the Lord Chancellour said, that this bill had neither point nor edge, for there was no colour why, when the heir came to redeem, he should not pay the whole money due on the mortgage: for that, if another man had met with a good bargain, there was no equity for the heir of the mortgagor to deprive him of the benefit of it, and take the advantage thereof himself,

But where a man dies in debt and under several incumbrances, namely, judgments, statutes, mortgages, &c. and the heir at law sues in any of them that are of the first date; if creditors, who have the latter securities, prefer their bill, the incumbrances bought in, shall not stand in their way for more than the heir actually paid for them. For a creditor has equal equity with a purchaser, and the taking away the gain of the latter to supply the loss of the former, is making both equal; and therefore the gain the heir would make, if the whole money due on the incumbrance were allowed him, shall be taken from him to make up the loss of the other incumbrancers upon the estate.

So, if an heir at law, trustee, executor, or agent, compound debts or mortgages, and buy them in for less than is the due upon them, he shall not take the benefit of it himself, but the creditors and legatees shall have the advantage of it; and, for want of them, the benefit shall go to those entitled to the surplus.

And where a mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's dower, it was decreed, that the heir of the mortgagor, on his bringing a bill to redeem, should have the benefit thereof, on this principle, that the mortgagee is but a trustee for the mortgagor after his money paid.

Vern. 262.
Foster v.
Merchant.

Williams v.
Springfield,
1 Vern. 476.
1 Salk. 155.
4.

Philips v.
Vaughan,
1 Vern. 336.
Baker v.
Kellet,
3 Rep. Ch.
23.

2 Vent. 353.
1 Vern. 49-
479-
1 Eq. Ca.
Abr. 330.3.
1 Salk. 155.

Darcy v.
Hall,
1 Vern. 49;
1 Salk. 155.
2 Atk. 54.

Baldwyn v.
Banister,
3 P. Will.
251. note A,

*John v.
Shaw.*
2 Vern. 471.

In the case of *John and Shaw*, one as a guardian to a child, took in an assignment of a mortgage; and the Lord Keeper is said, was of opinion, that as to the profits received out of mortgaged lands, the guardian should be taken to be in possession as mortgagee, and not as guardian. But the reporter puts it so; and the law seems to be otherwise; for where a guardian takes in an assignment, it was decreed, it should be for the benefit of the infant, and that that turns upon the same principle as that which the case of *John and Shaw* must be governed.

*Parish v.
Glover, 1 P.
W. 252.*

And the equity seems to be the same if a stranger purchase against incumbrances, creditors, or real purchasers.

*William v.
Springer.*
2 Vern. 472.
*Long v.
Cotton.*
2 Vern. 404.

Thus, on a Master's special report, to whom the account question was referred to be taken, it was determined by the court that an heir or any other person should not, as against a real claimant, be allowed more in any incumbrance bought in than what he paid for it, without regard to what was actually thereon.

*Radcliffe
v. Radcliffe.*
2 Vern. 335.
*Darcy v.
Hall.*
2 Vern. 471.

If an heir purchases in an incumbrance on an estate charged with portions to younger children, he shall be allowed no more than what he really paid for it.

But if an heir or trustee buy in incumbrances to protect one to which he is himself entitled, the whole money due shall be allowed on account, although it was purchased for less.]

6. At what Time the Redemption must be.

*Chan. Ca.
20.*

When a man made a feoffment in fee upon condition, that the feoffor paid a sum of money at a day he should re-enter the land; if the money was not paid at the day, the estate was gone for ever. This made pledging, according to the rules of the common law, very insecure, and also made it necessary for a court of equity to interfere. For though the words of the condition bound down the condition at common law to the payment at the precise day; yet a trust is supposed between the mortgagor and mortgagee, that in case the payment be afterwards made, the mortgagor may have up the lands: and this the rather, because the land is esteemed only a pledge for money, and it would be very unconscionable thing, that the mortgagee should take advantage of the non-payment at the precise day, when lands are generally pledged but for half value. And in this the chancellors who were ecclesiasticks, were more generally confirmed from reasonings of the civil law hereinbefore mentioned.

*Chan. Ca.
102.
Chan. Rep.
97. 184.
206. Abr.
Eq. 313,
314.
2 Vern. 377.*

But though a redemption has been allowed, yet no time has been limited when the same may be. But when a man comes at an old hand, it hath been sometimes decreed, that the feoffor shall account no farther, than for the profits made in his own time, to discourage the stirring in such dormant titles. However, it is the common doctrine in the courts of equity, that there is no time limited; for it is not within the statute of limitation and the courts of equity are tender of settling any set time; but

man can never be injured, if he receives principal, interest, and costs; and the proprietor is injured, if he parts with possession under the true value. Sometimes, indeed, the court has allowed length of time to be pleaded in bar, where the mortgagee hath descended, as a fee, without entry or claim from the mortgagor, and where the possessor would be entangled in an account.

And therefore, at a rehearing before my Lord Keeper, assisted by Justice *Vaughan* and *Turner*, concerning the redemption of a mortgage, which had been made above forty years, my Lord Keeper declared, that he would not relieve mortgages after twenty years; for that the statute of limitations did adjudge it reasonable to limit the time of one's entry to that number of years, unless there are some particular circumstances that may vary the ordinary rule; as, infants, femmes covert, &c., who are provided for by the statute; though these matters in equity are to be governed by the course of the court, and it is best to square the rules of equity as near the rules of reason and law as may be.

A bill was exhibited to redeem a mortgage; to which the defendant demurred (a); because, by the plaintiff's own shewing it appeared the mortgage was sixty years old: but, upon argument, the demurrer was over-ruled; because it was charged in the bill, that the mortgagor agreed the mortgagee should enter and hold, if he was satisfied, which is in the nature of a (b) *Welfb* mortgage.

2 Vent. 340.
Ewre v.
White.

Vern. 418.
Orde v.
Herning.
[(a) Whether length of time can be taken advantage of by way of demurrer,

Juner v. Tracy, and *Belch v. Harvey*, 3 P. Wms. note (B). *Frazer v. Moor*, Bunb. 54. *Saunders v. Ch. Ca.* 184. *Agges v. Pickrell*, 3 Atk. 225. *Beckford v. Close*, cited in 4 Br. Ch. Rep. 1. *Edfell v. Buchanan*, 2 Vez. jun. 83.] (b) In a conveyance by lease and release there was a proviso, that if A. his heirs or assigns, should on Michaelmas day then next ensuing, or any other Michaelmas day following, pay to B. his heirs or assigns, the sum of 300*l.* (the mortgage-money), and all sums of rent or interest which should be then due, then the said conveyance was to cease, without any other covenant for payment of the money: this was held to be a *Welfb* mortgage, being in nature of a conditional purchase, subject to be defeated on payment, by the mortgagor, or his heirs, of the sum advanced between them at any Michaelmas day, at the election of the mortgagor, or his heirs; and that the being an everlasting subsisting right of redemption, defendible to the heirs of the mortgagor, the mortgage could not be forfeited at law, like other mortgages; and this was said to be a common practice in the country, (proceeding from their pride,) being done with a design to keep the estate for ever in their family. See *Chan.* 423, 424.

[A. in 1699, having borrowed 50*l.* of B., conveyed several acres to the use of B. and his heirs, until he should have received by the rents and profits thereof the 50*l.* with interest, and all other sums by him advanced to the mortgagor; and after payment by such rent of the 50*l.*, and all such sums as should be advanced then to the use of A. for life, with remainder over. No application was made to redeem until 1740; and it was held, on a question, whether this mortgage might be then redeemed, that the estate was then a redeemable interest, and that no bar arose from length of time. For it was said, that this differed from a common mortgage, this being a conveyance of the inheritance, for securing the money lent, or any other sum advanced by the mortgagor, in trust that the mortgagee should continue in possession till, by perception of the rents and profits, he should be satisfied, the

Yates v. Hambley,
2 Atk. 36a.

an account, in 1730, of what was due for principal and interest, and no farther proceedings were had; yet that was held by *Herdwicke*, on application in 1742, to save the right of redemption.]

A mortgage was made to *A.* in the year 1639, to indemnify against debts for which he was engaged for the mortgagor; in the year 1649, he entered into the mortgaged premises, had possession, and afterwards conveyed away several parts of mortgaged premises to several persons; and several sales and large settlements had been made of them. In the year 1663, a bill was brought to redeem; but all the assignees were not parties; a decree to account, and a report made, and exceptions taken at report; and so it rested for about eighteen years; and then another bill was brought; and another decree to redeem; but no execution upon it from the year 1676 till 1697, and then the plaintiff, having purchased the equity of redemption of those (inter alia) from the heirs of the mortgagor, brought his bill to redeem. The objections against it were the length of time, many derivative titles that had been made, and when no suit depending, and the difficulty of taking the account. To which it was answered, that there had been fresh pursuits, and the difficulty of the account had been occasioned by the mortgages themselves, and that there were infants in the case. My Lord Keeper held, there ought to be no redemption; and that a long time excuses the mortgagee for taking the estate as his own, and using it accordingly; and none that have come under the mortgage have done amiss; and though there were infants in the case, the time having begun on the ancestor, it shall run even upon them, as it is at law in the case of a fine; and there is one great objection to a redemption in this case, that it does not appear that the plaintiff paid any thing for this equity of redemption, only had it given into his bargain.

The plaintiff's grandfather, in the year 1686, had made a mortgage of the estate in question, which was proved to be about ten pounds *per annum*, for securing about 100*l.* In the year 1696 this mortgage was assigned over to the defendant; who by agreement was then let into possession, and had continued so ever since, and was now about ninety years of age: the mortgagor died several years since, leaving the plaintiff's father his eldest son and heir of full age, who likewise died in the year 1714, leaving the plaintiff his eldest son and heir, then about twelve years of age; who brought this bill for an account, and to be let into a redemption of the estate in question; of which the defendant had been in possession thirty-three years, and so was greatly overpaid of principal and interest. But my Lord Chancery dismissed the bill; and ordered it to be entered down as one of the reasons for dismissing the bill, that the plaintiff had no remedy by ejectment at law, to recover the possession, being barred by the statute of limitations; and he thought that a reasonable guide for this court to follow, as to the redemption in equity; and though the plaintiff was an infant at his father's death, yet the computation of

2 Vern. 418.
Abr. Eq.
314. Saint
John v.
Turner.

Abr. Eq.
315.
Knowles v.
Spence.

* As twenty years possession will bar an entry or ejectment, unless in cases of infancy, coverture, imprisonment, or being beyond sea (but not absconding), so will it bar a redemption, *Jenner v. Tracy*. *Belch v. Harvey*, 3 P. W. 238. After the disability removed, ten years should be the rule in equity, as it is in the proviso in the statute of limitations. *Per Talbot, C. ibid.*

Orde v. Smith, Sel. Ca. Ch. 9. *infra.*

[Any act of the mortgagee, by which he acknowledges the transaction to be a mortgage within twenty years, will take the case out of this rule; as, by devising the money in case the mortgage should be redeemed, or exhibiting a bill to foreclose.

So, a man, taking notice by a will, or any other deliberate act, that he is a mortgagee, will take the case out of the rule that a mortgagor shall not redeem after forty years.

Ferry v. Marston, 2 Bro. Rep. Chan. 397.

A surrender was made by *P.* to *M.*, the reconveyance to be to such uses as *P.* should direct, or to himself in fee. There was a subsequent surrender to the use of himself for life, remainder to his wife for life, remainder to *M.* in fee, subject to the trusts of the former conveyance. Under these conveyances *P.* enjoyed the estate without paying interest until the year 1751, when he died, and after his death his wife enjoyed in like manner during her life. In the year 1751, upon the decease of the husband, part of the premises were sold, and the wife joined in the conveyance. She dying soon after, *M.* took possession, and held the same without any account to 1765, and from thence to 1779 no act was before the court to shew under what title *M.* held. In 1776 a bill was filed to redeem. In the first answer put in 1780, *M.* denied that he held as a mortgagee, and claimed to hold by title under the second deed. In the same year the conversation passed, which was considered as a declaration, that *M.* held only as a mortgagee. It was a conversation between the son of *P.* and *M.*, in which *M.* asked the son, *why his father did not pay the money; to which he answered, because he was so poor that he could not pay it. The reply of M. to this was, he was ready to settle the matter without suit.* An amended bill was afterwards filed, and the cause was heard at the Rolls, and on the above evidence being read, a redemption was decreed. But, upon appeal to the Chancery, the decree was reversed, on the ground that the second conveyance must have been in consequence of a new agreement, not a mode of keeping up the mortgage; as otherwise the mortgagee would have got the equity of redemption for nothing, and the *P.*'s would have estates for life, subject to the mortgage money, which was more than they were worth: the words "subject to the trusts" must therefore mean, "subject to the life estates of the mortgagor and his wife." Then if it was considered as matter of title, the rule did not apply. If *M.* had been the surrenderor, (which he ought to have been) it could not have been, that a conversation should defeat a clear act. Then there was evidence of a clear possession in *P.* and his wife. After her death the *M.*'s took the estate, and treated it as their own. On the whole the Chancery was of opinion, that the surrender was an instrument of title; and the decree was reversed.

So, where a bill was demurred to, because it was to be relieved against a mortgage after forty-one years, yet, on a promise being proved that the mortgagor should be at liberty to redeem after twenty-seven years, the demurrer was disallowed; because, though forty-one years had passed since the mortgage, yet but fourteen had elapsed after the time agreed for redemption.

White v.
Pigeon,
Totbill,
232.

So, a mortgage was decreed to be redeemed upon the foot of an account stated previous to the mortgagee's entering upon the premises, notwithstanding he had been in possession forty years; the husband of the heir of the mortgagee having entered into an agreement with the heir of the mortgagor, about seven years before the bill for redemption came to a hearing, for the purchase of the equity of redemption. For although, for reasons sufficiently evident in the case, the court refused to decree a specific performance of that agreement, yet it seems to have been considered, as an admission by the mortgagee, that, at that time, he conceived the mortgagor had a right to redeem, which, occurring within seven years of the time of exhibiting the bill, brought this case within the reasoning of that immediately preceding.

Conway v.
Shrimpton,
1 Bro. Parl.
Ca. 309.
Vin. vol. 5.
p. 505.
Ca. 5. 2 Eq.
Ca. Abr.
596. Ca. 10.
738. Ca. 2.

Upon the same principle, a redemption was decreed upon a bill filed fifty-five years, after the original mortgage, and forty-seven years after the mortgagee got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusal by four different answers to come to an account upon the bill of the mortgage, and to redeem. For, the non-redemption during thirty-eight years of the time elapsed, being accounted for, by having been occupied in different suits brought by the contending parties, a period of seventeen years only had run out between the time of settling that dispute, and the exhibiting the bill to redeem.

Palmer et al.
v. Jackson
et al. 5 Bro.
Parl. Ca.
194.

And if the mortgagee submit to be redeemed, time will be no bar. Thus, where a bill was brought to redeem after the mortgagee had been in possession from 1707 to 1732, the year in which the bill was filed; and the defendant (it being a family affair) submitted by his answer to be redeemed, notwithstanding the length of time; Lord *Hardwicke*, though he said he saw no colour for the redemption, yet, on the defendant's submission, decreed an account of what was due for principal, interest, and costs, and directed the plaintiff to pay the same in six months after the master's report, or, in default, the bill to be dismissed without costs.

Proctor v.
Oates,
2 Atk. Rep.
140.

Time will be no bar, if the mortgagor remain in possession. Thus, a person had chambers in *Gray's Inn*, and mortgaged them in 1687, but continued the possession till 1700; at which time an order of the Bench was made to deliver possession of the mortgaged premises to the mortgagee; upon part of which he entered; but, as to the other part, the mortgagor continued in possession till 1708, when he died, leaving the plaintiff an infant, who came of age in 1714. From the death of the mortgagor, the mortgagee had possession of the whole. A bill was brought to redeem in 1726, and it was so decreed at the Rolls, and the decree was affirmed by Lord Chancellor *King*, who said nothing was more

Rakestraw
v. Brewer,
Sel. Ca. Ch.
55. Mosely,
190.

clear than that, if the mortgagor was in possession of any part, he should be admitted to redeem the whole; for part of the chambers he might redeem as being in possession thereof, and part he could not, separately from the whole; therefore he should redeem the whole. If the mortgagee were in possession for 20 years, and no interest paid, there should be no redemption allowed. In this case the mortgagor was in possession of part till 1708; from 1708 till 1714, the plaintiff was an infant, so that was accounted for, and from that time it did not amount to 20 years.]

7. Of the Manner of Redeeming and Foreclosing.

7 Geo. 2;
c. 20. For
the more
easy re-
demption
and foreclo-
sure of
mortgages.

The methods of redemption and foreclosing being dilatory, expensive, and inconvenient, not only to the mortgagee but also to the mortgagor, the same seems now remedied by the 7 G. 2. c. 20., which reciting, that whereas mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay money secured by such mortgages, and for performing the covenants therein contained; and likewise commence suits in his majesty's courts of equity to foreclose their mortgagors from redeeming their estates; and the courts of law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal money, and interest due on such mortgages, and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a court of equity for that purpose; in which case the courts of equity do not give relief until the hearing of the cause; for remedy thereof, and to obviate all objections relating to the same, it is enacted, "That where any action shall be brought on
"any bond for the payment of the money secured by such mort-
"gage, or performance of the covenants therein contained; or
"where any action of ejectment shall be brought in any of his
"majesty's courts of record at *Westminster*, or in the court of
"sessions in *Wales*, or in any of the superior courts in the coun-
"ties palatine of *Chester*, *Lancaster*, or *Durham*, by any mort-
"gagee or mortgagees, his, her, or their heirs, executors, ad-
"ministrators or assigns, for the recovery of the possession of any
"mortgaged lands, tenements, or hereditaments, and no suit shall
"be then depending in any of his majesty's courts of equity, in
"that part of *Great Britain* called *England*, for or touching the
"foreclosing or redeeming such mortgaged lands, tenements, or
"hereditaments; if the person or persons having right to redeem
"such mortgaged lands, tenements, or hereditaments, and who
"shall appear and become defendant or defendants in such
"action, shall, at any time pending such action, pay unto such
"mortgagee or mortgagees, or, in case of his, her, or their re-
"fusal, shall bring into court, where such action shall be depend-
"ing, all the principal money and interest due on such mort-
"gage, and also all such costs as have been expended in any suit
"or suits at law or in equity, upon such mortgage, (such money
"for principal, interest, and costs, to be ascertained and com-

“puted by the court where such action is or shall be depending,
 “or by the proper officer by such court to be appointed for that
 “purpose,) the money so paid to such mortgagee or mortgagees,
 “or brought into such court, shall be deemed and taken to be in
 “full satisfaction and discharge of such mortgage; and the court
 “shall and may discharge every such mortgagor or defendant of
 “and from the same accordingly; and shall and may, by rule or
 “rules of the same court, compel such mortgagee or mortgagees,
 “at the costs and charges of such mortgagor or mortgagors, to
 “assign, surrender, or reconvey such mortgaged lands, tenements,
 “and hereditaments, and such estate and interest, as such mort-
 “gagee or mortgagees have or hath therein, and deliver up all
 “deeds, evidences, and writings in his, her, or their custody, re-
 “lating to the title of such mortgaged lands, tenements, and he-
 “reditaments; and such mortgagor or mortgagors who shall have
 “paid or brought such monies into the court, his, her, or their
 “heirs, executors, or administrators, or to such other person or
 “persons as he, she, or they shall for that purpose nominate or
 “appoint.”

§ 2. “And where any bill or bills, suit or suits shall be filed,
 commenced or brought, in any of his Majesty’s courts of equity
 in that part of *Great Britain* called *England*, by any person or
 persons having or claiming any estate, right, or interest in any
 lands, tenements, or hereditaments, under or by virtue of any
 mortgage or mortgages thereof, to compel the defendant or de-
 fendants in such suit or suits, (having or claiming a right to
 redeem the same) to pay the plaintiff or plaintiffs in such suit
 or suits the principal money and interest due on any such
 mortgage, or the principal money and interest due on such
 mortgage, together with any sum or sums of money due on
 any incumbrance or specialty, charged or chargeable on the
 equity of redemption thereof; and, in default of payment
 thereof, to foreclose such defendant or defendants of his, her, or
 their right or equity of redeeming such mortgaged lands, tene-
 ments, or hereditaments; such court and courts of equity
 where such suit or suits shall be depending, upon application
 made to such court by the defendant or defendants in such suit,
 having a right to redeem such mortgaged lands, tenements, or
 hereditaments, and upon his or their admitting the right and
 title of the plaintiff or plaintiffs in such suit, may and shall, at
 any time or times before such suit or cause shall be brought to
 hearing, make such order or decree therein, as such court or
 courts might or could have made therein, in case such suit or
 cause had then been regularly brought to hearing before such
 court or courts; and all parties to such suit or suits shall be
 bound by such order or decree so made, to all intents and
 purposes, as if such order or decree had been made by such
 court at or subsequent to the hearing of such cause or suit;
 any usage to the contrary thereof in anywise notwithstanding.”

§ 3. Provided always, " That this act, or any thing herein contained, shall not extend to any case, where the person or persons, against whom the redemption is or shall be prayed, shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent, or solicitor, to be delivered before the money shall be brought into such court at law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned, by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer; any thing in this act to the contrary thereof in anywise notwithstanding."

Yates v.
Hamblly,
2 Atk. 237.

[On a bill brought to redeem a mortgage of long standing, an objection was made for want of parties; namely, that as there had been an absolute conveyance made of this estate by the mortgagee without any clause of redemption, with several limitations over, the persons in remainder under this conveyance ought to have been parties. *Et per curiam*—When a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, then it is not necessary that the plaintiff should trace out all the persons who have an interest in such trusts to make them parties. But, where the redemption depends upon equitable circumstances, and the plaintiff is not in the common case of redemptions, and where the mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court.

Fell v.
Brown,
2 Bro. Rep.
Chan. 276.

H. the elder, and *A.* the younger (his second son) by surrender, conveyed the reversion of copyhold estates (after the decease of *H.* the elder) to *B.* in fee, subject to redemption on the payment of 30 *l.* and interest, and *B.* was admitted tenant to the land. The estate was afterwards charged with a farther sum lent to *H.* the elder, and *H.* the younger by *B.* Then *H.* the younger, who survived his father, devised the estate to *S. H.*, subject to the mortgage, and died. Afterwards *S. H.* surrendered the same estate, subject to the first mortgages, to *F.* in fee, to secure the repayment of a sum borrowed of *F.* by himself. And by a deed bearing even date with the last-mentioned surrender, the uses thereof were declared to be in trust to sell the same, and in the first place to pay himself the money by him advanced, with interest, and to pay the surplus to *S. H.*, his heirs, executors, or administrators. *F.* was admitted tenant to the land. Then *B.*, the first mortgagee, entered into possession of the said copyhold estates. *S. H.* died, leaving *R. H.* of *Baltimore*, in the province of

of Maryland, his heir at law. *F.* filed a bill against *B.* and *R. H.*, charging the latter to be abroad in *America*, and praying an account of what was due to *B.* for principal and interest, and that *B.* might account for the rents and profits, and pay to *F.* what should appear to be due to him, after paying such principal and interest; and in case that should not be sufficient to satisfy *F.*'s demand, that the estate might be sold, and proper parties join for that purpose, and *F.* be paid out of the purchase-money, and the residue paid and applied as the court should direct. *B.* by his answer acknowledged the possession, and said, that he was ready to account to such person as should appear to be entitled to the equity of redemption; but that he did not know who was so entitled, not knowing what was become of *T. H.*, whether he was living or dead, or whether he was ever married, or had left any child or children. One question which arose in the cause was, Whether there were proper parties before the court, the supposed heir at law of *T. H.*, the mortgagor, being in *America*, and his personal representative not being before the court? On the part of *F.* it was insisted that there were sufficient parties; that *B.* had the real pledge in his hands, and although there might be a contract between the heir and the executor, that did not affect him. Between the first and second mortgagees, it was not necessary to make the mortgagor a party. All the decree was redemption of the first mortgage, and a conveyance to the second, not on account of rents and profits, unless the mortgagee was in possession. That neither the mortgagor, nor the first mortgagee were hurt by its being unnecessary to make the mortgagor a party to the bill between them; for the first mortgagee was liable to no farther account to the original mortgagor, the second mortgagee being bound only to make him just allowances, and if he should do otherwise, being liable to all charges which might have been made against the first mortgagor in his account with the original mortgagee. *Ad per curiam*—It is impossible that a second mortgagee should come into this court against the first mortgagee, without making the mortgagor or his heir a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or stand foreclosed. It therefore must be necessary to have the real representative before the court, though it is not necessary to have his personal representative.

Where a mortgagee assigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occasion to bring the original mortgagee before the court, for the assignee as standing in his place will be decreed to convey.

Hill v. Adams,
2 Atk. 39.

Where the mortgage is of money in the stocks, or the like, no decree of foreclosure is necessary; therefore, where a bill was brought in 1729 by the plaintiff, to redeem the sum of 2500*l.* East-India stock, transferred to the defendant in 1708, for the securing the sum of 2000*l.* and interest; the defendant having executed a defeazance, whereby he obliged himself to transfer the

Lockwood v. Ewer,
2 Atk. 303.
But, it is observable on the last-mentioned case, that

the period of time had elapsed between the mortgage and the bill to redeem, after which, it will be shewn hereafter, a court of equity refuses its aid to a mortgagor, unless under special circumstances. 2 Pow. Mortg. 284.

Lowe v. Morgan, Brown's Rep. Ch. 368.

If there be several mortgagees of an entire thing mortgage they must all be made parties to the bill of foreclosure. This was held to be necessary in the case of *Lowe v. Morgan*, where a share of *Covent-Garden* theatre having been mortgaged, the mortgage assigned the mortgage to a trustee, in trust for three persons, who contributed equal proportions of the money. One of the three filed a bill to foreclose the equity of redemption. The cause was opened as a common bill of foreclosure, and the ordinary decree pronounced; but the Registrar finding some difficulty in drawing up the decree, applied to the Lord Chancellor, who said, it was a new case in respect of their being joint-tenants, and that it would be impossible for one to foreclose, without making the other two parties. The cause therefore stood over for that purpose.

Hobart v. Abbot, 2 P. Will. 643.

In a bill to foreclose, the case was:—*A.* made a mortgage for a term of five hundred years, for securing three hundred and fifty pounds and interest to *B.*, who, so long before as 1705, assigned the term to *C.*, redeemable by himself, on the payment of 300*l.* *B.* died; *C.* brought a bill against *A.* to redeem, or be foreclosed; and though but a derivative mortgagee, yet he did not make the representatives of *B.*, the original mortgagee, parties. *Et per curiam.* Here is plainly a want of proper parties; *B.* had a right to redeem *C.*; and to prevent another account, as to what is due upon the original mortgage, his representatives ought to be before the court.

Bonham v. Newcomb, 2 Vent. 365. 1 Vern. 272. S. C. supra.

Courts of equity will never decree a foreclosure, until the period limited for payment of the money be passed, and the estate, in consequence thereof, forfeited to the mortgagee; for it cannot shorten the time given by express covenant and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected thereby.

Anonym. 2 Ch. Ca. 244.

On a bill for foreclosure, the title of the mortgagee cannot be investigated; but he will be left to pursue legal means to establish it. And, therefore, where a mortgagee sued to have his money, or that the defendant should be barred of his equity of redemption, it happened that, by subsequent orders, possession was directed to be given to the mortgagee, and contempt prosecuted for not delivering it accordingly; upon which, the heir of the mortgagee set forth a title in his examination, that the mortgagee would have debated, but he was not admitted; it being insisted, that the court of the court, upon such a bill, was, and the court could go no farther than, to take away the equity of redemption, and leave the mortgagee

mortgagee to such title as he had at law, but could not amend it; which the Lord Chancellour agreed to, and discharged the contempt.

A mortgagee may bring an ejectment, at law, at the same time that he hath a bill of foreclosure depending; for he will not be prevented from pursuing *all* his remedies for the recovery of his debt. Booth v. Booth, 2 Atk. 344.

But special circumstances may arise, which will take the case out of the common rule, and induce the court to grant an injunction, to stay proceedings upon the ejectment. Thus, where a bill was brought by the plaintiff against the defendant, for an account of the rents and profits of an estate, during the time that he was guardian to the plaintiff's brother, and for an injunction to stay proceedings upon an ejectment for the possession thereof, it being mortgaged to him; the court, because he was proceeding to foreclose the equity of redemption, it being entangled with an account of the personal estate, agreed to grant an injunction, provided the plaintiff consented to give security to redeem. 1844.

Although a mortgagee be, of right, entitled to a decree for foreclosure, after the estate becomes forfeited, if he act fairly, yet, if there be any injustice in the case, the court may refuse such decree. Thus, where a mortgagee, having notice of a voluntary settlement, procured the trustees of the estate to convey to him to protect his incumbrance; the court, on a bill filed by him to foreclose the children claiming under the settlement, refused to do so; saying, that if he might be suffered to protect himself by getting in the legal estate, they would not carry it on by a decree in equity to foreclose. Saunders v. Dehew, 2 Vern. 271.

A mortgagee of a copyhold estate, who is not in possession, may exhibit his bill against a mortgagor, before admittance, for a decree of foreclosure; and, after he has obtained such a decree, may bring his ejectment for the possession of the mortgaged premises. Sutton v. Stone, 2 Atk. 101.

Where a mortgagee is made party to a bill, praying relief is the same thing as praying to redeem, for redemption is the proper relief; and if, upon a reference to a Master to see what is due for principal, interest, and costs, the plaintiff does not redeem the mortgagee, the court will, on his application, dismiss the bill, as against him; which is equivalent to decreeing a foreclosure. Cholmley v. Countess Dowager of Oxford, 2 Atk. 267.

If the heir of the mortgagee exhibit a bill to have the mortgagor pay the money, or, to be decreed to make farther assurance, and be foreclosed of redemption; it is a good cause of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party. Freak v. Hearley, 1 Ch. Ca. 51.

And, since it has been determined that, in all mortgages, the money belongs to the executor or administrator, and not to the heir; if it comes out, upon the hearing, that the executor or administrator are not parties, the plaintiff in the cause cannot be permitted to proceed. Mee'ter v. Tanton, 2 Ch. Ca. 290.

The executor of the mortgagor need not be party; for where, on a bill brought by a mortgagee against the mortgagor to foreclose; Duncomb v. Hanley, 3 P. Wms. 313 in notes.

close, it was objected, that he ought to have been a party, as it did not appear, but that he might have paid the debt; it was held by the Master of the Rolls and the Registrar, that there was no necessity to make him party; because, the bill being *only* to foreclose the equity, the plaintiff need *only* make *him* a party that *had* the equity, viz. the heir; and the course was so; neither was the mortgagee any ways bound to intermeddle with the personal estate, or to run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it.

Clarkson v.
Bowyer *et al.*
2 Vern. 66.

But a foreclosure, obtained on a bill exhibited by the heir at law, will be binding, although the executor or administrator be not a party; for if the executor or administrator of the mortgagee should afterwards come against the heir of the mortgagee, to have the benefit of the mortgage, the heir, in case the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himself.

Globe *et ux.*
v. Earl of
Carlisle,
cited in the
last case.

But it is ob-
servable that,
in this case, the heir made no offer to pay the mortgage-money to the executor, which is the basis of the resolution in the former case.

Where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party; upon a bill by the executor, against the heir of the mortgagee, and against the mortgagor, the land was decreed to the executor.

Senhouse v.
Earl,
2 Ves. 450.

A plea of a decree for foreclosure in the common form, with an averment of non-payment of the money, &c., *but no final order for foreclosure*, on appeal from Lord King, was held not to be good; for, although such plea, and length of time, might be a good defence, yet, as a plea, it could not stand for want of a final order.

Anony-
mous, Bar-
nard. 324.
2 Eq. Ca.
Abr. 605. p. 38. S. C.

On a decree to foreclose at a period certain, the computation of time must be according to calendar months, and not according to lunar ones.

2 Atk. 101.

Although where there is a clear tenancy in tail, there is no occasion for the remainder-man's being a party to a bill of foreclosure, yet, if there be an express estate for life, the remainder-man ought to be a party.

Draper *et al.*
v. Jennings
et al.
2 Vern. 518.

If there be many incumbrancers, some of whom are not made parties to a bill to foreclose, the plaintiff, in the bill, may notwithstanding foreclose such defendants as he has brought before the court.

Sherman v.
Cox, 3 Rep.
Ch. 84. S. C.
Nelson & Rep. 71.

But those not parties to the suit, will not be bound by such decree.

How v. Vi-
gures, 1 Ch.
Rep. 33.
1 Eq. Ca.
Abr. 318. 5.

If there be tenant for life, reversion in fee, and he in reversion mortgage his estate in fee, and the mortgagee devise it, the devisee may bring his bill to foreclose against the mortgagor, and need not make the heir of the devisor a party; because he hath no interest in the land, it being all devised away from him; and therefore the devisee need only foreclose the mortgagor.

So, where there is a clear tenancy in tail, there is no occasion for the remainder-man being a party to a bill of foreclosure ; but, if there be an expresse estate for life, the remainder-man ought to be a party.] Sutton v. Stone, 2 Atk. 102.

(F) Mortgagees and their Assignees, how to account, and what Allowances to make.

THE mortgagee is answerable in equity, when he comes into the possession of lands, for the profits he has made of the lands, and not for the profits which he might have made, unless there be fraud ; for it is the fault and laches of the mortgagor, that he would let the lands lapse into the hands of the mortgagee, by the non-payment of the money, and when they do, he is only a bailiff for what he actually receives, but is not bound to the trouble and pains of making the best of what is another's. Chan. Ca. 258. Vern. 476.

And therefore a mortgagee shall not be bound by any proof, that the land was worth so much, unless it can likewise be proved that he did actually make so much of it, or might have done so had it not been for his wilful default ; as, if he turned out a sufficient tenant that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it. Vern. 45.

[If the mortgagor make proof that the estate was let at *such* a price, whilst in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shew the contrary, which it is in his power to do, as being let by him. Blacklock v. Barnes, Sel. Ca. Ch. 53.

Where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care and pains ; but, if they employ a skilful bailiff, they will be allowed such sums as they have paid him ; for a man is not bound to be his own bailiff. Bonithon v. Hockmore, 1 Vern. 316. 3 Atk. 518.

And though there be a private agreement between the mortgagee and the mortgagor, for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate, yet the court will not carry it into execution, for equity will not allow him any more than his principal and interest. French Baron, 2 Atk. 120.

A mortgagee in possession is not obliged to lay out money *any* farther than to keep the estate in necessary repair ; but, if a mortgagee hath expended any sum of money in supporting the right of the mortgagor to the estate, where his title hath been impeached, the mortgagee may certainly add this to the principal of his debt, and it will carry interest.] 3 Atk. 512.

If a mortgagee in possession assigns over his mortgage without assent of the mortgagor, to an insolvent person, the mortgagee is bound to answer the profits both before and after the assignment, though assigned only for his own debt ; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to a person insolvent. But *quære*, if the mortgagor *hides*, so that he cannot be served with a *subpœna* to fore- 3 Chan. Ca. 3. 1 Eq. Ca. Abr. 328.

close, whether the mortgagee may not assign, and not be answerable for the profits after assignment?

Chan. Ca.
67, 258.
Vern. 167.
2 Vern. 135.

If the mortgagee assigns his mortgage, and the mortgagor comes to redeem against the assignee, all monies really paid by the assignee, either as principal or interest, shall be principal to the assignee, and shall bear interest; otherwise it is, if the assignee had not paid the money, and the assignment was only colourable, in order to load the mortgagor with compound interest.

Vern. 336.

If a stranger get an assignment of a mortgage for less than is due, the mortgagor, or his heir, shall not redeem without paying all the money due; but if a man purchases the mortgaged lands, without notice of this incumbrance, whether he has not an equity to redeem them for what was really paid by the stranger is made a *quære*?

Vern. 476.

But if there are subsequent incumbrances, or creditors in the case, a man who buys in a prior incumbrance, shall, against them, be allowed only what he really paid, though there was in truth a greater sum due.

2 Vern. 526.
Ramsden v.
Langley.

If an infant, by his guardian, endeavours to overthrow the mortgage by a supposed entail, and after a special verdict, and great agitation at law, the mortgagee prevails, and the infant brings his bill to redeem; the mortgagee having sworn he paid and expended above 120 l. in defending his mortgage at law, although he had but 60 l. costs allowed him there, shall not be held down to the taxation at law, but shall on the account be allowed all he laid out or expended; and if the mortgagee in this case, fearing that his mortgage would be defeated at law, gets administration, as principal creditor, in the spiritual court, he shall be allowed the costs expended there also.

Coppring v.
Cooke,
Vern. 270.

The mortgagee obtained judgment in ejectment, and entered on the mortgaged premises, and thereby prevented other creditors that had subsequent incumbrances from entering, and yet permitted the mortgagor to take the profits; and the other incumbrancers coming to redeem him, the court ordered, that the mortgagee should be charged with all the profits he had, or might have, received since his entry.

Vern. 258.
267.

So, where a bankrupt, before he became such, had made a mortgage of his estate, and the assignees of the statute brought an ejectment for recovery of the lands comprised in the mortgage, and the mortgagee refused to enter, but suffered the bankrupt to take the profits, and to fence against the assignees with the mortgage; it was held, that the mortgagee should be charged with the profits from the time of the ejectment delivered.

2 Vern. 407.
Amhurst v.
Dawling.

A. mortgaged the manor of *T.* to *B.* to which an advowson was appendant; *B.* brought a bill to foreclose; the church became void, and he likewise brought a *quare impedit* at law; and on a motion to stay the proceedings on the *quare impedit*, the court held, that though *A.* had no bill, yet being ready, and offering to pay the principal, interest, and costs; if *B.* would not accept his money, interest should cease, and an injunction to stay proceedings on the *quare impedit* should be granted; for the mort-

gagce

gagge can make no benefit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt; and the mortgagee therefore, in that case, is but in the nature of a trustee for the mortgagor.

It was decreed, that a mortgagee having received 8 *l. per cent.* since the year 1660, when the interest was reduced by statute to 6 *l. per cent.* should account for the 2 *l. per cent.* over value to sink the principal mortgage-money. But, if the principal and interest were overpaid, the parties must shake hands, for there shall be no refunding.

Chancellor Nottingham, on the mortgagee's bill to foreclose, and he being of opinion, that the two *per cent.* should go towards sinking the principal, the then plaintiff dismissed his bill. Afterwards, the mortgagee brought his bill to redeem, and that coming to a hearing before the Lord Chancellor Jeffries, he was of opinion, that the eight *per cent.* being paid, and received as interest, no part of it ought to be applied to sink the principal; and that the statute had no retrospect beyond 1660, but looked forward to contracts and agreements then after to be made, and not to any contracts or agreements before that time, and decreed the account to be taken accordingly. 2 Vern. 78. But, upon a bill of review, Rawlinson and Hutchins, Lords Commissioners, held, that the decree should be reversed, against Lord Trevor. 2 Vern. 145. It seems, however, to be now settled, that the statute of 12 Ann. c. 16. which reduces the interest of money to 5 *l. per cent.* has not a retrospect to any debts contracted before, but that they shall carry interest according to the interest allowed, or agreement made at the time when the debt was contracted. 1 Eq. Ca. Abr. 288.]

Prec. Ch.
50. Walker
v. Penning,
[This cause
was first
brought to a
hearing be-
fore Lord

A. makes a jointure of an equity of redemption, and afterwards becomes a bankrupt, the commissioners assign this equity of redemption, and the assignees state an account. The jointress brings her bill to be relieved, alleging combination between the assignees and the mortgagee, and that they had allowed more money than was due on the mortgage. Lord Keeper—The assignees stand in the place of the husband, and the account stated by them ought to be as conclusive as if stated by the husband, and the charge is not right in the bill, being too general. However, the plaintiff had leave to amend her bill.

Vern. 179.
Knight v.
Bampfild,

Mortgagor and mortgagee settled an account before a master, and now a subsequent mortgagee sues for a new account, supposing the former account to be false, and made by consent, but did not insist upon any particulars; and the Lord Chancellor declared, that the account should bind the second mortgagee, if the fraud and collusion were answered.

Chan. Ca.
299.
Needler v.
Deeble.

[But the account between the mortgagee and assignee will not conclude the mortgagor; but it will be referred to the Master to see what was really due, on making the assignment, and what money was *actually* paid thereon.

1 Chan. Ca.
68.

An account on a bill to redeem or foreclose, taken in a cause, in which tenant for life of the equity of redemption is party, and when no other person is entitled, will be binding on any contingent remainder-man, when his title afterwards vests; nor shall he open it, unless fraud or errors are shewn therein; for thereby accounts upon mortgages, to which all who can claim the equity of redemption are parties, would often be infinite. But, if a reasonable objection be made against such account, the court will so far open it. But the court will only give leave to surcharge and falsify the account; which often happens upon settlements, where there is tenant for life with limitations in remainder, upon a bill for

1 Ves. 164.

for an account, when none but tenant for life is in being, a child afterwards coming *in esse*, shall, if no fraud, only have liberty to surcharge and falsify.

Knight v. Bamfield et al. 1 Vern. 179.

And where a man made a mortgage, and, after a forfeiture for non-payment of the mortgage-money, married, and conveyed the equity of redemption to trustees, to the use of himself for life, remainder to his wife for her jointure; and afterwards became bankrupt; and the commissioners assigned the equity of redemption in trust for the creditors, and the assignees stated an account with the mortgagee: The jointress brought her bill to be relieved against this account, alleging, that it was not fairly stated, but that the assignees, by combination with the mortgagee, had allowed more money than was really due on the mortgage; and the defendant pleaded this stated account: *per* Lord Keeper, the assignees stand in the place of the husband, and the account by them stated ought to be as conclusive as if it had been stated with the husband; and the bill is not right in charging a general fraud in the stating of this account, but the plaintiff ought to have assigned particular errors in the account.

Earl of Macdonald v. Fitton, 1 Vern. 168. *Infra*, 427.

Where, upon the assignment of a mortgage, the debt was stated between the assignee, the mortgagee, and some of the coheirs that were looked upon to have a right to the redemption; it was insisted, that this ought to conclude the plaintiff, who claimed a devisee under the will of the mortgagor, as a stated account: but he being no party thereto, that was over-ruled by the court.

Pearson v. Fulley, 1 Chan. Ca. 102.

An assignee, after several assignments, will not be obliged to account for profits before his own time. Thus, where on a bill to redeem a mortgage made in 1632, it was insisted by the defendant, that he came in as an assignee at the third hand, and therefore that it would be hard to put him to an account *then*; the Lord Keeper said, that as there had been no stint put to the time at which a mortgage was to be redeemed, the defendant should account; but, in regard he came in at an old hand, it should not be taken, but so far only as went in discount of his money, *not* for the surplussage.

Cloberry v. Symonds, 2 Ch. Rep. 392.

So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill was dismissed in 1641; afterwards, he who had the extent, by virtue of the dismissal, sold the premises to the defendant, and the plaintiff having since bought the equity of redemption, came to redeem; the court, notwithstanding the dismissal, and length of time, ordered an account from the purchase, not from any time before, but till then the profits to go against the interest.

Radham v. Odell, 4 Brown's Parl. Ca. 447. *S. C.* *infra*.

An account taken by a master upon a decree in a bill of revivor, brought by an infant heir, will bind the heir, unless he can surcharge or falsify.

Child v. Tancard, 1 Atk. 534.

Where the yearly rents and profits of an estate in mortgage greatly exceed the interest of the money lent, rests are annually made on making up the account, and the surplus applied to sink the

the principal. But as this is often attended with great hardships to mortgagees (especially when the sum is large, and the mortgagee forced to enter upon the estate, and then can only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to an account) the Master is not obliged, on every small excess of interest, to apply it to sink the principal; nor has the court ever laid it down as an invariable rule, that the Master must always, in taking such account, make annual rests.

It is the constant practice of the court of Chancery, in decrees against a mortgagee upon a bill for redemption, or against an executor to account, to direct it with future words, to wit, to account for what they have received, or might have, if it had not been for their own default; and yet if the person, decreed to account, receive any thing subsequent to the decree, it is inquirable before the Master, and the defendants in such case must bring such sums so received to account.

Balfrode v.
Bradley,
3 Atk. 522.

Thomas Odell, an infant, to whom the equity of redemption of a mortgage for years descended on the death of his father, (who had exhibited his bill in the court of Exchequer in *Ireland*, against the mortgagee and his assignee, to redeem the premises, and for an account of the money due on the mortgage,) filed his bill of revivor; the cause was heard, and the court decreed, that it should be referred to the Remembrancer, to state and settle an account; who made his report, that 1883 *l.* 18 *s.* was due for principal and interest, which, there being no objections made, or exceptions taken thereto, was absolutely confirmed. And the cause coming on for farther hearing, it was decreed, that upon the mortgagor's paying the sum of 1883 *l.* 18 *s.* so reported due, *with interest for the same*, from the time of the report being confirmed *absolute*, the premises should be reconveyed, and all bonds and securities delivered up. Afterwards, *Odell* neglecting to pay the money reported due, or any interest for the same, the mortgagee, who had likewise had a suit depending, filed an amendment and supplemental bill, in order to have the benefit of the decree, by a sale or absolute foreclosure; and therein, in regard the account of what was due on the said mortgage had been stated in the former cause, prayed to have the benefit thereof, and that the account should be taken, in his present suit, on the foot of the report or decree made in the former suit. To this bill *Odell* put in his answer, and thereby, amongst other things, admitted the former report, decree, and proceedings; but insisted that, apprehending he was much aggrieved by those proceedings, he chose to have his bill, upon which the said decrees were made, dismissed, rather than submit thereto. Afterwards, the cause came on to be heard, when the court declared, they were of opinion that the defendant, the minor, was not to be concluded by the account taken in the said former cause; but, that the plaintiff was entitled to an account, as between mortgagor and mortgagee; and therefore decreed, that it should be referred to the Chief Remembrancer, or his deputy, to audit, and state an account between the plaintiff and defendant, on the foot of the mortgages and securities in the plead-

Baddam v.
Odell an infant,
and Fitzmaurice his guardian,
4 Brown's
Parl. Ca.
447-

ings

ings mentioned, in which account both parties were to have all just allowances. From this decree, the mortgagee appealed, insisting, that the infant ought to be concluded by the account, taken in the former cause, on a bill originally brought by his father, revived, and carried on by himself, confirmed by subsequent orders of the court, and signed and enrolled; and that he ought not to be permitted to waive or vary the same, especially when neither fraud nor error in the account were even suggested. And so it was adjudged, as to that point, and the decree reversed; and it was farther ordered, that the account taken upon the former decree should stand, with liberty for the infant to surcharge, or falsify the same; and that, in case of any surcharge, or falsification, the Remembrancer should deduct so much as ought to be deducted on account thereof; and that the Remembrancer should carry on the account of the *subsequent interest, from the time of the confirmation of the former report, for the sum thereby reported due, after such deductions made thereout as aforesaid.*]

Abt. Eq.
287.
Earl of
Chesterfield
v. Lady
Cromwell.
[On a bill,
that an in-
fant might
redeem a
mortgage,
or be fore-
closed; it
was decreed,
upon the
hearing, to
an account,
and that the
infant should
pay what
was reported

J. S. mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate; and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself, who was then near of age, signed it; and the account being admitted to be fair, it was held by my Lord Chancellor, that though regularly interest shall not carry interest, yet that in some cases, and upon some circumstances, it would be injustice if interest should not be made principal; and the rather in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence.

due, unless he shewed cause to the contrary six months after he came of age. A report was made, and confirmed, of 2600*l.* due; and upon a subsequent order being made to compute interest, the Lord Keeper doubted, whether interest ought to be allowed for the interest. *Bennet v. Edwards*, 2 Vern. 392.]

Brown v.
Barkham,
1 P. Wms.
652.

[In general, interest shall not carry interest upon a mortgagor's signing an account, whereby he admits so much due for interest; because that of itself does not shew any agreement, or intent to alter the interest or nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been so determined; for it seems, that, to make interest on a mortgage principal, it is requisite there should be a *writing* signed by the parties, *the estate in the land being to be charged therewith.*

Lord Keeper **North** was of opinion, in the case of *Howard v. Harris*, that if there were a covenant in the mortgage-deed for payment of the interest, upon which an action of debt would lie, the court would allow interest on interest, though no account was taken before a Master. In that case, a mortgage for 1000*l.* had been made upon a reversion ten years, and in the deed there were covenants for payment of the principal and 60*l.* *per annum* interest;

Howard v.
Harris,
2 Ch. Ca.
147 to 150.

terest, and 7 *l. per annum* rent was *only* reserved; and it was urged, that the mortgagee, against whom the bill was exhibited to redeem, ought, in this case, to have interest upon interest, otherwise he would be a great loser. To which it was answered, that the bill had been filed six years, and that the mortgagee had, by answer, opposed the redemption, and therefore, from that time, he had no pretence for an allowance of interest for his damages; and that it was never known in the court that interest upon interest was at any time allowed in such case. But the Lord Keeper was clearly of opinion, that as to so much interest as was reserved in the body of the deed, that should be reckoned principal; for it being ascertained by the deed, an action of debt would lie for it, and therefore it was reasonable that there should be damages given for the non-payment of that money. As to what had been urged, that this had never been practised, and that there was not any such precedent in the court, and that if this were to be established for a rule, every scrivener would reserve all his interest half-yearly, from time to time, as long as the money should be continued out upon the security, which would be to change the law and practice of the court, and make all mortgagors pay interest upon interest; the Lord Keeper said, that he was clear in the distinction between debt and damages, and he saw no inconvenience that could ensue; it would serve only to quicken men to pay their just debts. And it was decreed accordingly, that after a deduction of the yearly rents of the mortgaged premises out of the 60 *l. a-year*, payable for the interest, the defendant should be allowed interest for the residue of the said 60 *l. a-year*, for which the mortgagee might have sued at law, and recovered damages.]

S.C. 1 Vern.
194.
1 Vent. 364.

If *A.* mortgages for 450 *l.* payable at the end of five years, with interest at 5 *l. per cent.* in the mean time, and about two months before the end of the five years, the mortgagee assigns over the mortgage for 560 *l.*, being the principal and interest then due, the 560 *l.* shall carry interest, though the five years were not elapsed, the mortgage being forfeited by the non-payment of interest.

2 Vern. 135.
Gladman v.
Henchman.

[A bill was to have the redemption of a mortgage of the manors of *B.* and *S.*, in the county of *C.*, which mortgage had been assigned to *F.*; one point was, Whether, there being great arrears due at the time of the assignment, which were paid by *F.*, the money paid for interest, then in arrear, should be reckoned principal as to him, and carry interest with it? And it was insisted for the mortgagor, that interest was never made principal, in such case, unless the mortgagor had joined in the assignment; and the case of *Porter* and *Hubbart* was cited, where, in a like case, it was decreed, that interest should be reckoned principal; but the decree was reversed in the House of Lords, because the executor of the mortgagor was no party. But the Lord Keeper said, that precedent could not weigh much with him; he was of counsel therein, and it was hard in all its circumstances. For although he thought it reasonable, that the interest paid upon the assignment should be reckoned principal, yet he would not now make a new precedent.

Earl of Mac-
clesfield v.
Filton,
1 Vern. 168.

Porter v.
Hubbart,
2 Ch. Rep.
86.

precedent. However, his Lordship directed the defendant's counsel to search for precedents, and said, that if they could find any one, he would follow it in this case; but no such precedent could be found.

Aspenhurst
v. James,
3 Atk. 271.

But, where creditors procure a decree for sale of an estate before a Master, and one, (by consent of all parties entitled to the estate, being confirmed the best bidder by authority of the court, all the incumbrancers agreeing he shall be purchaser) takes an assignment of all incumbrances; in this case, he will be a creditor of the mortgagor for the whole sum, as well what he paid for interest due, as for principal, together with interest upon the interest, their consent being the same thing, as if they had been made parties to the assignment.

Proctor v.
Cooper,
Prec. Ch.
116.
Trin. 1700.

But, where *G.*, in 1641, made a mortgage in fee of lands, worth about 30 *l. per annum*, to *C.*, to secure 300 *l.*; in 1652, the mortgagee took possession, and in 1660 devised the lands to *A.*; in 1680 the devisee brought a bill to foreclose: the wife of the mortgagor had recovered a third part, as dower, against the mortgagee, so that the profits did not answer the interest of the money, which was then 8 *l. per cent.*, and there had been infancies on the plaintiff's part for several years: the Master of the Rolls decreed the plaintiff to redeem, and pay 8 *l. per cent. only*, that being then legal interest; and said, that, though the profits were not sufficient to answer the interest, yet the arrears could not carry interest, although the costs and charges must.

Bacon v.
Clerk,
1 P. Wms.
478. Prec.
Ch. 500.
S.C. Eq. Ca.
Abr. 530.9.

A Master's report, computing interest, makes that interest principal, and to carry interest; for a report is as the judgment of the court, and appoints a day for the payment, carrying on interest to that day; and the party's disobedience to the court, in not complying with the time of payment, ought to subject him to interest.

1 P. Wms.
453. 480.
Kelly v.
Lo. d Bellew,
1 Brown's
Parl. Ca.
202. *Ibid.*
566. *Mosely*, 27.
Abr. 530.

But the report must be confirmed; for, where *A.*, the defendant, insisted that 800 *l.* was owing to him, and, upon the Master's report, only 180 *l.* appeared due; the court ordered interest for that sum, from the time of confirming the report absolute, *and not before*; because, until then, it was not any liquidated sum.

Mosely, 247.

Attorney General *v. Illington Overseers et al.* 1 P. Wms. 376-7. 2 Eq. Ca.
Where creditors are decreed to be paid according to their priority, if the estate is deficient, the principal only shall bear interest after the confirmation of the report.

Harris v.
Harris,
3 Atk. 722.

And although the report be confirmed, yet, if the suit be for a sale, and not to foreclose, interest shall not carry interest, if there be other mortgagees, and bond creditors, parties thereto. Thus, the plaintiff, a mortgagee, brought a bill, in conjunction with several bond creditors, against the heir at law of the mortgagor, for a sale of the mortgaged premises, and had a decree accordingly, with a direction to pay the mortgagee his principal and interest in the first place. The Master made a report of a stated sum due, which was confirmed; the mortgagee then moved, that the Master might compute subsequent interest and costs upon the

sum

sum reported due. There was not near enough arising from the sale, to pay the second mortgagee and the bond creditors. The rest of the creditors and the mortgagor opposed this motion, and endeavoured to shew a difference between the present bill and a bill of foreclosure, insisting, that, in the latter, the court directs the Master to allow subsequent interest upon the sum reported due, because it is a compensation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem; but that here a sale was directed in the first instance, and the interest of the other creditors was concerned; therefore, it would be hard to give interest upon interest in favour of one creditor, to the prejudice of the rest. And the Lord Chancellor allowed the distinction, saying, that it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carried 5*l. per cent.*, and proposed to the counsel, that, from the time of the Master's report being confirmed, it should carry only 4*l. per cent.*, in which the plaintiff acquiesced.

Where the court enlarges the time for a mortgagor, or a subsequent mortgagee, that is a favour, for they would otherwise be foreclosed, and it is but just and reasonable they should pay for it, and that the first mortgagee should be no loser thereby; therefore, if on a bill to foreclose, principal, interest, and costs, are lumped into one sum by a Master; if the mortgagor, or a puisne mortgagee, pray longer time to redeem, they always pay interest for the whole sum.]

If the mortgagor tenders the money, and the mortgagee refuses, he loses the interest from the time of the tender; because it is but a pledge for the money, and if the money be tendered, he ought not to keep the pledge; and no man ought to pay for the forbearance when he hath the money ready.

The plaintiff had made a mortgage in fee of his estate, which by several mesne assignments was come to Sir *William Dodwell*, and there being likewise two several terms for years standing out, they were assigned to trustees, in trust for Sir *William Dodwell* to protect the inheritance, and subject to the same equity of redemption; The plaintiff and Sir *William* settled an account of what was due; and there appearing to be due thereon 4400*l.* principal money, the interest was then paid off, and at the same time Sir *William Dodwell* gave a note, whereby he promised, that on payment of the sum of 4479*l.*, or thereabouts, on the 23d *October* then next, being the interest computed to that time, he would reconvey the inheritance to the plaintiff and his heirs, and would procure his trustees to assign the two terms for years, as the plaintiff should direct. In *August* following Sir *William Dodwell* died, and the defendants were his executors; and he likewise left the defendant *Mary*, his only child and heir at law, an infant of about eight years of age; the plaintiff provided the money, and on the 23d of *October* tendered a bank-bill of 4500*l.* to one of the executors (there being four in all), for him to take thereout what was then due for principal and interest; but the executors having

Moseley,
246, 247.

Chm. Ca.
29.
2 Chan. Ca.
206.

Abr. Eq.
318, 319.
Sir John
Austen v.
Executors of
Sir William
Dodwell.

none of them proved the will, he refused to accept the tender upon which the plaintiff asked him, if he objected to the legality of the tender, being in a bank-bill and not in money, and that he did, he would immediately turn it into money; to which the other answered, he had no objection to the tender, but, not having proved the will, he could not accept of the money. Afterwards the plaintiff made the like tender to another of the executors, who likewise refused to accept of it, not having proved the will; but he objected to the legality of the tender, not being in money. Afterwards all the four executors proved the will; and the bill was brought to redeem, on payment of 4400*l.* and interest, to the 23d *October*, being the time mentioned in the note and that the plaintiff might not be obliged to pay interest beyond that time, as the executors insisted he ought. And it was held by my Lord Chancellor, that this tender in a bank-note was not strictly speaking, a legal tender (a); but since it was proved the plaintiff offered to turn it into money, that made it a good tender 2dly, It was clearly agreed, that any or either of the executors before probate, might have received, and given a good discharge for the money, especially when, as appeared in this case, they afterwards proved the will, and so were executors *ab initio*. 3dly, That though they were executors only in trust for the daughter, who was an infant, yet none of them could be in a better case than Sir *William Dodwell* himself would have been, if he had been living; and as such tender, under these circumstances, would have bound him, so it will his executors and devisee; and therefore decreed a redemption on payment of the 4400*l.* and interest to the 23d *October*, the time mentioned in the note, and no longer, and no costs on either side: and the infant, heir at law, on payment of the money to the executors, was to convey the inheritance descended to her, according to the act 7 *Ann. c.* 19. for obliging infant trustees and mortgagees to assign and convey.

[Although, according to the above case, a mortgagee, refusing to receive his money on tender, after forfeiture, will lose his interest from the time of the tender; yet notice of paying off the mortgage must have been given to the mortgagee, at least *six calendar months* before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the very day on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord *Hardwicke* not to be thereby suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a farther notice of *six calendar months*, at the expiration of which a strict tender must be made.

But, it seems, the plaintiff ought to make oath, that the money was always ready, and no profit was made of it; which may be controverted by the mortgagee, who may prove the contrary; namely, that the mortgagor was not ready to pay it, in which case the interest must run on.

(a) Although it hath never yet been determined, that bank-notes are a legal tender, yet the court of King's Bench have holden, that if such notes are presented in payment, and no objection made to the receipt on that account, they are a good tender. *Wright v. Reed*, 3 Term Rep. 554.

Hix v. Ling, before Lord *Hardwicke*, 2 Pow. Mortg. 256.

Sutton v. Rodd, 2 Ch. Ca. 206.
Gyles v. Hail, 2 P. Wms. 378.

A tender must be made by a person actually interested; and, accordingly, it was said by *Coke* to have been adjudged, *Trin. 27 Eliz.* that, where one, who was not guardian, nor was to have any interest in the land, tendered money upon a mortgage for an infant, it was adjudged a void tender.

Watkins v. Ashwicke, Cro. Eliz. 132. The above case is reported

more at large

in *Owen*, by the name of *Watkins and Ashwicke*, and is thus stated: A man made a feoffment on condition, that if he, his heirs or executors, did pay 100 l. before such a day, that he might re-enter; the feoffor died, his heir within age; the mother, without any notice to the son, requested *J. S.*, that he would pay the money for her son. All this was found by special verdict, but it was not found of what age the son was. Clinch said, that if the jury had found, that the son was of the age of seventeen years, the payment had been good. But by *Wray*, if a bond be upon condition, that the obligor or his heirs shall pay 100 l., and the obligor die, his heir within age, I conceive payment by the guardian, or by some other friend, is good. And afterwards, all the justices agreed, that if the infant were within the age of fourteen years, the tender of the money by his mother had been good, but otherwise if he had been more than fourteen years of age; and because no age was proved, but that he was within age, it should not be intended that he was within the age of fourteen years; and therefore, they advised the party to begin *de novo*, and that it might be found, that the infant was within the age of fourteen years. *Owen, 137.*

The money being a sum in gross, and collateral to the title of the land, the mortgagor must tender it to the *person* of the mortgagee, and it is not sufficient for him to tender it *upon the land*.

Co. Lit. 210. b. 2 Eq. Ca. Abr. 603. 34. Co. Lit. 211. b. 212.

But, if a time and place for payment of the money be appointed, in that case he need not seek for the mortgagee, or be in any other place but in that comprised in the indenture, or there longer than the time specified therein.

And so it is, although a place be not appointed in the proviso, if the mortgagor give notice *where* he will pay it off. Thus, where the mortgagor gave personal notice, in writing, to the defendant the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning, at *Lincoln's Inn Hall*, at a day and hour appointed therein, which accordingly was done; it was objected, that *Lincoln's Inn Hall* was not named in the proviso in the mortgage-deed, as the place for payment, and therefore, that the tender must be to the person; but it was held, that the money being lent in town, it would be very hard, after personal notice being given for payment thereof, and no objection made by the mortgagee to the place at the time of notice, to make the mortgagor travel with this sum of money to *Oxford*, where the mortgagee lived.

Gyles v. Hall, 2 P. Wms. 378.

In some cases, a tender at the house of the mortgagee will be sufficient. Thus, where there was a mortgage, and the mortgagor afterwards meeting the mortgagee, said to him, I have monies now, I will come and redeem the mortgage; to which the mortgagee replied, he would hold the mortgaged premises as long as he could, and then when he could hold them no longer, let the devil take them if he would. Afterwards the mortgagor went to the mortgagee's house with money, more than sufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or that the tender was made to him; the court decreed a redemption, and that the defendant should have no interest from the time of the tender, because of his wilfulness. And a like determination was made, in the case of *Peckham and Legay*.

Manning v. Burges, 1 Ch. Ca. 29.

Withshire v.
Smith,
3 Atk. 90.

But, if there be a deed of assignment presented to be executed, at the time when the tender is made, in which there are covenants, the mortgagee is entitled to lay them before his attorney, and shall have reasonable time allowed him so to do before the interest shall stop. Thus, a bill was brought, in *May 1742*, to redeem a mortgage, in which the plaintiff insisted upon a redemption, on paying the principal money only, for that the interest ought to determine in *February 1741*, because he had given six months notice to pay it off, and had, on that day, tendered the principal and interest, with a deed of assignment, but the defendant absolutely refused to take the money: the defendant swore; that he offered to take the money, provided he might have time to consider of it, and to advise upon the deed of assignment, there being covenants therein on his part, upon which, as he was not of the profession of the law, it was reasonable he should consult his attorney, whether they were such as he might safely execute. And the Lord Chancellour said, that the plaintiff, not having sent a draught of the assignment to the defendant any time before the money was tendered, as he ought to have done, he was in the wrong; for where there were covenants on the part of the mortgagee, it was very reasonable that he should have some time to look them over; the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have had an opportunity to advise upon it, and should have appointed a time to pay the money, after the defendant had had sufficient time to consider it. And his Lordship decreed the mortgage-money, with interest, to be paid within six months, otherwise the plaintiff's bill to stand dismissed.

Sharpnel v.
Blake, 2 Eq.
Ca. 603. 34.

So, if there be a controversy, to whom the equity of redemption belongs, no assignment can be made until that point is settled; therefore the interest of the mortgage will not cease, although the money be tendered to the mortgagee, and he refuse it.

Lord Milton
v. Moore
Edgeworth
and Damer
Edgeworth,
Infants,
6 Brown's
Ca. Fair.
3d0.

Lord *Milton*, being possessed, under a conveyance from his father, of divers mortgaged premises, and all the securities for the same, and entitled to all the money due thereon, filed his bill in the court of Exchequer in *Ireland*, in *June 1764*, against *Moore Edgeworth* and *Damer Edgeworth*, infants, heirs to the mortgagor; praying the benefit of the proceedings in a former cause, and for an account; and that the money which should appear due thereon might be paid the plaintiff by a short day, or that the defendants might be foreclosed, and the mortgaged premises sold, for payment of what should appear due. The defendants, by their answer to this bill, admitted most of the matters therein stated; but insisted upon the benefit of an agreement, which they alleged had been made between the plaintiff's father, *John Damer*, and the father of the defendants, for reducing the interest of the said mortgages, which, by the deed, was originally at 8 per cent. to 6 per cent. Issue being joined in the cause, several witnesses were examined; and the same came on to be heard in *November 1771*; when (upon reading an answer put in by the said *John Damer*, in 1758, to a bill, filed against him by the defendant's father in 1757, whereby the former admitted, that, pending a former suit, the said de-

endant's

tenant's father had told the said *John Damer*, "That the debts, affecting the estates mortgaged, were so great, that if *John Damer* did not make an abatement in the interest of the money due to him, he would have little benefit in case he succeeded in the said suit," and that *Damer* then said, "that if that should be the case, he would leave any reasonable abatement to his friend *Ambrose Harding*." Whereby it appeared, that such conversation had passed between them; and that the said *Ambrose Harding* understood, that *Damer* had agreed to accept of 6l. per cent. interest upon the money so due to him on the said securities; and also, upon reading other evidence, the court made an order, directing an issue to be tried at the next assizes, "Whether there was any, and what agreement between *John Damer*, esq. deceased, and *Packington Edgeworth*, deceased, at any, and at what time, for any, and what abatement of interest, on the principal sums due to the said *John Damer*?" From this order, Lord *Milton* appealed to the House of Lords, and the principal objection urged by him against directing such issue, was, that considering the state of the evidence before the court, it was unjust to direct an issue; because the answer of Mr. *Damer*, which was read by the defendants at the hearing, denied any agreement between him and *Packington Edgeworth*, to reduce the rate of interest; and this denial, being set in opposition to any conclusion drawn from *Harding's* evidence, took away all ground for the court's interposing; whereas, by directing an issue, upon the trial of which Mr. *Damer's* answer could not be read for the appellant, he would be deprived of that evidence which the defendants had made evidence at the hearing of the cause. But it was adjudged, that the order should be affirmed, with this addition, viz. that the plaintiff should be at liberty, at such trial, to read the answer of *Damer*.

Interest due upon a mortgage of money which is in settlement, will not be considered as in the nature of rent, and, consequently, go with the mortgage; but, if the tenant, under the settlement, die in the broken part of the quarter or half year, the interest will be apportioned; and what is due from the last day of payment, to the day of the death of the tenant for life, will be paid to his executor, and the residue to him in remainder.

Edwards v.
Councils of
Warwick,
2 Will. 178.

The reason is, that interest increases on a mortgage from day to day; and the mortgagor, whenever he pays the principal and interest, must pay the interest up to the day of payment.

Wilson v.
Harmen,
2 Vez. 672.

In this, a mortgage likewise differs from stock, for dividends upon stock are by the legislature made payable only half-yearly, and are in nature of rents, and, consequently, not liable to apportionment.

Ibid.

On the statute 12 Ann. stat. 2. c. 16. § 1. which enacts, 3 Ark. 154.
"That all bonds and assurances for the payment of any principal, or money to be lent upon usury, whereupon there shall be reserved or taken above five in the hundred, shall be utterly void;" parol evidence has been admitted, to shew *usurious* interest taken by a mortgagee, though there was none reserved upon the face of the deed itself.

Murder and Homicide.

THE taking away the life of another, whether it amount to felony or not, is called by the general name of homicide and is thus branched out and distinguished by our law :

Bract. 134.
Stamf. 17.
Kelyng, 121.
& vide For-
tescue's
Pref. to Ab-
solute and
Limited Mo-
narchy, 59.
(a) The
amercement
was forty-
six marks.
Wilk. Sax.
Law, 280.

1. Into *murder*, which is usually defined the wilful killing of : person through malice prepense. And it is said, that anciently it signified only the private killing of a man, for which, by force of law, introduced by King *Canutus*, for the preservation of his *Danes*, the town or hundred, where the fact was done, was (a) amerced, unless it could be (b) proved, that the person slain was an *Englismen*, or unless they could produce the offender. And this law was provided to avoid the secret murder of the *Danes* who were hated by the *Englisch*, and oftentimes privately murdered by them.

(b) This proof was called *Englethire*, and was various according to the custom of several places, but most ordinarily it was by the testimony of two males, of the part of the father of him that was slain, and by two females of the part of the mother. Hal. Hist. P. C. 447.

Hal. Hist.
P. C. 450.
Hawk. P. C.
c. 31. § 2.

But this law having been abolished by 14 E. 3., the killing of any *Englismen* or foreigner, through malice prepense, whether committed openly or secretly, was by degrees called murder, and punished with death. But by the common law, as also by the statute of 25 E. 3. c. 4., clergy was promiscuously allowed, as well in case of murder as of homicide or manslaughter, before the statutes of 23 H. 8. c. 1., 25 H. 8. c. 3., 1 E. 6. c. 12., 5 & 6 Ed. 6. c. 10., by which clergy is taken away from murder *ex malitia praeconitata*.

1 Inst. 35.
Dalt. c. 94.
Hal. Hist.
P. C. 450.
Hawk. P. C.
c. 30. § 1.

2. *Manslaughter*, by which is understood such killing, as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all, and in which the offender is allowed his clergy, though be felony, and differ from murder only in degree and quality. Hence it is, that upon an indictment of murder, the party offending may be acquitted of murder, and yet found guilty of manslaughter, as is every day's practice. As it is done without premeditation, it is held, that there can be no accessories to it before the fact.

Hal. Hist.
P. C. 477.
Hawk. P. C.
c. 30. § 1.

3. Homicide *per infortunium*, or *chance-medley*, is, where a man doing a lawful act, without any intent of hurt, unfortunate chances to kill another ; and though this be not felony, yet, as the king hath lost a subject, and in order to make men the more careful of their actions, the law punishes the offender with the loss of his goods.

Hal. Hist.
P. C. 478.
Hawk. P. C.
c. 31.

4. Homicide *se defendendo* is, where one who has no other possible means of preserving his life from one who combats with him

on a sudden quarrel, kills the person, by whom he is reduced to such an inevitable necessity. And in this case, as in the former, the party forfeits his goods, though it be not felony.

Justifiable homicide is, 1st, Where, in defence of a man's house, he kills one who attempts to burn it, or to commit in it murder, robbery, or other felony. 2dly, Where, in defence of a man's person, he kills one who assaults him in the highway, with an intent to murder or rob him. 3dly, When the killing happens in the advancement and due execution of publick justice; and where a felon flies from those who endeavour to apprehend him, &c. And this is so far from being felony, that it causes no forfeiture whatsoever.

Hal. Hist.
P. C. 424.
Hawk. P. C.
c. 28.

But for the better understanding these several species of homicide, it will be necessary to consider,

(A) In what Cases a Man may be said to kill another.

(B) Who are such Persons, by killing of whom a Person may be said to commit Murder.

(C) What shall be deemed Murder: And herein,

1. Where it shall be said to be express Murder, and of Malice prepense.
2. Where the Malice shall be said to be implied, or by Presumption of Law: And herein,

1. *Where the Homicide being voluntarily committed; and without Provocation, the Law implies Malice.*
2. *When done on an Officer or Minister of Justice.*
3. *When done by Persons in the Execution of some other unlawful Act,*

(D) Of Manlaughter: And herein of Manlaughter exempt from Clergy by the Statute of 1 Jac. 1. c. 8.

(E) Of Justifiable Homicide: And herein,

1. As it happens in the due Execution and Advancement of Publick Justice.
2. As it happens in the Defence of a Man's Person, House, or Goods.

(F) Of excusable Homicide: And herein,

1. Of Homicide *per Infortunium*, or Chance-medley
2. Of Homicide *se Defendendo*.

(A) In what Cases a Man may be said to kill another.

3 Inst. 48.
Palm. 548.
Hal. Hist.
P.C. 433. 2.
1 Hawk.
P.C. c. 31.
§ 4.

AS there are as many ways of killing, as there are modes by which one may die, *moriendi mille figura*, it is laid down in general, that not only he, who by a wound or blow, or by poisoning, strangling, or famishing, &c. directly causes another's death; but also, in many cases, he, who by wilfully and deliberately doing a thing, which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him.

Crompt. 24.
b. Dalt.
c. 93.
Hal. Hist.
432. 1 Hawk. P. C. c. 31. § 6.

Hence, in the case of that unnatural mother, who left her child in an orchard covered only with leaves, in which condition it was struck by a kite, and died thereof, it was adjudged murder.

Crompt. 24.
b. Pult. 122.
Dalt. c. 93.
Hale's Hist.
432. 1 Hawk. P. C. c. 31. § 5.

So, in the case of that unnatural son, who carried his sick father, against his consent, in cold frosty weather from one town to another, by reason whereof he died.

Britt. c. 11.
§ 38.
Fitz. Indict-
ment, 3.
Lamb. 240.
Stamf. 36.
3 Inst. 52.
Palm. 548.
Hale's Hist.
456. — And
that there.

So, if by duress of imprisonment a prisoner die, it is murder in the gaoler. And this duress is said to be inflicted on every one, that by the usage of his keeper is brought nearer to death and further from life; and therefore it is said, not to be material whether it proceeds from the neglect and carelessness of the gaoler, or from any actual violence; and may be effected by confining the prisoner too closely in a noisome place, loading him with fetters, &c. (a)

fore where any person dies in gaol, the coroner ought to be sent for to inquire of the manner of his death. Hale's Hist. 432. [(a) A gaoler, knowing that a prisoner infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, *against his will*, in the same room. The second prisoner, who had not had the distemper, of which the gaoler had notice, caught the distemper, and died of it. This was holden to be murder in the gaoler. 2 Str. 856. Fost. Cr. L. 312. Another straitly confined his prisoner in a low, damp, unwholesome room, without allowing him the common necessities of chamber-pot, &c. for keeping things sweet and clean about him. The prisoner, having been long confined in this manner, contracted an ill habit of body, which brought on distempers, of which he died. This likewise was holden to be murder in the party guilty of the duress. 2 Str. 884. 2 Ld. Raym. 1578. Fost. Cr. L. 312.]

Stamf. 36.
3 Inst. 91.

So, where one, by duress of imprisonment, compels a man to accuse an innocent person, who on his evidence is condemned and executed; this is murder. *Nil refert an quis mortem inferat, aut causam mortis præbeat. Sed quære.*

Plow. 19. a.
Dalt. c. 93.
Hale's Hist.
434.

So, in judgment of law, a man may be said to kill one, who in truth is killed by another, or by himself; as, where a man incites a madman to kill himself, or another; or, where A. by force takes the arm of B., and the weapon in his hand, and therewith stabs C., whereof he dies; this is murder in A.

9 Co. 81.
Plow. 474.
Hale's Hist.
449.

So, if a man lays poison with an intent to kill one man, which is accidentally taken by another, who dies thereof; this is murder.

So, if a woman be with child, and a person give her a potion to destroy the child within her, and she take it, and it work so strongly that it kills her; this is murder.

Also, a person, who wilfully neglects to prevent a mischief, which he may, and ought, to provide against, is answerable for any ill consequences that may ensue his neglect: And on this foundation it is held by some opinions, that if a man have an ox, horse, &c. which he knows to be mischievous, by being used to gore or strike those who come near them, and he neglects to tie them up, by which they kill a person, that the owner may be indicted, as having himself feloniously killed him; which seems agreeable to the (a) *Jewish* law. But herein my Lord *Hale* lays down the following particulars, which, he says, seem to him to be agreeable to law:

Fitz. Coron.
311.
Stamf. 17.
Crompt. 24.
Hawk. P. C.
c. 31. § 8.

(a) Exod. c.
xxi. v. 29.

1. If the owner have notice of the quality of his beast, and it do any body hurt, he is chargeable with an action for it.

Hale's Hist.
430.

2. Though he have no particular notice that he did any such thing before, yet, if it be a beast that is *feræ nature*, as, a lion, a bear, a wolf, yea, an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage; as was adjudged in *Andrew Baker's* case, whose child was bit by a monkey that broke his chain and got loose.

Hale's Hist.
430.

3. And therefore in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows it, he must, at his peril, keep him up safe from doing hurt; for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages.

Hale's Hist.
430.

4. But as to the point of felony, if the owner have notice of the quality of the ox, &c., and use all due diligence to keep him up, yet the ox break loose, and kill a man; this is no felony in the owner, but the ox is a deodand.

Hale's Hist.
432.

5. But if he do not use that due diligence, but through negligence the beast go abroad, after warning or notice of his condition, and kill a man, it is manslaughter in the owner.

Hale's Hist.
432.

6. But if he did purposely let him loose, or wander abroad, with design to do mischief; nay, though it were with design only to fright people, and make sport, and it kill a man, it is murder in the owner; and this, he says, he had heard had been so ruled at the assizes held at *St. Albans*; but he adds, this is only a hearsay.

[Whether taking away the life of an innocent man by perjury in a course of legal proceeding amounts to murder?]

See Fost. C.
L. 131. 4B.
Comm. 190. note.

If a physician gives a person a potion, without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a surgeon.

Hale's Hist.
429.

But some hold, that if a person, not duly authorised to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony. But this opinion, says my Lord *Hale*, is erroneous; for physick and salves were before licensed physicians and surgeons; and therefore, if they be not licensed according to the statutes of 3 H. 8. c. 11., or 14 & 15 H. 8. c. 5., they are liable to the penalties in the statutes, but are not

Stamf. 16. b.
Pult. 22. b.
Crompt. 27.
43 E. 3.
31. b.
Fitz. Coron.
163. Hale's
Hist. 429.
Hawk. P. C.
c. 22. § 62.

guilty of murder or manslaughter. And herewith agreeth *Hawkins*, who says, that the charitable endeavours of those gentlemen, who study to qualify themselves to give advice of this kind, in order to assist their poor neighbours, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure. But as it is highly rash and presumptuous for unskilful persons to undertake matters of this nature, the law cannot well be too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed, without the manifest hazard of the lives of those that have to do with them.

Hale's Hist.
432.

If a person, who is infected with the plague, having a plague-sore running upon him, goes abroad to the intent to infect another, and another is thereby infected, and dies; this it seems is murder by the common law. But, if no such intention evidently appear, though *de facto* by his conversation another be infected, it is no felony by the common law, though it be a great misdemeanour.

Hale's Hist.
429.

If a man, either by working upon the fancy of another, or possibly by harsh or unkind usage, put another into such passion of grief or fear, that the party either die suddenly, or contract some disease, whereof he dies; though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God; yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offered, whereof the common law can take notice; and secret things belong to God.

Stamf. 21.
Dalt. c. 93.
Hawk. P.C.
79.

(a) Antiently a barbarous assault

But in all these cases it is agreed, that no person shall be adjudged, by any act whatever, to kill another, who doth not (a) die thereof within a year and a day after; in the computation whereof the whole day on which the hurt was done shall be reckoned the first.

with an intent to murder, so that the party was left for dead, but yet recovered again, was adjudged murder and petit treason; but that holds not now; for the stroke without the death of the party stricken, nor the death without the stroke, or other violence, makes not the homicide or murder. Hale's Hist. P. C. 425-6.

3 Inst. 53.
Kely. 26.
Keb. 17.

If a person hurt by another, die thereof within a year and a day, it is no excuse for the other, that he might have recovered, if he had not neglected to take care of himself.

Hale's Hist.
P. C. 428.

But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines, the party dies; if it can clearly appear that this medicine, and not the wound, was the cause of his death, it seems it is not homicide. But then that must appear clearly and certainly to be so.

(B) Who are such Persons, by killing of whom a Person may be said to commit a Murder.

IT is agreed, that the malicious killing of any person, whatsoever (a) nation or religion he be of, or of whatsoever (b) crime attained, is murder. Hawk. P. C. c. 31. § 15.
 many within this kingdom, yet it is felony; unless it be in the heat of war, and in the actual exercise thereof. Hal. Hist. P. C. 433. (b) Though outlawed of felony, or attained in a *premnire*, for the execution of the sentence must be by a lawful officer, lawfully appointed; and therefore, if a person be condemned to be hanged, and the sheriff behead him, this is murder, and the wife may have an appeal. Hale's Hist. P. C. 433. (a) If a man kill an alien

If a woman be quick or great with child, if she take, or another give her, any potion to make an abortion, or, if a man strike her, whereby the child within her is killed; it is not murder nor manslaughter by the law of *England*, because it is not *in rerum natura*, and it cannot be legally known whether it was killed or not; though it be a great crime, and by the judicial law of *Moses*, was punishable with death. So, (c) if, after, such child were born alive and baptized, and after die of the stroke given the mother, this is not homicide. Hale's Hist. P. C. 433. (c) But this per Hawkins is clearly murder, notwithstanding some opinions to the contrary.

But, if a man procure a woman with child to destroy her infant when born, and the child be born, and the woman, in pursuance of that procurement, kill the infant; this is murder in the mother, and the procurer is accessory to murder; and this, whether the child were baptized or not. Hawk. P. C. 7 Co. 9. Dyer, 186. Hale's Hist. P. C. 433. Hawk. P. C. c. 31. § 17.

(C) What shall be deemed Murder: And herein,

1. What shall be said to be express Murder, and of Malice prepense.

HEREIN it seems to be agreed, that any (d) formed design of doing mischief may be called malice; and therefore, that not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be a malice prepense. Hawk. P. C. 80. (d) My Lord Hale defines malice in fact to be a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized; and the evidences of such a malice, says he, must arise from external circumstances discovering that inward intention; as, lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various, according to variety of circumstances. Hale's Hist. P. C. 451.

If two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder; and this the law adjudges to be of malice, and that the party cannot help himself by alleging, that he was first struck by the deceased, or that he often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent Roll. Rep. 360. 2 Bulst. 147. Crompt. 22. b. 1 Hawk. P. C. c. 31. § 21. Fost.

Cr. L. 297. to vindicate his reputation; or that he meant not to kill, but only
 (a) By reason of the countenance they give, and it being done by compact and agreement. But this construction is said to be too rigid; and that it would be hard to make a man, by such reasoning, the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in his quarrel. 1 Hawk. P. C. c. 31. § 31. Hale's Hist. P. C. 453.

Keil. 56.
 Sid. 177.
 Lev. 180.
 Oneby's case, 2 Str. 773. 2 Ld. Raym. 1489.

A man is esteemed to fight in cool blood, when he meets in the morning on an appointment over night; or in the afternoon, on an appointment in the morning; or, as some say, if he fell into other discourse after the quarrel, and talked calmly upon it; or, if he have so much consideration as to observe, that it is not proper or safe to fight at present, for such and such reasons, which shew him to be master of his temper.

Mason's case, Fost. Cr. L. 132.

[*A.* and *B.*, two brothers, were at play together; they then wrestled; afterwards cudgelled: *A.* gave *B.* a smart stroke; *B.* grew angry, threw away his cudgel: they fought in earnest, and were parted. *A.* went away angry, threatening to fetch something and stick *B.* He went home, took off a thin coat, and put on a thick one, returned with a sword concealed under his coat, drew on a discourse of the quarrel, and offered to cudgel, if *B.* would keep off his hands. *B.* went to him, and took up the cudgel which *A.* dropped, and gave him two blows on the shoulders. *A.* drew out the concealed sword, said, "Stand off, or I'll stab you," thrust at, but missed him. *B.* went back, *A.* shortened his sword, leaped towards *B.*, stabbed him, and killed him. This was adjudged murder.]

Hawk. P. C. c. 31. § 24.

If *A.* on a quarrel with *B.* tell him he will not strike him, but that he will give *B.* a pot of ale to strike him, and thereupon *B.* strike, and *A.* kill him, he is guilty of murder; for he shall not elude the justice of the law by such a pretence to cover his malice.

Hawk. P. C. c. 31. § 25.
 Hale's Hist. P. C. 453.

In like manner, if *B.* challenge *A.*, and *A.* refuse to meet him, but, in order to evade the law, tell *B.* that he shall go the next day to such a town about his business; and accordingly *B.* meet him the next day in the road to the same town, and assault him, whereupon they fight, and *A.* kill *B.*, he seems guilty of murder; unless it appear by the whole circumstances that he gave *B.* such information accidentally, and not with a design to give him an opportunity of fighting.

Crompt. 22.
 b. Dalt.
 c. 93. Keil. 58. 129.

And at this day it seems settled, that if a man assault another with malice prepense, and after he driven by him to the wall, and kill him there in his own defence, he is guilty of murder, in respect of his first intent.

Kelyng, the Queen v. Mawbridge. Hawk. P. C. c. 31. § 27.
 Fost. Cr. L. 295. 6.

And it hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any words or gestures of another, so as to make a push at him with a sword, or to strike at him with any such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made

made such assault kills the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he shewed that he intended not to fight with him, but to kill him; which violent revenge is no more excused by such a slight provocation; than if there had been none at all.

But it is said, that if he, who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him and kill him, he is guilty of manslaughter only; because that by neglecting the opportunity of killing the other, because he was on his guard, and in a condition to defend himself, with like hazard to both, he shewed that his intent was not so much to kill as to combat with the other, in compliance with those common notions of honour, which prevailing over reason, during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice prepense.

Keil 55. 62.
131.
Hawk. P.C.
c. 31. § 22.

And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kill the other, he is guilty of manslaughter only, because he did it in the heat of blood.

Hawk. P.C.
c. 31. § 29.

And such an indulgence is shewn to the frailties of human nature, that where two persons, who have formerly fought on malice, afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole (a) circumstances of the fact.

Hawk. P.C.
c. 31. § 30.
(a) If upon circumstances it appears, that the reconciliation was

pretended, or counterfeit, and that the hurt done was upon the score of the old malice, then it is murder. Hale's Hist. P. C. 452.

[Three Scotch soldiers were drinking together in a publick house; some strangers, who were sitting in the next box, used several opprobrious epithets, and reviled the character of the Scotch nation; whereupon one of the soldiers struck one of them with a small rattan cane. An altercation ensued; and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle. The altercation increased; and when the soldier had paid his reckoning, the stranger again shoved him from the room into the passage. Upon this, the soldier exclaimed, that "he did not mind killing an Englishman more than eating a mess of crowdy." The stranger, assisted by another person, then violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged manslaughter.

Rex v. Taylor, 5 Barr. 2794.

A quarrel arose between several soldiers, and a number of keelmen: one of the soldiers, to protect himself and his comrades from the assaults of the mob, drew his sword, and mistaking a person passing by for one of the keelmen, struck him on the head with his sword, of which blow he died. This was adjudged manslaughter.

Brown's case. Leach's Cases, 135.

A. and B. suddenly quarrelled: upon some provoking language B. seized A. by the collar; a fight ensued; they both fell to the ground;

Snow's case, Id. 138.

ground; and while struggling on the ground, *B.* received a mortal wound from a knife which *A.* held in his hand. This also was adjudged manslaughter.]

Hawk. P.C. c. 31. § 33, 34. and several authorities there cited. If a man be so far provoked by a breach of promise, or by a trespass on his lands or goods, or by any words or gestures whatsoever, as thereupon immediately to push at another with a sword, or strike him with a dangerous weapon before his sword is drawn, and thereupon a fight ensue, and the person assaulted be slain, the assailant is guilty of murder, though he was driven to the wall when he gave the mortal wound; for by assaulting the other in such abusive manner, he shews that his intent was not to fight with him, but to kill him. But if he had made no pass till the other's sword had been drawn, or had only beaten him, in such manner as made it appear that he meant only to chastise him, he would have been guilty of manslaughter only.

Hawk. P.C. c. 31. § 35. So, if a person, seeing two others fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other, it is but manslaughter.

Hawk. P.C. c. 31. § 36. So, if two strive for the wall, and one happen to kill the other, or a man happen to kill another, who, claiming a title to his house, attempts forcibly to enter it, &c., or to kill one who endeavours unlawfully to arrest him; or to force him from his possession of a room in a publick house; or, if a man immediately kills one whom he finds in bed with his wife; or that pulls him by the nose; or fillips him in the forehead, or actually strikes him; in all these cases, the party is, at most, only guilty of manslaughter.

12 Co. 87. So, where *A.* the son of *B.*, and *C.* the son of *D.*, fall out in the field, and fight, *A.* is beaten, and runs home to his father all bloody, *B.* presently takes a (*a*) staff, runs into the fields, being three quarters of a mile distant, and strikes *C.* that he dies; this is not murder in *B.*, because done in a sudden heat and passion. *12 Co. 87.* according to Croke's report, a *small cudgel*, and according to Godbolt's, a *rod*. "It may be fairly collected," saith Sir Mr. Foster, "from Croke's manner of speaking, [and Godbolt's reports,] that the accident happened by a *single stroke* with a cudgel *not likely to destroy*, and that death did not immediately ensue." The words of Croke are, "*Rowley struck the child with a small cudgel, of which stroke he afterwards died.*" The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. Observe that Lord Raymond (Ld. Raym. 1498.) layeth great stress on this circumstance, *that the stroke was with a cudgel not likely to kill!* Fost. Cr. L. 295.]

Hawk. P.C. c. 31. § 38, 39. If a person in cool blood, by way of revenge, deliberately beat another in such a manner that he dies of it; or, if a man, upon a sudden provocation, execute his revenge in such a manner as shews a cruel and deliberate intent of doing a personal hurt, he is guilty of murder; as (*b*), where the keeper of a park, finding a boy stealing wood, tied him to a horse's tail, and beat him, whereupon the horse ran away, and killed him.

1 Hale's Hist. P. C. 454. S. C. cited and agreed; because the correction was excessive, and it was an act of deliberate cruelty.

Fost. Cr. L. 292. [There being an affray in the street, one *Stedman* a foot-soldier ran hastily towards the combatants. A woman seeing him run in that manner cried out, "You will not murder the man, will you?" *Stedman* replied, "What is that to you, you bitch?" The woman thereupon

thereupon gave him a box on the ear, and *Siedman* struck her on the breast with the pommel of his sword. The woman then fled, and *Siedman* pursuing her stabbed her in the back. *Holt* was at first of opinion, that this was murder, *a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear*; and it was proposed to have the matter found specially. But it afterwards appearing in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter.

The smart of the man's wound, and the effusion of blood, might possibly keep his indignation boiling to the moment of the fact.

Mr. *Lutterel*, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as *Lutterel* pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, which *Lutterel* refused to give; and he went up stairs pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, *He did not intend to hurt the officers, but he would not be ill-used*. The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising, *Lutterel* struck one of the officers on the face with a walking-cane, and drew a little blood. Whereupon both of them fell upon him, one stabbed him in nine places, *he all the while on the ground begging for mercy, and unable to resist them*; and one of them fired one of the pistols at him while on the ground, and gave him his death's wound. This is reported to have been holden manslaughter by reason of the first assault with the cane.]

Rex v. Tranter, 1 Str. 499. This is the case as reported by Sir John Strange; and an extraordinary case it is, that all these circumstances of aggravation, two to one, he helpless and on the ground begging for mercy, stabbed in nine places, and then dispatched

with a pistol; that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane. But in the printed trial (6 St. Tr. 195.) there are some circumstances stated, which are entirely dropped, or very slightly mentioned by the reporter:—1. Mr. *Lutterel* had a sword by his side, which, after the affray was over, was found drawn and broken. How that happened did not appear in evidence; for part of the affray was at a time when no witness was present, nobody spoke to the whole. 2. When *Lutterel* laid the pistols on the table, he declared that he brought them down, *because he would not be forced out of his lodgings*. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol-shot, (for both the pistols were discharged in the affray,) and slightly on the wrist by some sharp-pointed weapon; and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching *Lutterel's* begging for mercy was not, that he was on the ground *begging for mercy*; but that on the ground he held up his hands *as if he was begging for mercy*. The Chief Justice directed the jury, that if they believed Mr. *Lutterel* endeavoured to rescue himself, which he seems to think was the case, and very probably was the case, it would be justifiable homicide in the officers. However, as Mr. *Lutterel* gave the first blow accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done, if the debt had not been paid, or bail given, he declared it could be no more than manslaughter. Fost. Cr. L. 293.

2. Where the Malice shall be said to be implied, or by Presumption of Law : And herein,

1. *Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.*

Hale's Hist. P. C. 445. Herein it is laid down, that when one voluntarily kills another, without any provocation, it is murder; for the law presumes it to be malicious, and that he is *hostis humani generis*; and therefore it is necessary for him, who happens to kill another, to shew such a provocation as will take off the presumption of malice.

Hale's Hist. P. C. 455. He that wilfully gives poison to another, whether he had provoked him or not, is guilty of wilful murder; because it is an act of deliberation odious in law, and presumes malice.

Hale's Hist. P. C. 445. If *A.* comes to *B.*, and demands a debt of him; or comes to serve him with a *subpœna ad respondendum*, or *ad testificandum*, and *B.* thereupon kills *A.*, this is murder; for herein there is no provocation.

Cro. Elie. 778. Brain's case. Hale's Hist. P. C. 455. cited. *Watts* came along by the shop of *Brains*, and distorted his mouth, and smiled at him: *Brains* kills him; it is murder; for it was no such provocation as would abate the presumption of malice in the party killing.

Hale's Hist. P. C. 455, 456. If *A.* be passing the street, and *B.* meeting him, there being a convenient distance between *A.* and the wall, take the wall of *A.*, and thereupon *A.* kill him, this is murder. But if *B.* had justled *A.*, this justling had been a provocation, and would have made it manslaughter. And so it would be, if *A.* riding on the road, *B.* had whipped the horse of *A.* out of the track, and then *A.* had alighted, and killed *B.*, it had been manslaughter.

Hawk. P. C. b. 31. § 33. It seems agreed, that no affront by bare words or gestures, however slighting, or however false and malicious they may be, and aggravated by the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life. But if *A.* gives indecent language to *B.*, and *B.* thereupon strikes *A.*, but not mortally, and then *A.* strikes *B.* again, and then *B.* kills *A.*, this is but manslaughter; for the second stroke made a new provocation; and so it was but a sudden falling out. And though *B.* give the first stroke, and, after a blow received from *A.*, *B.* gives him a mortal stroke; this is but manslaughter, according to the proverb, *The second blow makes the affray.*

Hale's Hist. P. C. 456. *A.* and *B.* are at some difference; *A.* bids *B.* take a pin out of the sleeve of *A.*, intending thereby to take occasion to strike or wound *B.*, which *B.* doth accordingly, and then *A.* strikes *B.*, whereof he died; this was ruled murder; 1. Because it was no provocation, when he did it by the consent of *A.* 2. Because it appeared to be a malicious and deliberate artifice, thereby to take occasion to kill *B.*

Hale's Hist. P. C. 457. *A.* and *B.* are at some difference; *A.* bids *B.* take a pin out of the sleeve of *A.*, intending thereby to take occasion to strike or wound *B.*, which *B.* doth accordingly, and then *A.* strikes *B.*, whereof he died; this was ruled murder; 1. Because it was no provocation, when he did it by the consent of *A.* 2. Because it appeared to be a malicious and deliberate artifice, thereby to take occasion to kill *B.*

If there be chiding between husband and wife, and the husband strike his wife thereupon with a pestle, that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter.

Hale's Hist. P. C. 457.

It is said, that if a person happen to occasion the death of another unadvisedly, doing an idle wanton action, which cannot but be attended with the manifest danger of some other, as by riding with a horse, known to be used to kick, among a multitude of people, by which he means no more than to divert himself, by putting them into a fright; he is guilty of murder.

Hawk. P. O. c. 31. § 68.

2. When done on an Officer or Minister of Justice.

It hath been adjudged, and hath frequently been agreed, that if a justice of peace, constable, watchman, &c. be killed in the execution of their offices, he, by whom any such person is killed, is guilty of murder; for herein the law implies malice; and the indictment need not be special, but general, *Ex malitia sua premeditata interfecit & murtheravit*; because the malice in law maintains the indictment.

9 Co. 68.

4 Co. 40.

Cromp. 25.

3 Inst. 52.

Savil. 67.

Keil. 66.

Hawk. P. C.

c. 31. § 48.

Hale's Hist. P. C. 457.

So, if (a) a private person be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; and he cannot excuse himself by alleging, that what he did was in a sudden affray, in the heat of blood, and through the violence of passion. But, if such person do not give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel, but to appease it; he who kills him, is guilty of manslaughter only.

Keil. 66.

Hawk. P. C.

c. 31. § 48.

(a) Killing

the assistant

of the constable

is as well murder

as the killing

of the constable

himself; &c.

those who come to the constable's assistance, though not specially called thereunto, are under the same protection, as they that are called to his assistance by name. Hale's Hist. P. C. 463.

Hawk. P. C.

c. 31. § 53.

Whoever kills a sheriff, or any of his officers, in the lawful execution of a civil process, as, on arresting a person, a *capias*, &c. is guilty of murder.

Hawk. P. C.

c. 31. § 56.

Nor is it any excuse to such person, that the process was erroneous (b), (for it is not void by being so,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance,) or that the officer did not shew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one.

[(b) If the

process, be

it by writ of

warrant, be

not defective

in the

frame of it;

and issue in

the ordinary

course of justice from a court or magistrate having jurisdiction in the case; though there may have been error or irregularity in the proceeding previous to the issuing of the process, yet, if the officer or other minister be killed in the execution of it, this will be murder. And therefore if a *capias ad satisfaciendum*, *sen facias*, writ of assistance, or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without shewing the judgment or decree. So ruled by Lord Hardwicke, in the case of one Rogers, at the summer assizes in Cornwall in the year 1735. Foxt. Cr. L. 311. — In the case of a warrant from a justice of the peace, in a matter wherein he hath jurisdiction, the person executing such warrant is under the special protection of the law; though such warrant may have been obtained by gross imposition on the magistrate, and by false information touching matters suggested in it.

Curtis's

Curtis's case, Fost. Cr. L. 135.—An attachment issued out of the county court, and signed by the county clerk in his own cause, is legal process; and if the officer be resisted and killed in the execution of it, it will be murder. **Baker's case**, Leach's Cases, 106.]

Hawk. P.C. s. 31. § 57. But, where the warrant, by which he acts, gives him no authority to arrest the party; as (*a*), where a bailiff arrests *J. S.* baronet, who never was knighted, by force of a warrant to arrest *J. S.* knight, it is but manslaughter.

§ 57. (a) So, if the name of the bailiff, plaintiff, or defendant be interlined, or inserted after the sealing thereof, by the bailiff himself, or any other; if such bailiff be killed it is but manslaughter. Hal. Hist. P. C. 457.—So, if the process be executed out of the jurisdiction of the court, the killing of the officer is only manslaughter. 1 Hal. Hist. P. C. 458.—The constable of the vill of *A.*, comes into the vill of *B.*, to suppress some disorder, and in the tumult the constable is killed in the vill of *B.*, this is only manslaughter, because he had no authority in *B.*, as constable. Hal. Hist. P. C. 459.—But it seems, that if the constable of the vill of *A.*, had a particular precept from a justice of peace directed to him by name, or by the name of the constable of *A.*, to suppress a riot in the vill of *B.*, or to apprehend a person in the vill of *B.* for some misdemeanor, and within the jurisdiction and countenance of the justice of peace, and, in pursuance of that warrant, he go to arrest the party in *B.*, and in execution of his warrant is killed in *B.*, this is murder; for though, in such case, the constable was not bound to execute the warrant out of his jurisdiction; neither could he do it singly, *virtute officii*, as constable of *A.*, yet he may do it as bailiff or minister, by virtue of the warrant, and the killing of him is murder, as well as if he had been constable of the hundred wherein *A.* and *B.* lie; or sheriff of the county; for a justice of the peace may, for a matter within his jurisdiction, issue his warrant to a private person as servant, but then such person must shew his warrant, or signify the contents of it. Hal. Hist. P. C. 459.

Hale's Hist. P. C. 460.

And as to the point of notice, it is herein further laid down by my Lord *Hale*, that if he be a bailiff, constable, or watchman, *juris & comus*, the killing of him is murder, though the party does not know him to be such; also it is not necessary for him to notify himself to be such by express words; but it shall be presumed that the offender knew him.

Hal. Hist. P. C. 461.

But, if he be a private bailiff, either the party must know that he is so, or there must be some such notification thereof whereby the party may know it; as by saying, *I arrest you*, which is of itself sufficient notice; and it is at the peril of the party, if he kill him after these words, or words to that effect pronounced; for it is murder, if *de facto* it fall out that he were a bailiff, and had a warrant.

Hal. Hist. P. C. 462.

A constable coming to appease a sudden affray in the day-time, in the village whereof he is constable, it seems every man, *ex officio*, is bound to take notice that he is the constable, because he is to be chosen and sworn in the leet, where all residents are to attend; but it is not so in the night-time, unless there be some notification that he is the constable.

Hal. Hist. P. C. 461.

But whether it be in the day or night, it is sufficient notice, if he declare himself to be the constable, or command the peace in the king's name; and the like for any who come in his assistance, or for a watchman, &c., and therefore, if any of them are killed after such notification, it is murder in them that kill him.

Hal. Hist. P. C. 465.
Hugget's case, 25th April 1666, at Newgate, Kel. 59.137.

A press-master seized *B.* for a soldier, and with the assistance of *C.* laid hold on him; *D.* finding fault with the rudeness of *C.*, there grew a quarrel between them, and *D.* killed *C.* By the advice of all the judges, except very few, it was ruled, that this was but manslaughter.

[Where

[Where an officer on the impress service, *fired in the usual manner* at the halliards of a boat, in order to *bring her to*, and happened to kill a man, this was adjudged to be only manslaughter.

Rex v. Philips, Cowp. 830.

A captain of a ship had a prels-warrant, directing *that no person but a commissioned officer was to be intrusted with the execution of it*; and his name to be inserted on the back of it. The captain appointed his lieutenant to execute it, and sent his boat with some of the crew to prels, but the lieutenant staid in the ship. The boat's crew some leagues off boarded a ship, and attempted to prels, when one of them was killed. This was ruled to be only manslaughter, for they did not act according to the warrant.]

Broadfoot's case, Fort. Cr. L. 154.

If a legal warrant be executed in an unlawful manner; as, if a bailiff be killed in breaking open a door or window to arrest a man; or, perhaps, if he arrest one on a *Sunday* (a), since the statute 29 Car. 2. c. 7. by which all such arrests are made unlawful, and he be killed; this is but manslaughter.

Hawk. P.C. c. 31. § 58. (a) This had been murder before the statute. Hal. Hist. P. C. 457.

[So, where a peace officer about to take a man to prison under a warrant, which turned out to be illegal, was killed in the attempt by a woman whom the man kept, this was adjudged to be only manslaughter.]

Mary Adey's case, Leach's Cases, 188.

3. When done by Persons in the Execution of some other unlawful Act.

It seems agreed, that wherever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as, where a person, shooting at tame fowl with an intent to steal them, accidentally kills a man; this is murder.

Kelyng, 117. Dalt. c. 93. Moor, 87. Plow. 101.

So, if A. come to rob B. in his house, or upon the highway, or otherwise, without any precedent intention of killing him; yet, if in the attempt, either without, or upon the resistance of B., A. kill B., this is murder.

3 Inst. 52. Hal. Hist. P. C. 465.

So, if men come to steal deer in a park or forest, or to rob a warren of conies, and the parker, forester or warrener resists, and is killed, this is murder.

Hal. Hist. P. C. 465.

And not only in such cases, where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also, where it any way occasionally causes such a misfortune, it makes him guilty of murder. And such was the case of the husband, who gave a poisoned apple to his wife, who eat not enough to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child, who died thereof. Such also was the case of the wife, who mixed ratifbane in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation tasted it himself, having first stirred it about. Neither is it material in this case, that the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for inasmuch as a murderous intention,

Plow. 473. 9 Co. 81. Hawk. P.C. c. 31. § 42.

tion, which of itself perhaps, in strictness, might justly be punished with death, proves now, in the event, the cause of the king's losing a subject, it shall be as severely punished, as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power.

Hal. Hist.
P. C. 466.

So, if *A.*, by malice forethought, strikes at *B.*, and missing him strikes *C.*, whereof he dies; though he never bore any malice to *C.*, yet it is murder, and the law transfers the malice to the party slain.

Savil, 67.
Moor, 86.
Palm. 35.
Crom. 24.
Dyer, 128.
5 Mod. 289.
Hawk. P. C.
c. 31. § 46.

If divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as, by committing a violent disseisin with great numbers of people, hunting in a park, &c., and in so doing happen to kill a man, they are all guilty of murder; for they must, at their peril, abide the event of their actions, who wilfully engage in such bold disturbances of the publick peace in open opposition to, and defiance of the justice of the nation.

Crom. 28.
Hawk. P. C.
c. 31. § 47.

Yet, where divers rioters, having forcibly possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason (says *Hawkins*), because the person slain was so much in fault himself.

Hawk. P. C.
c. 31. § 48.

But, if in such case, or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable or watchman, or even a private person be slain in endeavouring to keep the peace, and suppress the affray, he who kills him is guilty of murder; for though it was not his primary intention to commit a felony, yet, inasmuch as he persists in a less offence with so much obstinacy, as to go on in it to the hazard of the lives of those, who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems to be in this respect equally criminal, as if his intention had been to commit a felony.

1 Hal. Hist.
P. C. 475.

If *A.* throw a stone with an intent to kill the poultry or cattle of *B.*, and the stone hit and kill a by-stander, it is manslaughter, because the act was unlawful; but not murder, because he did it not maliciously, or with an intent to hurt the by-stander.

Hal. Hist.
P. C. 475.

And though by the statute 33 H. 8. c. 6. no person not having lands, &c. of the yearly value of 100 *l.* per ann. may keep, or shoot in a gun, upon pain of forfeiting 10 *l.*, yet, if a person not qualified shoots with a gun at a bird or at crows, and by mischance it kills a by-stander, by the breaking of the gun, or some other accident that, in another case, would have amounted only to chance-medley; this will be no more than chance-medley in him; for though the statute prohibit him to keep or use a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not enhance the effect beyond its nature.

If a man, knowing that people are passing along the street, throws a stone, or shoots an arrow over the house or wall, with an intent to do hurt to people, and one is thereby slain, this is murder; and if it were without such intent, yet it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful. But if the man were tiling an house, and let fall a tile knowingly, and gave warning, and yet a person be killed, this is *per infortunium*; but if he gave not convenient warning, it is manslaughter, *quia non adhibuit debitam diligentiam* *.

he should cry out first, it is manslaughter. See Hull's case, 1664. Kel. 40.

Hal. Hist. P. C. 475. * This is upon supposition, that the house do not stand near an highway or place of resort, for then, though

(D) Of Manslaughter: And herein of Manslaughter exempt from Clergy by the Statute of 1 Jac. 1. c. 8.

Manslaughter, or simple homicide (a), is the voluntary killing of another without malice exprefs or implied, and differs not, in substance of the fact, from murder, but only differs in these ensuing circumstances.

Hal. Hist. P. C. 466. (a) By manslaughter is understood such killing

as happens either on a sudden quarrel, or in the commission of any unlawful act, without any deliberate intention of doing mischief. Hawk. P. C. c. 30. § 1.

1. In the degree of the offence, murder being aggravated with malice presumed or implied, but manslaughter not; and therefore in manslaughter there can be no accessories before. 2. In the form of the indictment, the former being always *felonice ex malitia praecogitata interfecit & murtheravit*, the latter only *felonice interfecit*. 3. In the point of clergy (b), murder being by the statute of 23 H. 8. c. 1. exempt from the benefit of clergy, but not manslaughter. 4. In the form of the pardon of murder; for though at common law a pardon of all felonies had pardoned murder, yet, by the statute of 13 Rich. 2. c. 1. the pardon of murder must either be by the exprefs word of *murder*, or it must be a pardon of *felonice interfectio*, with a special *non obstante* of the statute of 13 Rich. 2.

Hal. Hist. P. C. 466-7. [(b) The punishment of murder, and that of manslaughter, were originally one and the same; both having the benefit of clergy: So that none but unlearned persons, who least

knew the guilt of it, were put to death for this enormous crime. But now, by several statutes, 23 H. 8. c. 1., 1 Edw. 6. c. 12., 4 & 5 P. & M. c. 4., the benefit of clergy is taken away from murderers through malice prepenſe, their abettors, procurers, and counsellors. It is also enacted by stat. 25 G. 2. c. 37. that the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it, and shall, in passing sentence, direct him to be executed the next day but one, (unless the same shall be Sunday, and then on the Monday following,) and that his body be delivered to the surgeons to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in nowise to be buried without dissection. And during the short, but awful, interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause, to respice the execution, and relax the other restraints of this act. 4 Bl. Comm. 200. Fost. 207. 141.]

But there is a particular kind of manslaughter from which the benefit of clergy is taken away by the (c) 1 Jac. 1. c. 8. "Where any person shall stab or thrust any person or persons, that hath not then any weapon drawn, or that hath not then first stricken the party that shall so stab or thrust, so as the person or persons, so stabbed or thrust, shall thereof die within the space of six months

[This statute was made at a criticaltime, and, as tradition hath it, upon a very special

occasion. It is supposed to have been principally intended to put an effectual stop

to outrages then frequently committed by persons of inflammable spirits and deep resentment; who, wearing short daggers under their clothes, were too well prepared to do quick and effectual execution upon provocation extremely slight. *Fost. Cr. Law, 297.*] (c) It is generally holden, that this statute is but declarative of the common law. *Bulf. 87. Keilyng, 55. Hawk. P. C. c. 30, § 5.* ["Whether it was merely a declaratory law," saith Sir M. Foster, "I will not take upon me to determine. But certain it is, that though the words descriptive of the offence are very general, probably in *terrorum*, yet in the construction of the statute the circumstances which at common law will serve to justify, excuse, or alleviate in a charge of murder, have always had their due weight in prosecutions grounded on the statute." *Fost. Cr. Law, 298.*]

In the construction of this statute, the following opinions have been holden:

Jon. 240.
3 Lev. 266.
Hawk. P. C. c. 30, § 6.
Allen, 44.
Salk. 542.
pl. 2.
Hawk. P. C. c. 30, § 7.
Hal. Hist. P. C. 468.

That wherever a person, who happens to kill another, was struck by him in the quarrel before he gave the mortal wound, he is out of the statute, though he himself gave the first blow.

That he only who actually gives the stroke, and not any of those who may be said to do it by construction of law, as being present and aiding and abetting the fact, are within the statute; from whence it follows, that if it cannot be proved by whom the stroke was given, none can be found guilty within the statute. But the indictment, though formed specially upon the statute, and concluding *contra formam stat.* is yet a good indictment of manslaughter against them that were present aiding and abetting; and upon such a special indictment of manslaughter upon the statute, the prisoner may be convicted of simple manslaughter, and acquitted of manslaughter upon the statute, and the indictment serves for a common manslaughter, as well as a man upon an indictment of murder may be acquitted of murder, and convicted of manslaughter.

Jon. 432.
3 Lev. 266.
Hawk. P. C. c. 30, § 7.
(a) If the stabbing or thrusting were with a sword or with a pike-staff, it is within the statute; but if by a shot of a pistol, blow with a sword or staff, quare, Hal. Hist. P. C. 470.
(b) So, if the party slain had a cudgel in his hand, it is a weapon drawn within this statute; but this must be intended of such a cudgel as might probably do hurt, not a small riding rod or cane. Hal. Hist. P. C. 470.

That the killing of a man with a (a) hammer, or such like instrument, which cannot come properly under the words *thrust* or *stab*, is not a killing within the statute. But it seems that the discharging a (b) pistol, or throwing a pot, or other dangerous weapon at the party, is within the equity of the words *having a weapon drawn*; for penal statutes are construed strictly, and favourably, and equitably for the subject.

Hal. Hist. P. C. 463.

The indictment to oust the prisoner of his clergy, must be specially formed pursuant to the statute, *viz.* that he did with a sword, &c. stab the party dead; he having no weapon drawn, nor having struck first; otherwise it will be but a common manslaughter, and the party will have his clergy.

Styl. 86.
Hal. Hist. P. C. 463.

The indictment need not conclude *contra formam statuti*, no more than in burglary or robbery; for the statute doth not make the

the offence to be felony, but ousts the prisoner of his clergy, where the crime is so circumstanced as the statute expresseth.

But yet it doth not vitiate the indictment, though it do conclude *Et sic interfecit contra formam statuti*, and accordingly, for the most part, to this day the indictments upon this statute do conclude *contra formam statuti*. So, it is good with or without such conclusion; but it is best to follow the common usage, because every man doth not readily observe the reason of the omission of that conclusion.

Cro. Jac.
283. Hal.
Hist. P. C.
468.

Also, the use hath been, in cases of this nature, to prefer two indictments against offenders in this kind, viz. one of murder, another upon this statute, and put the prisoner to plead to both; and to charge the jury first with the indictment of murder, and if they find it not to be murder, then to charge them to inquire upon the other bill; because, if convicted upon either, the offender is ousted of clergy.

Hal. Hist.
P. C. 468.

In the year 1657, at *Newgate*, before *Glyn*, who then sat as Chief Justice, a man was indicted upon this statute, and a special verdict found, that a bailiff, having a warrant to arrest a man, pressed early into his chamber, with violence, but not mentioning his business. The man not knowing him to be a bailiff, or that he came to make an arrest, snatched down a sword that hung in his chamber, and stabbed the bailiff, whereof he presently died. There was some diversity of opinion among the judges, whether this were within the statute; but at length the prisoner was admitted to his clergy; for though this case was within the words of the statute, and not within the particular exceptions, yet it was held, that this case was never intended in the statute; for the prisoner did not know but that the party came in to rob or kill him, when he thus violently broke into his chamber, without declaring his business.

Hal. Hist.
P. C. 470.

[Upon an outcry of thieves in the night-time, a person, who was concealed in the closet, but no thief, was, in the hurry and surprise the family was under, stabbed in the dark. This was holden to be an innocent mistake, and ruled chance-medley. Possibly, observes Sir *M. Foster*, it might have been better ruled manslaughter at common law, due circumspection not having been used; but it was not manslaughter within the statute.]

1 Hale, 42.
474. Cro.
Car. 538.
Sir Wm.
Jones, 429.
Fost. Cr.
law, 299.

(E) Of justifiable Homicide: And herein,

1. As it happens in the due Execution and Advancement of publick Justice.

SUCH killing as happens in the due execution and advancement of publick justice, is deemed justifiable homicide; the ministers of justice being under the special protection of the law; and therefore, if a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own (a) defence, or fly, so that he cannot possibly be apprehended alive

22 Aff. 55.
Bro. Coron.
87. 89.
Stamf. 13.
3 Inst. 2. 1.
Dait. c. 98.
Crompt. 30.
Fitz. Coron.

192. 258. by those who pursue him, whether private persons or publick officers, with or without a warrant from a magistrate, he may be lawfully slain by them.

Hale's Hist. P. C. 489.
Hawk. P. C. c. 28. § 11. (a) But, if the prisoner makes no resistance, but flies, and the officer, being fearful, lest the prisoner should escape, strikes him, whereof he dies, this is murder. Hale's Hist. P. C. 481. For here was no assault first made by the prisoner, and so it cannot be *se defendendo* in the officer.

Hawk. P. C. c. 28. § 12. So, if an innocent person be indicted of felony, where, in truth, no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose; he may lawfully be killed by him, if he cannot otherwise be taken; for there is a charge against him on record, to which, at his peril, he is bound to answer.

9 Co. 68. So, if a prisoner, endeavouring to break the gaol, assault his
Hal. Hist. P. C. 481. gaoler, he may lawfully be killed by him in the affray.

Hawk. P. C. c. 28. § 14. So, if those who are engaged in a riot, or forcible entry, or detainer, stand in their defence, and continue the force, in opposition to the command of a justice of peace, &c., or resist such justice endeavouring to arrest them, the killing of them may be justified; and so, perhaps, may the killing of dangerous rioters by any private person, who cannot otherwise suppress them, or defend himself from them; inasmuch as every private person seems to be authorized by the law to arm himself for the purposes aforesaid.

Crompt. 30. So, if trespassers in a forest, chase, park, or warren, or any
Dyer, 326. inclosed ground, wherein deer are kept, will not render themselves
Hawk. P. C. c. 28. § 15. to the keepers, upon an hue and cry made to stand to the king's peace, but fly from, or defend themselves against them; they may be slain, by force of the statute *de malefactoribus in parcis*, and 3 & 4 W. & M. c. 10.

Plow. g. b. If either of the parties fighting in a combat, allowed by law for
Dalt. c. 98. the trial of some special cases, be slain, he who kills him is justified;
3 Inst. 221. and the death of the other is imputed to the just judgment of
37 H. 6. God, who is presumed to give the victory to him who fights in
21. a. the maintenance of truth.

Roll. Rep. 189. If a sheriff, being resisted by one whom he attempts lawfully to
3 Inst. 56. arrest in a civil action, or to retake after he has arrested him, un-
Crompt. 24. avoidably kill him in the affray, he may justify it; though he never
Dalt. c. 98. gave back, but stood his ground, and attacked the party. But if a
Hawk. P. C. c. 28. § 17. person barely fly from the execution of (b) civil process, the sheriff
(b) Herein, cannot justify killing him.

says my Lord Hale, the difference is between civil actions and felonies; that if a man be in danger of arrest by a *capias* in debt or trespass, and he fly, and the bailiff kill him, it is murder; but if a felon fly, and he cannot be otherwise taken, if he be killed, it is no felony; and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods. Hale's Hist. P. C. 481.

Homicide may be justified in the due execution of publick justice; but herein these rules must be observed:

1. That the judgment, by virtue whereof the party was put to death, be given by one who had jurisdiction in the cause; for otherwise both judge and officer may be guilty of felony; as, if the court of Common Pleas give judgment on an appeal of death,
30 Co. 76.
Dalt. c. 98.
22 E. 4.
33. a.
Hawk. P. C. c. 28. § 4.
or

or justices of peace on an indictment of high treason, and award execution, which is executed. But if justices of peace condemn a man to death on an indictment of trespass, and he be executed, they only, and not the officers, are guilty of felony; because they had a jurisdiction over the offence, and therefore their proceedings are erroneous only, and not void.

A man hath the liberty of *Infangthief*, the steward of the court gives judgment of death against a prisoner against law; this was a cause of seizure of the liberty, but was not murder in the judge, *quia factum judicialiter licet ignorantur*, 2 R. 3. 10. a. The case of the steward of the liberty of the abbot of *Crowland*. Hal. Hist. P. C. 454.

The judgment must be executed by the lawful officer; for those ancient opinions, that any one may kill a person attainted of felony, and that a man condemned in an appeal of death is to be executed by the relations of the deceased, are now obsolete; and at this day, even the judge who condemns a man, cannot execute his own sentence; neither can the proper officer do it, but by a lawful command, without being guilty of felony. Hawk. P. C. c. 28. § 7, 8, 9. Hal. Hist. P. C. 455.

The execution must pursue the judgment; therefore, if the sheriff behead a man, where beheading is no part of the sentence, it is the general opinion that he is guilty of felony. Hawk. P. C. c. 28. § 10. Hal. Hist. P. C. 433.

S. P. Because an act of deliberate cruelty.

2. As it happens in the Defence of a Man's Person, House, or Goods.

It is clear, that the killing of a person in the defence of a man's person, house, or goods, is justifiable in the following instances: As, where a man kills one who assaults him in the highway to rob or murder * him; or the owner of a house, or any of his servants, or lodgers, &c. kills one who attempts to burn it, or to commit in it murder, robbery, or other felony; or a woman kills one who attempts to ravish her; or a (a) servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately, and kills him; for he does it in the height of his surprise, and under just apprehensions of the like attempt upon himself. But in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him. Hawk. P. C. c. 28. § 21. and several authorities there cited. Hal. Hist. P. C. 484. (a) So, of a husband in defence of his wife, a child of his parent, &c. *conversus* for the act of the assistant shall

have the same construction, in such cases, as the act of the party assisted should have had, if it had been done by himself. Hal. Hist. P. C. 484.—* By 24 H. 8. c. 5. it is no forfeiture for killing a man attempting to commit murder or robbery.

But a man cannot justify the killing another in defence of his house or goods, or even of his person, for a bare private trespass; and therefore he who kills another, who claiming title to his house attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges, after he is forbidden, is guilty of manslaughter; and he, who in his own defence kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, is guilty

guilty of homicide *se defendendo*, for which he forfeits his goods, but is pardoned of course; yet it seems, that a private person, and *a fortiori*, an officer of justice, who happens unavoidably to kill another in endeavouring to defend himself from, or suppress dangerous rioters, may justify the fact, inasmuch as he only does his duty, in aid of the publick justice.

Hawk. P.C.
c. 28.

If a man be dangerously assaulted by another, as with a drawn sword, &c. without any previous affray, though in a town, or other place where help may be expected, and use the same caution to avoid fighting as would make the killing the assailant homicide *se defendendo* only, if there had been a previous affray, and then unavoidably kill the assailant, it seems reasonable that he may justify it.

Dalt. c. 98.

It seems also, that in some special cases, a man may justify even killing an innocent person; as, where in a shipwreck two persons get upon the same plank, which will not support them both, and one thrusts the other off.

Cro. Car.
538.
March, 5.
Vide supra.

So, if a man be awakened in the night with an alarm that thieves are in his house, and searching for them in the dark, with his sword drawn, happen to kill a person lying hid in part of the house, who in truth had no ill design, and was brought thither by a servant in order to assist in cleaning the house; it seems, he may justify the fact, inasmuch as it hath not the appearance of a fault.

Hawk. P.C.
c. 28. § 2.

But a man shall never justify himself under a necessity which he brought upon himself by his own fault; and therefore, if rioters, wrongfully detaining a house by force, kill the party ejected, or any of his assistants who attack it from without, and endeavour to burn it, they are guilty of manslaughter.

Vailor's
case, Foss.
Cr. Law,
278.

[The prisoner was indicted for the murder of his brother, and the case upon evidence appeared to be, that the prisoner on the night the fact was committed came home drunk. His father ordered him to go to bed, which he refused to do; whereupon a scuffle happened betwixt the father and son. The deceased, who was then in bed, hearing the disturbance got up, and fell upon the prisoner, threw him down, and beat him upon the ground, and there kept him down, so that he could not escape, nor avoid the blows; and as they were so striving together, the prisoner gave the deceased a wound with a penknife, of which wound he died.

Holt, Tracy,
and Bury.

The Judges present doubted, whether this were manslaughter or *se defendendo*, and a special verdict was found to the effect here set forth. At a conference of all the judges of England, it was unanimously holden to be manslaughter; for there did not appear to be any inevitable necessity so as to excuse the killing in this manner.]

Hawk. P.C.
c. 28. § 3.
(a) But
herein my
Lord Hale
says, it is
generally to
be observed,

It seems a reasonable opinion, and countenanced by the old books, that a fact amounting to justifiable homicide, being specially (a) pleaded, and proved to the court on an indictment or appeal of murder, the party shall be dismissed without being arraigned, &c. But it is certain, that a fact amounting to excusable homicide cannot be so pleaded; but the party must plead not guilty, and

and give the special matter in evidence: also, it is certain, that where a fact amounting to justifiable homicide is found by a jury, the party is to be dismissed, without being obliged to purchase a pardon, &c.

that in case of any indictment, or charge of felony, the prisoner

cannot plead any thing by way of justification, as, that he did it in his own defence, or *per infortunium*, but must plead not guilty; and, upon his trial, the special matter is to be found by the jury, and thereupon the court gives judgment. Hal. Hist. P. C. 478.

(F) Of excusable Homicide: And herein,

1. Of Homicide *per Infortunium*, or Chance-medley.

EXcusable or involuntary homicide is of two kinds. 1st, When it is purely involuntary and casual; as the killing of a man *per infortunium*. 2dly, When it is partly involuntary, and partly voluntary, but occasioned by a necessity which the law allows, which is commonly called homicide *ex necessitate*; as killing a man in his own defence.

Hal. Hist. P. C. 477.

Homicide *per infortunium* is where a man is doing a lawful act, and without intention of bodily harm to any person, and by that act, death of another ensues; as, if a man be shooting at butts or pricks, and by casualty his hand shakes, and the arrow kills a by-stander.

Hal. Hist. P. C. 472.

And though the killing of another *per infortunium* be not in truth felony, nor subject the party to a capital punishment; and therefore, in such cases the verdict usually conclude *quod interfecit per infortunium & non per feloniam*; yet the party forfeits his goods; and though he ought to have, *quasi de jure*, a pardon of course, upon the certificate of the conviction, yet he is not to be discharged out of prison, but bailed to the next term, or sessions, to sue out his pardon of course; for though it was not his crime, but his misfortune, yet, because the king hath lost a subject; and that men may be the more careful, he forfeits his goods; and is not presently absolutely discharged of his imprisonment, but bailed.

Hal. Hist. P. C. 477.

Also, it is agreed, that no one can excuse the killing of another, by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead not guilty, and give the special matter in evidence.

Hawk. P. C. c. 29. § 24.

As, where, without any intent of doing hurt, a person chances to kill another by the head of a hatchet flying off at work; this being proved in evidence, the party is guilty of homicide *per infortunium* only.

Hal. Hist. P. C. 472.

So, where a person happens to kill another by a piece of timber flung down from a house standing out of any road, after loud warning to all persons to stand clear; or by a gun discharged at wild-fowl; or by an unlucky fall or kick at wrestling or football, or other such like sports; or in fighting at barriers; or tilting by the king's command; or by moderate correction of a child, scholar,

Hal. Hist. P. C. 473.
Hawk. P. C. c. 29.

lar, or servant. But, if the correction be immoderate, the offence will be manslaughter at least; and if the instrument be such as apparently endangers life, as, an iron bar, &c. it will be murder.

Hawk. P.C. c. 29. So, if a man whip a horse on which another is riding, whereupon he springs out and runs over a child, and kills him, the rider is guilty of homicide *per infortunium*, the other of manslaughter.

Hal. Hist. P. C. 473. &c. Hawk. P. C. c. 29. [The prisoner came to town in a chaise, and before he got out of it, he fired his pistols, which by accident, killed a woman. But, regularly, if the act, which occasions the death of a man, be a trespass, or cannot but be attended with the manifest danger of hurt to the person of some man, or be of such a nature, that it cannot be used without manifest hazard of life, and there were no deliberate intent of mischief, the killing is esteemed manslaughter; as, if a man kill another by shooting at deer in a third person's park; or by slinging down a piece of timber into a common street or highway, though in work, and after warning to stand clear; or by throwing stones at another wantonly at play; or by tilting without the king's command; or by parrying with naked swords covered with buttons at the points, or with swords in the scabbards.

King, C. J. ruled it to be manslaughter. Rex v. Burton, 1 Str. 481.]

Hawk. P.C. c. 29. Hal. Hist. P. C. 475. But, if a man in the execution of a deliberate purpose to commit a felony, or to do a personal hurt to another, or to do any unlawful act, which cannot but manifestly be attended with danger of great personal hurt to some other, happen to kill another, though it be not intended against any one in particular, he is guilty of murder; as, where a man kills another by maliciously beating or wounding him; or by shooting at tame fowl, with an intent to steal them; or by knowingly and deliberately discharging a gun; or throwing a great stone or piece of timber; or riding with a horse, used to strike, among a multitude, though he do it only with an intent to divert himself by frightening them; or by engaging in a riot; or robbing in a park, &c.

[By stat. 10 Geo. 2. c. 31. if any waterman between *Gravesend* and *Windfor* receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.]

Fost. Cr. Law, 261. A man at the diversion of cock-throwing at *Shrovetide* missed his aim, and a child looking on received a blow from the staff, of which he soon died; this was ruled manslaughter.

2. Of Homicide *se Defendendo*.

Hawk. P.C. c. 29. § 13. (a) In homicide *se defendendo* there forms necessary Homicide (a) *se defendendo* is where one is forced to fight on a sudden affray, retreats as far as he can without endangering his own life, and then, and not before, in order to save his life, or to defend his person from a battery, (especially if the assault were in his own house) gives the other a mortal wound. It is said by

some not to be material who struck first. But, if a man attack another upon malice, in such a manner as endangers his life, and then fly to the wall, and kill him, he is guilty of murder. some act to be done by the party killing; for
 If he be merely passive, this will make it only a killing *per infortunium*; and though it be not felony, not being accompanied with a felonious intent, yet it subjects the party to a forfeiture of his goods and chattels. Hal. Hist. P. C. 478. &c.

Regularly, it is necessary that the person, who kills another in his own defence, fly as far as he may to avoid the violence of the assault, before he turn upon his assailant; for though, in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour; because the king and his laws are to be the *vindex injuriarum*; and private persons are not trusted to take capital revenge one of another. Hal. Hist. P. C. 481.

There is malice between *A.* and *B.*, they appoint a time and place to fight, and meet accordingly, *A.* gives the first onset, *B.* retreats as far as he can with safety, and then kills *A.*, who had otherwise killed him; this is murder; for they met by compact and design, and therefore neither shall have the advantage of what they themselves created. Hal. Hist. P. C. 479.

There is malice between *A.* and *B.*, they meet casually, *A.* assaults *B.* and drives him to the wall, *B.* in his own defence kills *A.*; this is *se defendendo*, and shall not be heightened by the former malice into murder; for it was not a killing upon the account of the former malice, but upon a necessity imposed upon him by the assault of *A.* Hal. Hist. P. C. 479.

In *Fleet-street* *A.* and *B.* were walking together, *B.* gave some provoking language to *A.*, *A.* thereupon gave *B.* a box on the ear, they closed, *B.* was thrown down and his arm broken, he runs to his brother's house presently, which was hard by, *C.* his brother, taking the alarm, came out with his sword drawn and made towards *A.* who retreated ten or twelve yards, *C.* pursued him, *A.* drew his sword and made a pass at *C.* and killed him; *A.* being indicted at *Newgate* sessions for murder, the court directed the jury upon the trial to find this manslaughter, not murder; because upon a sudden falling-out; not *se defendendo*, partly because *A.* made the first breach of the peace, by striking *B.* and partly because, unless he had fled as far as might be, it could not, by way of interpretation, be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger; and his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon *C.* than to avoid him. And accordingly at last it was found manslaughter, 1671, at *Newgate*. Hal. Hist. P. C. 482.

Nonfuit.

- (A) Of the Nature thereof, and how it differs from a *Retraxit*.
 - (B) Who may be Nonfuit.
 - (C) In what Actions there may be a Nonfuit.
 - (D) At what Time a Nonfuit may be.
 - (E) How far the Nonfuit of one shall be the Nonfuit of another.
 - (F) How far a Nonfuit for Part of the Thing in Demand shall be a Nonfuit for the Whole.
 - (G) Of the Effect of a Nonfuit : And herein of its being a peremptory Bar.
-

- (A) Of the Nature thereof, and how it differs from a *Retraxit*.

Co. Lit.
139. a.
2 Lil. Reg.
230.
(a) For the
form of the
entry, *vide*
Cro. Jac.
213.
2 Leon. 177.
2 Salk. 456.
pl. 6:
(b) That
where a
plaintiff is

WHERE a plaintiff is demanded and doth not appear, he is said to be nonfuit. And this usually happens, where upon the trial, and when the jury are ready to give their verdict, the plaintiff discovers some error or defect in the proceedings, or is unable to prove a material point, for want of necessary witnesses, &c. and thereupon being demanded, (as he must be) his default is recorded by the secondary. And the (a) entry is *in misericordia quia non prosecutus est breve suum*; upon which the defendant recovers his costs against him. But this arising from some supposed neglect or oversight, the plaintiff, except in some particular cases, is not (b) barred from commencing a new action.

nonfuit, if he will again proceed in the same cause, he must put in a new declaration; for by his being nonfuit, it shall be intended that he had no such cause of suit as he declared in, and so that declaration is void, and he hath no day in court. 1 Lil. Reg. 231. — But a nonsuit by mistake may be set aside, and a *disfringas de novo* awarded, for which *vide* Cro. Car. 203. Cro. Jac. 669. Godb. 328. Raym. 38. 73. 2 Salk. 455. — A motion to set aside a nonsuit occasioned by the judge's mistaking the law. Ca. Law and Eq. 315. — Nonsuit discharged, being entered on *nisi prius* without *habeat corpus*. Sid. 164. — * A plaintiff sometimes submits to be nonsuited, where the opinion of the judge is against him, the judge giving him leave to move the court to set the nonsuit aside, without costs. — If the judge does not give such leave, but directs a nonsuit, the plaintiff, if he conceives the judge mistaken in the law, may move to set the nonsuit aside; and if the court is of opinion the judge was mistaken, will

let *se* aside, and generally without costs: In some particular cases, however, there may be reasons sufficient to induce the court to refuse to set aside the nonsuit, unless the plaintiff will pay costs.—If there are several defendants, and all found guilty, plaintiff may enter a *noli prosequi* against any one; therefore, if in trover against a defendant executor, and other defendants not executors, there is a verdict against these, and the executors found not guilty, judgment shall not be arrested, for plaintiff may enter *noli prosequi* as to him. Dale v. Eyre, T. 24 & 25 Geo. 2. 1 Will. 306.

A *retraxit* is, when the plaintiff is present in court (as regularly he is ever by intendment of law, till a day be given over, unless it be when a verdict is given, and then he is but demandable); and this is either privative, when the entry is *quod solemniter exactus non venit, sed a secula sua in contemptum curiae se retraxit*, &c. or positive, when the entry is *quod fatetur se, seu cognoscit se ulterius nolle prosequi*, &c. It is called a *retraxit*, because that is the effectual word used in the entry, and is (a) a bar to all actions of the like or inferior nature.

A *retraxit* is always of the part of the plaintiff or demandant, and cannot be, unless the plaintiff or demandant be in court in proper person *.

R. C. Co. Lit. 138. b. S. P. — * *Sed qu.* If plaintiff's counsel, with consent of the attorney, may not consent to a *retraxit*, though the plaintiff is not present in court? A juror is thus frequently withdrawn, when those concerned for the plaintiff clearly see it is for his benefit.

It is held, that a *retraxit* cannot be entered (b) before the plaintiff hath declared, and if entered before, it hath but the effect of nonsuit.

a *retraxit* may be entered after a general verdict. Cro. Eliz. 465. dubitatur.

Debt was brought upon a bond against A., wherein A. and B. were jointly and severally bound, and after plea pleaded the plaintiff entered a *retraxit*, and in an action after brought against B. upon the same bond, whether this should be a bar, between (c) Dennis and Paine, Cro. Jac. 551. dubitatur & adjournatur. It was said, that a *retraxit* was in nature of a release, and a release to one joint obligor discharged the other; but on the other side it was said to be a bar only by way of estoppel between the parties, whereof no other should take advantage.

It; for by this report, debt was brought both against A. and B., and the plaintiff entered a *retraxit* against A., and whether this was a discharge of B. is made the question. Vide Cro. Eliz. 762. — * None but the defendant can demand the plaintiff. If neither plaintiff nor defendant appear after cause called, and jury sworn, the only way is to discharge the jury. Arnold v. Johnston, Str. 267. Smith v. Whistler, Ca. temp. Hard. 305. S. P. — If a cause is tried by proviso, there must be a rule given in the office, *non nisi prius per provisionem si querens fecerit defaultum*; and if there is not, and plaintiff is nonsuited, the nonsuit shall be set aside. Dodson v. Taylor, Str. 1055. [Proude v. Willimote, 1 Barnard. B. R. 18. acc. But it is sufficient if the defendant obtain this rule any time before the trial. King v. Pippet, 1 Term Rep. 695.] — If it appears on the record, that no issue is joined, the jury must be dismissed. Heath v. Walker, Str. 1117. — By stat. 14 Geo. 2. c. 17. If plaintiff neglects to bring the issue to trial according to the course of the court, the court, on motion, on notice, shall give judgment as in case of a nonsuit, unless they allow farther time, and defendant shall have costs as in case of a nonsuit. — But if in action against two on a joint promise, there is judgment against one by default; and on plaintiff's neglecting to bring issue joined by the other on to trial, rule is obtained for judgment as in case of a nonsuit, yet costs cannot be taxed; for plaintiff could not have been nonsuited on a trial. Weller v. Goytoun, 1 Bur. 358. — A *noncitur* at *nisi prius* must be recorded by the judge of *nisi prius*, and cannot afterwards be recorded in bank. Gardner v. Davis, 1 Will. 301. — If defendant has obtained a rule for costs for not proceeding to trial, he cannot afterwards move for judgment as in case of nonsuit. Barnes, 131. 314. 316. [Yet, where the plaintiff does not countermand notice of trial, but withdraws the record after the cause is called on, the court will make it a condition for discharging a rule for judgment as in case of a nonsuit, (on a peremptory undertaking to try,) that he shall pay the defendant the costs incurred by omitting to try. Jorline v. Sharpe, 2 H. Bl. 280.] — *Non pros*, for want of declaration demanded in the country, shall be

Co. Lit.

139. a.

(a) 8 Co. 58. *in cont.*
52. S. P. 1 *saem.* 207.
laid down 3 *J. Rep.* 511.
as a rule.

4 Mod. 87.
S. P.

9 Co. 58.
Beecher's
case, Cro.
Jac. 211.

Dalf. 78.

3 Leon. 19.
(b) Whether
dubitatur.

(c) Jon. 451.
S. C. and
judgment
given for the
plaintiff,
because of a
defect in the
plea. March,
95. S. C.
dubitatur,
but varies in
the stating

set

set aside. Barnes, 311.—If a judge of assize directs nonsuit erroneously, there is no remedy. Barnes, 311.—[It is now settled, that such nonsuit may be set aside. Lady Windsor's case, 4 Bl. 1984.]—If plaintiff dies after nonsuit, and before day in bank, it is not helped by the statute, but error. Barnes, 312.—Rule to declare in C. B. must be in the office where plaintiff's attorney practices. Barnes, 312.—On motion for judgment, as in case of a nonsuit, there is a rule for the plaintiff to call issue; if he does not, defendant may have *non prof.* if he enters it, the roll must be produced, and defendant may move for a nonsuit; if the court admit cause, why the nonsuit should not, &c. they appoint day for trial; on such motion, there must be an affidavit that the cause is not tried. Barnes, 313, 316.—Six miles of plaintiff—marriage of *seu* plaintiff—that the bankrupt did not attend assignees, plaintiffs—material witnesses were ill—or that the record was offered to be entered, though a little out of Barnes, 313, 314, 315, 316, 464.—[the insolvency of the defendant since the action brought, *Bell v. Wilkinson*, Dougl. 671. or, that the cause was carried down and made a *remainer*, *Mewburn v. Layley*, 3 Term Rep. 1. are sufficient causes to prevent judgment as in case of a nonsuit. Indeed, the *Chief of Common Pleas* have lately holden, that in all cases where an application is made for the first time for judgment as in case of a nonsuit, it is a sufficient answer to it, to undertake peremptorily to try, without alleging any reason for not having before tried the cause; and that whatever might have been former practice, in future, it should be understood, that the first motion for judgment as in case of a nonsuit, is only a mode of obtaining a peremptory undertaking to try. *Mallet v. Hilton*, 2 H. Bl. 179.] It seems now by the practice of the courts both of B. R. and C. P., that the judgment as in case of a nonsuit cannot be moved for till the third term after that in which issue is joined. *Hall v. Buchanan*, 2 Term Rep. 734. *Da Costa v. Ledstone*, 2 H. Bl. 558.]—Replevins and *assumpsit* are within the statute. Barnes, 315, 317.—[A replevin is not; for in replevin both parties are *adverses*, and the defendant may carry down the record by proviso. *Jones v. Concannon*, 3 Term Rep. 661. *Shoetridge v. Hiers*, 5 Term Rep. 400. Judgment as in case of a nonsuit may be given in *replevin* of a return to a *mandamus*. *Rex v. Mayor, &c. of Stafford*, 4 Term Rep. 689.]—If plaintiff was ready, but the cause did not come on because the view was not returned by six jurors, judgment shall not be signed. Barnes, 498.—If defendant has obtained a rule for judgment *non*, the court will not give plaintiff leave to amend his declaration by striking out allegation, but judgment shall be *absolute*. Barnes, 318.—Judgment as in case of a nonsuit, may be moved for without term's notice, though no proceedings in a year. Barnes, 308.—In replevin, if plaintiff does not appear at the trial, but defendant brings down record, nonsuit shall be entered, and not verdict for defendant; if it is, it shall be so amended at defendant's cost. Barnes, 458. [Where a plaintiff has once proceeded to trial, judgment as in case of a nonsuit cannot be entered for not proceeding to a new trial. *Porzelius v. Maddock*, 1 H. Bl. 101.]

(B) Who may be Nonsuit.

Bro. Nonsuit, 68.
Co. Lit.
339. b.
Moll. Abr.
131. * But
q. If this
does not

mean a nonsuit on the merits, and if such plaintiff, by collusion with the defendant, does not choose to proceed, whether the king may not proceed for his share of the penalty?—In a *qui tam* action, judgment as in case of a nonsuit may be entered on a rule to *shew cause*. *Watson v. Johnson*, P. 25 G. 2
1 Will. 325.

39 Aff. pl. 1.
2 Roll. Abr.
130. S. C.

If an infant bring an assize by guardian, although that the infant disavow the suit in proper person, yet no nonsuit shall be awarded.

6 Mod. 181.

Where an executor need not name himself executor, he shall pay costs upon a nonsuit, and the naming himself executor shall not exempt him from it.

10 H. 6. 44.
b. Roll.
Ab. 581.
S. C.

If an attorney of Common Pleas is sued in an action there, he shall not be demanded, because he is supposed always present aiding the court.

(C) In what Actions there may be a Nonfuit.

A Person may be nonfuit in a writ of error.

2 Roll.
Abr. 130.
Sid. 255.
S. P.

A person may be nonfuit in a writ of false judgment.

20 H. 6. 18. b. 2 Roll. Abr. 130. S. C.

One cannot be nonfuit in any action in which he is not an actor or demandant; and though he afterwards become an actor, not being originally so, he cannot be nonfuit as an avowant. So, of garnishees who become actors, but were not so originally.

So, if a person outlawed hath a charter of pardon, and sues a writ *facias* against the party, though hereby he is an actor, yet he cannot be nonfuit.

2 Roll.
Abr. 130.

So, if a man traverse an office he cannot be nonfuit, although he is actor, for he hath no original pending against the king.

2 Roll.
Abr. 130.
Dyer, 141.

pl. 47. this is made a *querre*.

But in a petition of right against the king the plaintiff may be nonfuit.

11 H. 4. 52.
2 Roll.
Abr. 130.

So, in an *audita querela* to avoid a statute, the plaintiff may be nonfuit, for he is plaintiff in this action.

47 E. 3. 5. b.

If to two *nilis* returned on a *scire facias* on a charter of pardon, the plaintiff does not appear, he shall be nonfuit; for the statute ordains, that upon his appearing he ought to count against the defendant.

45 E. 3. 16.

(D) At what Time a Nonfuit may be.

At the common law, upon every continuance, or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been nonfuit.

Co. Lit.
139. b.
That at
common
5 Mod. 208.

law if he did not like the damages given by the jury, he might be nonfuit.

But now by the 2 H. 4. c. 7. it is enacted in the words following: "Whereas, upon verdict found before any justice in assise of novel disseisin, mort d'ancestor, or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law, upon the matter so found; it is ordained and established, that if the verdict pass against the plaintiff, that the plaintiff shall not be nonfuted."

But notwithstanding this statute it hath been held, that the plaintiff may be nonfuted after a special verdict, or after a demurrer and (a) argument thereupon.

Co. Lit. 139.
2 Jon. 1.
2 Roll. Abr.
131-2.

§ Leon. 28. & vide 2 Hawk. P. C. c. 23. § 95. (a) In debt upon an obligation, upon demurrer, the cause being argued, the opinion of the court was against the plaintiff, and rule given, that judgment should be entered for the defendant; and the plaintiff prayed that he might be nonfuted; and because he had the same term appeared, and argued by his counsel, and had prayed judgment, he could not be nonfuted the same term. Cro. Jac. 35.

If there be judgment to account, and auditors assigned, and thereupon a *capias ad computandum*, the plaintiff cannot be nonfuted,

2 Roll. Abr.
131. Vide
Co. Lit.
on 139 b.

on the original, because the original is determined by the judgment to account.

3 H. 6. 13.
2 Roll.
Abr. 131.

If the defendant wages his law, and a day is given him over to another term to make his law, if the plaintiff does not appear that day he will be nonsuited: otherwise, if he wages his law immediately, or, as some hold, on a day in the same term.

(E) How far the Nonsuit of one shall be the Nonsuit of another.

Co. Lit. 139.
2 Inst. 563.
2 Roll. Abr.
132. Several
cases to this
purpose.

IN real or mixt actions, the nonsuit of one demandant is not the nonsuit of both; but he that makes default shall be summoned and severed; but regularly, in personal actions, the nonsuit of the one is the nonsuit of both.

Co. Lit.
139. a.
Vide head of
Executors.

But in personal actions, brought by executors, there shall be summons and service, because the best shall be taken for the benefit of the dead; and so it is in action of trespass by them, as executors, for goods taken out of their own possession. Like law in account by them, as executors, by the receipt of their own hands.

Co. Lit. 139.
(a) In an *audita querela*,
scire facias,
attaint, the
nonsuit of one shall not prejudice the other. 6 Co. 26.

In an (a) *audita querela* concerning the personalty, the nonsuit of the one is not the nonsuit of the other; because it goeth by way of discharge, and freeing themselves, and therefore the default of the one shall not hurt the other.

Co. Lit.
139. a.

In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both, because the tenant cannot attorn according to the grant.

Co. Lit.
139. a. b.
2 Roll.
Abr. 133.
(b) But
where a
plaintiff
may enter

Some actions follow the nature of those actions whereupon they are grounded; as, the writs of error, attaint, *scire facias*, and the like. If a real action be brought by several *precipes* against two or more, if the demandant be nonsuit against one, he is nonsuit against (b) all; for, as to the demandant, it is but one writ under one *teste*.

a *nolle prosequi* against one, and have judgment against the rest, vide 2 Roll. Abr. 101. Cro. Car. 239. 243. Hob. 70. 180. Carth. 19. 3 Mod. 101.

Cro. Eliz.
460. pl. 6.
Dyer, 120.
2 Roll.
Abr. 133.
Sid. 387.

In an appeal against divers, whether they plead the same or several issues, it hath been adjudged, that a nonsuit against one, at the trial of any one of the issues, is a nonsuit as to all, because such a nonsuit operates in nature of a release to the whole.

2 Salk. 455.
pl. 1.
Comyns, 74.
(c) There is
a nonsuit
before ap-
pearance at
the return
of the writ,

A *latitat* was sued out against four defendants in trespass, the plaintiff was nonsuit for (c) want of a declaration, and the defendants' attorney entered four nonsuits against him; and it was held to be irregular, because the trespass is joint; and though the plaintiff may count severally against the defendants, yet it remains joint till it is severed by the count.

Harris v.
Butterley,
Cowp. 483.

[In trespass against several, if any of them suffer judgment by default, the plaintiff cannot be nonsuited.]

(F) How far a Nonfuit for Part of the Thing in Demand shall be a Nonfuit for the Whole.

IT is laid down as a general rule, that a nonfuit for part is a nonfuit for the whole. But it hath been held, that if a defendant plead to one part, and thereupon issue be joined, and demur to the other, the plaintiff may be nonfuit as to one part, and proceed for the other. 2 Leon. 177.
Hob. 180.

If in debt the defendant acknowledges the action as to part, and joins issue as to the residue, and the plaintiff hath judgment for that which is so confessed, but there is a *cessat executio*, by reason of the damages to be assessed by the jury; if the plaintiff be nonfuit in this issue, this shall not be a nonfuit for the damages to be given, because that he had judgment. 2 Roll.
Abr. 134.

If in trover for divers goods the defendant pleads, that as to some of the goods they were fixed to his freehold, as to others that he had them of the gift of the plaintiff, and as to the rest not guilty; and as to the first, the plaintiff enters *non vult ulterius persequi*; this amounts only to a *retraxit*, and is no nonfuit, so as to bar the plaintiff from proceeding on the other parts of the plea, on the rule, that a nonfuit for part is a nonfuit for the whole. 2 Leon. 177.
Sir John
Sands v.
Packfal
Brocas.

(G) Of the Effect of a Nonfuit: And herein of its being a peremptory Bar.

A Nonfuit, as hath been observed, is regularly no peremptory bar; but the plaintiff may, notwithstanding, commence any new action of the same or like nature. But this general rule hath the following exceptions:

1. It is peremptory in a *quare impedit*; and in that action a discontinuance is also peremptory; and the reason is, for that the defendant had, by judgment of the court, a writ to the bishop; and the incumbent, that cometh in by that writ, shall never be removed; which is a flat bar to that presentation. Co. Lit.
139. a.

2. Nonfuit in an appeal of murder, rape, robbery, &c. after (a) appearance, is peremptory, and this *in favorem vite* (b). But the nonfuit of the plaintiff in an appeal is not such an acquittal, on which the defendant shall recover damages against the abettors, by *West. 2. c. 12.* unless, after the nonfuit, he were arraigned at the king's suit upon the appeal, and acquitted. Co. Lit.
139. a.
(a) But the
bare taking
out of a writ
of appeal,
and causing
it to be de-

livered of record to the sheriff, and a nonfuit upon it, is no bar of a second appeal; because it doth not appear of record, but that it might be done by a stranger; and therefore the nonfuit must be after an appearance in proper person of record. 2 Hawk. P. C. c. 23. § 131. (b) 2 Inst. 385.

3. So, if the plaintiff, in an appeal of mayhem, be nonfuit after appearance, it is peremptory; for the words therein are *felonice mayhemavit*. Co. Lit.
139. a.

Co. Lit.
139. a.
Cro. Eliz.
881.

4. A nonsuit after appearance is also peremptory in a *natus habendo*, and the nonsuit of one plaintiff in that action nonsuits both *in favorem libertatis*. But in a *libertate probanda* such nonsuit is not peremptory; neither is the nonsuit of one plaintiff the nonsuit of both.

Co. Lit.
139. a.

5. Such nonsuit is also peremptory in an attain, but a discontinuance in an attain is not, because there is a judgment given upon the nonsuit, but not upon the discontinuance.

Nuisances.

2 Roll.
Abr. 83.
Hawk. P.C.
c. 75.

A Common nuisance is an offence against the publick, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires.

Under which description we shall consider,

- (A) What shall be said a Nuisance.
- (B) How far the Indictment must charge it to be an Annoyance to all the King's Subjects.
- (C) How a Nuisance is to be removed or abated.
- (D) How the Offence is punishable.

For Nuisances relating to the Highways, *vide* title *Highways*.

For those relating to Bridges, tit. *Bridges*.

For those relating to publick Houses, tit. *Inns and Inn-keepers*.

(A) What shall be said a Nuisance.

3 Inst. 205.
Kitchen, 11.
Hawk. P.C.
c. 75. § 6.
2 Bur. Rep.
1232.

It is clearly agreed, that keeping a bawdy-house is a common nuisance, as it endangers the publick peace, by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness.

Salk. 343.
pl. 35.
The Queen
v. Williams.

Also it hath been adjudged, that this is such an offence, of which a feme covert may be guilty as well as if she were sole; and that

that she, together with her husband, may be indicted and condemned to the pillory for keeping a bawdy-house; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband; and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex.

It is clearly agreed, that all common gaming-houses are nuisances in the eye of the law, being detrimental to the publick; as they promote cheating and other corrupt practices, and incite to idleness, and avaricious ways of gaining property, great numbers, whose time might otherwise be employed for the general good of the community. Also, it hath been (a) adjudged, that this is such an offence, for which a feme covert may be indicted; for as, in the preceding case, the wife may be concerned in acts of bawdry, so here she may be active in promoting gaming, and furnishing the guests with all conveniencies for that purpose.

Hawk. P.C.
c. 75. § 6.

(a) Trin.
2 G. 1. The
King v.
Dixon.

It seems to be the better opinion, that all common stages for rope-dancers, &c. are nuisances, not only because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood.

Mod. 76.
2 Keb. 846.
3 Keb. 464.
Vent. 169.
5 Mod. 142.
Hawk. P.C.
c. 75. § 6.
Rushworth's
Coll. part ii.
vol. i. fol.
220. 247.
Roll. Rep.
109. 5 Mod.
142. Skin.
625. pl. 21.

But it seems the better opinion, that playhouses, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident; as, where they draw together such numbers of coaches or people, &c. as prove generally inconvenient to the places adjacent; or, when they pervert their original institution, by recommending vicious and loose characters under beautiful colours to the imitation of the people, and make a jest of things commendable, serious, and useful.

And now for the better regulation of players and playhouses, by the 10 G. 2. c. 28. it is enacted, "That every person who shall for hire, gain or reward, act, represent, or perform, or cause to be acted, represented, or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in case such person shall not have any legal settlement in the place where the same shall be acted, represented, or performed, without authority by virtue of letters patent from his Majesty, his heirs, successors, or predecessors, or without licence from the Lord Chamberlain of his Majesty's Household for the time being, shall be deemed to be a rogue and a vagabond, within the intent and meaning of the 12 Ann. stat. 2. c. 23. and shall be liable and subject to all such penalties and punishments, and by such methods of conviction, as are inflicted on, or appointed by the said act, for the punishment of rogues and vagabonds who shall be found wandering, begging, and misordering themselves, within the intent and meaning of the said act."

And see
25 G. 2.
c. 36. made
perpetual by
28 G. 2.
c. 19. for
preventing
thefts and
robberies,
regulating
places of
publick en-
tertainment,
and punish-
ing persons
keeping
disorderly
houses. And
note: these
sort of play-
ers are with-
in the de-
scription of
the vagrant

act 17 G. 2.
c. 5.—" By
25 G. 2.
c. 36. § 2.
houses and
gardens of
entertain-
ment in
London and
Westmin-
ster, or with-
in twenty
miles there-
of, are not
to be kept
without li-
cence.—By
30 G. 2.
c. 24. § 14.
penalties are
inflicted on
publicans,
permitting
journeymen
to game in
their houses.

And § 2. it is further enacted, " That if any person having, or not having a legal settlement as aforesaid, shall, without such authority or licence as aforesaid, act, represent, or perform, or cause to be acted, represented, or performed, for hire, gain or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, every such person shall, for every such offence, forfeit the sum of fifty pounds; and in case the said sum of fifty pounds shall be paid, levied, or recovered, such offender shall not, for the same offence, suffer any of the pains or penalties inflicted by the said recited act."

And by § 3. it is further enacted, " That no person shall for hire, gain, or reward, act, perform, represent, or cause to be acted, performed, or represented, any new interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any new prologue or epilogue, unless the copy thereof be sent to the Lord Chamberlain of the King's Household for the time being, fourteen days at least before the acting, representing, or performing thereof, together with an account of the playhouse or other place where the same shall be, and the time when the same is intended to be first acted, represented, or performed, signed by the master or manager, or one of the masters or managers of such playhouse, or place, or company of actors therein."

And it is further enacted by § 4. " That it shall and may be lawful to and for the said Lord Chamberlain for the time being, from time to time, and when and as often as he shall think fit, to prohibit the acting, performing, or representing any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, or any prologue or epilogue; and in case any person or persons shall for hire, gain, or reward, act, perform, or represent, or cause to be acted, performed, or represented, any new interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, or any new prologue or epilogue, before a copy thereof shall be sent as aforesaid, with such account as aforesaid; or shall for hire, gain, or reward, act, perform, or represent, or cause to be acted, performed, or represented, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, or any prologue or epilogue, contrary to such prohibition as aforesaid; every person so offending shall, for every such offence, forfeit the sum of 50*l.*; and every grant, licence, and authority, (in case there be any such,) by or under which the said master or masters, manager or managers, set up, formed, or continued such playhouse, or such company of actors, shall cease, determine, and become absolutely void to all intents and purposes whatsoever."

Provided, § 5. " That no person or persons shall be authorized, by virtue of any letters patent from his Majesty, his heirs, suc-
cessors,

“cessors, or predecessors, or by the licence of the Lord Chamberlain of his Majesty’s Household for the time being, to act, represent, or perform for hire, gain or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in any part of *Great Britain*, except in the city of *Westminster*, and within the liberties thereof, and in such places where his Majesty, his heirs or successors, shall in their royal persons reside, and during such residence only.”

And it is further enacted by § 6. “That all the pecuniary penalties inflicted by this act, for offences committed within that part of *Great Britain* called *England*, *Wales*, and town of *Berwick* called *Tweed*, shall be recovered by bill, plaint, or information in any of his Majesty’s courts of record at *Westminster*, in which no essoin, protection, or wager of law shall be allowed; and for offences committed in that part of *Great Britain* called *Scotland*, by action or summary complaint before the court of sessions or justiciary there; or for offences committed in any part of *Great Britain*, in a summary way, before two justices of the peace for any county, stewarty, riding, division, or liberty, where any such offence shall be committed, by the oath or oaths of one or more credible witness or witnesses, or by the confession of the offender, the same to be levied by distress and sale of the offender’s goods and chattels, rendering the overplus to such offender, if any there be, above the penalty and charge of distress; and for want of sufficient distress, the offender shall be committed to any house of correction in any such county, stewarty, riding, or liberty, for any time not exceeding six months, there to be kept to hard labour, or to the common gaol of any such county, stewarty, riding, or liberty, for any time not exceeding six months, there to remain without bail or mainprize; and if any person or persons shall think him, her, or themselves aggrieved by the order or orders of such justices of the peace, it shall and may be lawful for such person or persons to appeal therefrom to the next general quarter sessions, to be held for the said county, stewarty, riding, or liberty, whose order therein shall be final and conclusive; and the said penalties against this act shall belong one moiety thereof to the informer, or person suing or prosecuting for the same, the other moiety to the poor of the parish where such offence shall be committed.”

And it is further enacted by § 7. “That if any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, shall be acted, represented, or performed, in any house or place where wine, ale, beer, or other liquors shall be sold or retailed, the same shall be deemed to be acted, represented, and performed for gain, hire, and reward.

“Provided that every prosecution, for any offence within this act, shall be commenced within six calendar months after the offence is committed.”

*Rex v. Ham-
dy*, 6 Term
Rep. 286.

[Tumbling is not an entertainment of the stage within the meaning of the above act.]

2 Roll.

Abr. 138.

Poph. 148.

Cro. Jac.

322. *Godb.*

259. *Cro.*

Eliz. 548.

Roll. Rep.

136. 200.

2 *Roll. Rep.*

3, 4. 34.

5 *Co.* 104.

Moor, 238.

* As to

pigeons see

1 *Jac.* 1.

c. 27.

amended

by 2 *G.* 3.

c. 29.

It was formerly held, that the erecting of a dovehouse on a man's own frank-tenement was a nuisance, because the pigeons* and doves were to be accounted tame animals, inasmuch as they had *animus revertendi*; and that therefore whoever erected such houses, were answerable for the damages done by them; and because they were not liable to every man's action, to avoid multiplicity of suits, it was thought a matter indictable in the leet. But the contrary opinion has prevailed; because it was allowed the lord of the manor might erect, or permit by his licence any person to erect a dovehouse; which he could not do, if it were a nuisance, every nuisance being *malum in se*. Besides, these animals are rather to be accounted *fera natura*; and by consequence, the only remedy any person had, for the damage sustained by the birds feeding on his ground, was to kill them and take them to himself, which was the proper relief according to the common law; inasmuch as the birds were accounted no man's property. But it is said, that a dovecote newly erected in a manor, without the lord's licence, is a good ground for an action on the case, at the suit of the lord.

Vide tit.

Highways,

letter (E).

Jon. 221.

Cro. Car.

104.

Bull. 203.

2 *Roll.*

Abr. 137.

It is clearly agreed to be a nuisance to dig a ditch, or make a hedge overthwart a highway, or to erect a new gate, or to lay logs of timber in it; or generally to do any other act which will render it less commodious: But it seems that a gate, which has continued time out of mind, is no nuisance; but that the same may be justified by prescription, being at first intended to have been set up by consent, on a composition with the owner of the land, on the laying out the road; in which case, the people had never any right to a freer passage than what they still enjoy.

Noy, 103.

3 *Feb.* 640.

759.

And as navigable rivers are deemed highways, it is a nuisance to divert part of the river, whereby the current of it is weakened, and made unable to carry vessels of the same burden as it could before. Also, the laying of timber in a common river, though the soil belong to the party, is equally a nuisance, as if the soil was not his, if thereby the passage of boats, &c. is obstructed. And hence also it seems to follow, that private stairs from those houses that stand by the *Thames* into it, are common nuisances. But it seems, that where there are cuts made in the banks, that are not annoyances to the river, the timber lying there is no nuisance.

2 *Roll. Abr.*

139. pl. 3.

It hath been holden to be a common nuisance, to divide a house in a town for poor people to inhabit in; by reason whereof it will be more dangerous in the time of infection of the plague.

6 *Mod.* 145.

The Queen

v. Leich.

Bringing a great ship of 300 tons into *Billingsgate-dock*, though a common dock, yet being only so for small ships coming with provision to the markets of *London*, is a nuisance, in the same manner, as a man using with his cart a common pack and horse way, so as to plough it up, and thereby render it less convenient to riders, is a nuisance indictable.

It seems the better opinion, that a brew-house, glass-house, chandler's shop, sty for swine, set up in such inconvenient parts of a town, that they cannot but greatly incommode the neighbourhood, are common nuisances.

Vent. 26. Keb. 500. 2 Salk. 458. pl. 3. 460. pl. 7. 2 Ld. Raym. 1163.

[Buildings for making acid spirit of sulphur, whereby the air was impregnated with noisome and offensive stinks in a parish, near the king's highway, and near several dwelling-houses, were declared a nuisance.

Ward's erections at Twickenham.

It is enacted by 9 & 10 W. 3. c. 7. "That it shall not be lawful for any person to make or cause to be made, or to sell or utter, or offer or expose to sale, any fire-works, or any cases, moulds, or implements, for making the same, on pain of 5*l.* on conviction before one magistrate on the oath of two witnesses: or, for any person to permit fire-works to be cast, thrown, or fired from, out of, or in his house, lodging, or habitation, or from, out of, or in any part or place thereto belonging or adjoining, into any publick street, highway, road, or passage, on pain of 20*s.* on conviction as aforesaid: or for any person to cast, throw, or fire, or to be aiding or assisting therein, on pain of 20*s.* and that every such offence is and shall be adjudged a common nuisance."

By 10 & 11 W. 3. c. 17. all mischievous games, called lotteries, and all other lotteries, are declared to be publick and common nuisances.

See too 17
G. 2. c. 5.
27 G. 3. c. 1.

By 6 G. 1. c. 18. § 19. "All undertakings, attempts, and projects by publick subscriptions, for adventuring on certain schemes of commerce, tending to the common grievance of his Majesty's subjects or a great number of them, and the receiving and paying of any money upon such subscriptions, &c. and more particularly the presuming to act as a body corporate, or to raise transferable funds, or pretending to act under any charter formerly granted from the crown for any particular or special purpose therein expressed, by persons making, or endeavouring to make use of such charter, for any such other purpose not thereby intended, and also acting, or pretending to act under any such obsolete charter, &c. shall be deemed a publick nuisance."

(B) How far the Indictment must charge it to be an Annoyance to all the King's Subjects.

EVERY nuisance, punishable by a publick prosecution, must be charged to be *ad commune nocumentum*, or to the general annoyance of all the king's subjects; for if they are only injuries to particular persons, they are left to be redressed by the private actions of the parties aggrieved by them.

And therefore an indictment for surcharging such a common, or inclosing such a piece of ground, or disturbing such a water-course, or doing any other act, not apparently of a publick nature, to the nuisance of the inhabitants of such a town, or of *J. S.* and his tenants, is not good.

2 Roll.
Abr. 83.
Hawk. P.C.
c. 75. § 3.

Hawk. P.C.
ubi supra,
and several
authorities
there cited.

Vent. 26. So, an indictment in a court-leet for keeping a glass-house
2 Keb. 500. *maximum nocumentum* was quashed, because it was not a nuisance unless it had been *ad commune nocumentum*.

Mod. 107. So, an indictment for stopping a watercourse was quashed
3 Keb. 284. being only laid *ad nocumentum omnium prope inhabitantium*, without saying *&c. transeuntium*.

1 Leon. 183, But it hath been held, that an indictment, for not repairing
184. bridge, *per quod ligei domini regis transire non possunt*, &c. *ad nocumentum eorundem*, is sufficient; for by the king's liege people shall be understood all his liege people.

2 Roll. Abr. Also, an indictment for doing a thing which plainly appears immediately to tend to the prejudice of religion, or of the king; &c.
83, 84. for breaking the walls of a church, or embezzling the king's treasure, &c. is good, without expressly laying it as a common grievance.
Hawk. P.C. c. 75. § 4.

6 Mod. 11. So, an indictment of a common scold, by the words *communis fixatrix*, hath been held good, though it concluded *ad commune nocumentum diverforum* instead of *omnium*; because, says Hawkins, from the nature of the thing, it cannot but be a common nuisance. And for the same reason, says he, an indictment with such a conclusion, for a nuisance to a river, plainly appearing to be a public and navigable river, or to a way, plainly appearing to be a highway, is sufficient. And perhaps, says he, the (a) authorities which seem to contradict this opinion, might go upon this reason, that in the body of the indictment it did not appear, with sufficient certainty, whether the way wherein the nuisance was alleged were a highway, or only a private way; and therefore it shall be intended from the conclusion of the indictment, that it was a private way.

(C) How a Nuisance is to be removed or abated.

Hawk. P.C. c. 75. § 12. **H**EREIN it is laid down by *Hawkins*, that any one may pull down or otherwise destroy a common nuisance; as, a new gate, or even a new house erected in a highway, &c. for if one whose estate is or may be prejudiced by a private nuisance actually erected, as, a house hanging over his ground, or stopping his lights, &c. may justify the entering into another's ground, and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate; surely, it cannot but follow *à fortiori*, that any one may lawfully destroy a common nuisance. And as the law is now holden, it seems, that in a plea, justifying the removal of a nuisance, the party need not shew that he did as little damage as need be.

If a river be stopped to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns, who have a common passage and easement therein, may be compelled to do it.
1 Aff. 10.
2 Roll.
Abr. 137.
Hawk. P.C. c. 75. § 13. said to have been adjudged.

(b) A writ to prohibit a bowling. It seems to be the better opinion, that the court of King's Bench may, by a (b) mandatory writ, prohibit a nuisance, and order

der that the same shall be abated; and that if the party disobeys the writ, he subjects an attachment. But upon such attachment, for proceeding after the writ of prohibition, there ought to be a declaration, setting forth the nature of the offence, and that the same is a nuisance, and that, notwithstanding the writ of prohibition, the defendant proceeded in or continued it; to which, if the defendant can in pleading set forth a sufficient justification, his proceeding *post prohibitionem regiam* will be good in law, and himself discharged of all contempt and costs against the complainant.

Simon restraining Jacob Hall, a rope-dancer, who had erected a stage at Charing-cross. 1 Kch. 146. Mod. 76. & *vide* Skin. 625. pl. 21. 5 Mod. 142.

alley erected near St. Dunstan's church, said by Hale to have been granted 8 Car. 1. on Noy's motion. Mod. 76. —So, a pro- Vent. 169.

(D) How the Offence is punishable.

ALL common nuisances to the publick are regularly punishable by fine and imprisonment, at the discretion of the judges; but in some cases, corporal punishment may be inflicted; as, in the case of a common scold, who is said to be properly punishable, by being put into the ducking-stool. Also the offence of keeping a bawdy-house is punishable, not only with fine and imprisonment, but also with such infamous punishment, as to the court in discretion shall seem proper.

Also a person convicted of a nuisance done to the king's highway, may be commanded by the judgment to remove the nuisance at his own costs; and *per Hawkins*, it is but reasonable that those, who are convicted of any other common nuisance, should also have the like judgment.

But it is clearly agreed, that common nuisances against the publick are only punishable by a publick prosecution; and that no action on the case will lie at the suit of the party injured; for this would create a multiplicity of actions, one man being as well entitled to bring an action as another; and therefore, in those cases, the remedy must be by indictment at the suit of the king.

2 Brownl. 147. Vaugh. 341. Cro. Eliz. 664. 3 Mod. 294. Carth. 191. Salk. 15. pl. 7.

But, if by such a nuisance the party suffer a (a) particular damage, as, if by stopping up a highway with logs, &c. his horse throws him, by which he is wounded or hurt, an action lies (b).

1 Jon. 157. Salk. 15. pl. 15. (a) But if a highway is stopped, that a man is delayed in his journey a little while, and by reason thereof he is damaged, or some important affair neglected; this is not such a special damage, for which an action on the case will lie; but a particular damage, to maintain this action, ought to be direct, and not consequential; as for instance, the loss of his horse, or some corporal hurt, in falling into a trench in the highway, &c. Carth. 194. [(b) But this does not extend to entitle one, who has received detriment by a county bridge being out of repair, to bring an action against the inhabitants of that county, there being no ground to consider them, for this purpose, as a corporation, and in that capacity liable to be sued. 2 Term Rep. 667.]

Also an action lies for continuing a nuisance; as, where, for erecting a nuisance 2 *die Febr.*, the defendant pleaded a prior action, brought for erecting a nuisance 20 *die Martii*, and a recovery thereupon, and averred these to be the same nuisance and erection; and on demurrer the plaintiff had judgment; for though he cannot have a new action for the same erection, yet he may for the continuing the same nuisance.

2 Roll. Abr. 84. Hawk. P. C. c. 75. § 14. 6 Mod. 11. 178. 213. Salk. 382. pl. 31.

2 Roll. Abr. 84. Hawk. P. C. ubi *supra*.

Co. Lit. 56. a. Roll. Abr. 88. 110. 2 Roll. Abr. 140, 141. Moor, 180. 4 Co. 18. 9 Co. 113. Salk. 15. pl. 7.

Co. Lit. 56. Cro. Jac. 446. Keb. 847.

Salk. 10. pl. 3. Carth. 455. Ld. Raym. 370.

Obligations.

- (A) Of the Nature of the Security, called a Bond or Obligation.
 - (B) What Words create such a Security.
 - (C) Of the Ceremonies requisite to a Bond or Obligation : And herein of Signing, Sealing, Date, and Delivery.
 - (D) Of the Parties to the Obligation : And herein
 - 1. Who may bind themselves, or be Obligors.
 - 2. Who may take such Security, or be Obligees.
 - 3. Who shall be said the Obligee; and herein of making several Obligees.
 - 4. Where there are several Co-obligors or Sureties; and herein, where they shall be said to be jointly and severally bound, and of the Obligee's Remedy against all or any of them.
 - 5. Of their Remedies against each other.
 - (E) Of the Condition and Consideration of the Obligation.
 - (F) How the Breach of the Condition must be assigned and set forth, and the Manner of pleading Performance, and in Bar.
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- (A) Of the Nature of the Security, called a Bond or Obligation.

Co. Lit.
172. 2.

OBLIGATION, says my Lord *Coke*, is a word in its own nature of a large extent, but is usually taken in the common law for a bond, containing a penalty with condition for payment of money, or to do or suffer some act or thing, &c. ; and as my Lord says he, is most commonly taken for a single bond without condition.

This security is also called a specialty; the debt being therein particularly specified in (a) writing. And the party's seal, acknowledging the debt or duty, and confirming the contract, renders it a security of a (b) higher nature than those entered into without the solemnity of a seal; and therefore bonds or specialties shall be (c) preferred to simple contracts, in a course of administration. And from its being a higher security, it is held, that for a breach or non-performance an action of debt (d) only will lie.

sewed in a book, and, either way, it is good; but if it be made on a tally, piece of wood, or any thing but paper or parchment, (although it be sealed and delivered,) it is void. Bro. Oblig. 30.—Because these are least subject to alteration or corruption. Co. Lit. 229. a.—May be in a letter, or writing, so it be sealed. Comb. 87. 3 Mod. 154.—But note, That by the late statutes it must be on stamped paper or parchment. (b) Therefore if a man accepts an obligation for a debt due by contract, this extinguishes the simple contract debt. Roll. Abr. 604. 2 Leon. 110.—So, if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the death of the legatee is extinct, and it is become a mere duty at common law. Yelv. 18. [But the bond of a surety extinguishes the simple contract debt of the principal. White v. Cuyler, 6 Term Rep. 176.]—Also, in being of a higher nature than a simple contract, the defendant cannot plead *nil debet*, but must plead *solvit ad diem*, or *non est factum*; for the seal of the party continuing, it must be dissolved *quasi quo ligatur*. 2 Inst. 651. Hard. 218. (c) For this *vide* head of Executors and Administrators. (d) And therefore it is held, that if the obligor in a bond, without any new consideration, as a promise, &c. promises to pay the money, an *assumpsit* will not lie, but the obligee must still pursue his remedy by action of debt. Roll. Abr. 8. Hut. 34. Cro. Eliz. 240.

A bond or obligation is a debt or duty which adheres to the obligor or debtor, let it be contracted where it will, and let the obligor fly to what place he pleases; and being chargeable everywhere, it need not be dated from any particular place; and therefore usually begins with *Noverint universi*: but yet the plaintiff in a declaration must lay a place where it was made, that it may be tried, if it be denied.

And let it out as made at the true place, and introduce the place of trial under a *videlicet*, 1 Str. 612. And where the plaintiff declared, "that the defendant by his bond *apud London concessit*, &c." and on oyer, the bond appeared to be dated at Port St. David in the East Indies, which was not mentioned in the declaration, the variance was pronounced to be fatal. Roberts v. Harnage, 2 Salk. 659.]

A bond is (e) a *chose in action*, which cannot be assigned over, so as to enable the assignee to sue in his (f) own name; yet he may by the assignment such a title to the paper and wax, that he may keep or cancel it.

And if the husband dies, it shall survive to her, being a *chose in action*, which the husband might have reduced into possession.—So, if the wife, who is the obligee, dies, her husband is no otherwise entitled to it than as administrator to his wife. Noy, 149. Style, 205. For this *vide* tit. Baron and Feme. And by the modern practice, he may sue for it in the name of the obligee, as his attorney; but *quære*, whether this can be done without an express authority? *Vide supra*, vol. i. 249.

Also, in equity, a bond is assignable for a valuable (g) consideration paid, and the assignee alone becomes entitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over to the assignee.

2 Vern. 595. But payment to the obligee, without notice of the assignment, is good. Chan. 221.

The assignee must take it, subject to the same equity that it is in the hands of the obligee; as if, on a marriage-treaty, the

(a) An obligation may be made upon parchment or paper, and in loose parchment or paper, or in a piece of parchment

Cro. Eliz. 773. Salk. 141. 3 Lev. 348. 6 Mod. 228. [If the bond be dated at a certain place, the declaration

Co. Lit. 212. (e) That being given to a feme sole, who afterwards

2 Vern. 595. Abr. Eq. 44. there must be a consideration paid. 3 Chan. Rep. 90.

2 Vern. 428. 692. 764.

Obligations.

... into a marriage-brokers bond, which is not to be carried into execution against the creditors, yet it still remains liable to the principal and interest.

... considered as securities for the performance of the obligation, and are usually entered into with (a) penalties, which are considered as (b) compensations for the breach of the obligation, that a man shall pay 200*l.* if he omits to pay 100*l.* at such a time, that he shall pay so much if he does not perform such and such covenants, do or omit such and such act, or that he may *cedere suo jure*, provided the thing be not unlawful, or injurious to the publick, &c.

... the principal at the end of the year, is not usurious within the statute, because it is a loan to avoid the payment of the money so reserved, by paying the principal at the end of the year. *Cro. Jac.* 509. (b) A contract or covenant to give bond for the payment of money, without shewing of what sum the obligation shall be, is good, and if the sum is 5 Co. 77. b. 78. a. Lev. 88.—So, where there was an agreement to enter into a bond for the performance of the covenants; and it was found that he did not enter into bond, &c., and a verdict for the plaintiff; it was moved, that this part of the agreement was uncertain and void, because it was not stated what the bond should be, and here was no certainty to guide it, as in the above case. The sum in the bond must be to the value of the agreement; & *per cur.* you shall see, though the sum were never so small, and why did you not tender such a sum?

... a man enter into a bond of such a sum, on condition to void on payment of a less sum; or, if a man bind himself in a penalty of 100*l.* that he will pay 50*l.* by such a day; after that day of payment is past, the penalty or sum of 100*l.* is the legal debt; and for so much it hath been (c) resolved, that an executor of an obligor of such forfeited bond, may cover the assets of the obligor.

... *Richard. K. B.* 183. S. C. *Caf. temp. Hardw.* 219. S. C. 4 Br. P. C. 287. S. C. ... the sum really due; and indeed if the bond be not forfeited, such sum is not due. *1 Term Rep.* 300. However, if the penalty be pleaded, the plaintiff may reply that he is ready for principal and interest, which he may aver the obligee is ready to receive, and it shall be taken on fact by a jury.]

... And as the penalty, by the bond's being forfeited, becomes a legal debt; so there was no remedy against such penalty, but application to a court of equity, which relieves in those cases on payment of principal, interest, and costs. Also, though the law says there can be no remedy beyond the penalty, because that the obligee seems to have taken up his security; yet, as it is on the foundation of doing equal justice to both parties in equity proceeds, it will, on any application for a favour from the obligor, compel him to pay the principal, interest, and costs, though exceeding the penalty (e).

... may be recovered beyond the amount of the penalty. *Lord Londale v. Church*, 2 T. R. 511. *Wade v. Clarkson*, 6 Term Rep. 103. *contra.* (e) In general, however, the law does not allow of any thing beyond the penalty of the bond. *Tew v. Earl of Winter*, 10 T. R. 408. Thus, where there was a devise for payment of debts, it was holden, that for seventy years standing, were renewed by it, and were ordered to be paid with interest; but the bond debts were only allowed interest to the amount of the penalty. *Kettilb. v. Lord Bathurst*, cited in 1 Anstr. 527. So, though the principal and interest were due, yet the obligor, on a bill to redeem, can claim only to the extent of the penalty. *Lord v. Hanchett*, 14 335.]

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for though in strictness it may be accounted his own fault why he did not take out execution, and therefore he is not entitled to interest; yet, as by the judgment he is entitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him principal, and the interest, which incurred as well before as after the entering up of the judgment.

Also, by the 4 & 5 Ann. c. 16. it is enacted, "That where any action of debt shall be brought on any single bill, or where an action of debt, or *scire facias*, shall be brought upon any judgment, if the defendant hath paid the money due on such bill or judgment, such payment shall and may be pleaded in bar of such action or suit; and where an action of debt is brought upon any bond, which hath a condition or defeazance to make void the same, upon payment of a less sum at a day or place certain; if the obligor, his heirs, executors, or administrators have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeazance or condition of such bond, though such payment was not strictly made according to the condition or defeazance; yet it shall and may be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place according to the condition or defeazance, and had been so pleaded."

And it is further enacted by the said statute, § 14. "That if at any time pending an action upon any such bond with a penalty, the defendant shall bring into court, where the action is (a) depending, all principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond; the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly*."

(a) One cannot move to stay proceedings upon a bond upon payment of principal, interest, and costs, till bail be put in; for till then the parties are

not in court. 6 Mod. 11. — * Stealing a bond made felony, by 2 G. 2. c. 25. § 3.

(B) What Words create such a Security.

HEREIN we must observe, that the law does not seem to require any particular set form of words, as essentially necessary to create an obligation, but that any words, which declare the intention of the party, and denote his being bound, will be sufficient; because such obligation is only in nature of a contract, a security for the performance of a contract, which ought to be construed according to the intention of the parties.

Therefore, if a man useth this form of words, *viz. This bill witnesseth, that I A. B. have borrowed 10 l. of C. D.; or this form, Memorandum, quod talis debet to B. ten pounds; or thus, Memorandum,*

Yelv. 193.
2 Roll. Abr.
146-7.

Dyer, 22. b.

dum, all things reckoned and accounted between A. and B. A. cognovit se debere to B. ten pounds; all these forms are good, and shall as effectually bind the party and his executors, as if the most formal words were made use of, provided the writing be sealed and delivered.

Leon. 25. So, a writing in this form, *Memorandum, I A. B. have agreed to pay J. S. 20 l.* though this be in the preterfect tense, yet if it hath all other ceremonies essential, it shall amount to an obligation.

Cro. Eliz. 729. So, in this form, *This bill witnesseth, that I R. S. have received of T. B. 40 l. to the use of R. and J. S. children of, &c. equally to be divided between them; which sum I confess to have received to the uses aforesaid, and the same to repay at such time as shall be thought best for the profits of the said R. and J. S.; this was resolved to be a good obligation.*

Cro. Eliz. 561. & vide Cro. Eliz. 758. So, a writing in this form, *Memorandum, that I bind myself to J. M. to pay him as much money as my brother owes him; and in the end of the bill is written the sum of 40 l. which is said to be the debt due from the brother: this is a good obligation.*

Cro. Eliz. 386. *Memorandum, that I owe and promise to pay to A. 10 l. at any time after the Feast, &c. when thereto required, for the payment whereof I bind myself to J. H. by these presents: this is a good bill to A. by the first words, and the latter being surplusage are void, and to be rejected.*

Moor, 537. It is held in *Moor and Cro. Eliz.* that a bill in this form, *Be it known, &c. that I owe to B. 14 l. to be paid at the Feasts, &c. together with 6 l. which I owe him upon bills and reckonings subscribed with my hand,* amounts only to a bill for 14 l.; but (a) *Dyer* holds it a good obligation for the whole debt of 20 l.

with 6 l. which I owe by bills, &c., are only an explanation of the precedent debt. Cro. Eliz. 537. S. C. adjudged, and that that which comes after the *solvendum* is void, as that which comes after an *habendum*. (a) *Dyer*, 22. b. in margin.

Vent. 238. In debt for 20 l. the plaintiff declared, that the defendant *con-*
Watson v. Saeed. *cessit se teneri per scriptum suum obligatorium, &c.* and the words of the deed were, *I do acknowledge to Edward Watson by me twenty pounds upon demand, for doing the work in my garden; and upon demurrer to the declaration, it was adjudged a good bond.*

3 Leon. 119. These words, *I am content to give to W. 10 l. at Mich. and 10 l.*
2 Roll. Abr. *at our Lady-day,* amount to an obligation, and an express engage-
146. S. P. *ment to pay, &c.*

But for this It hath been held in variety of cases, that a seeming *Latin word*,
vide 10 Co. not properly expressing the quantity of the sum in which the party
133. a. intended to be bound, should, notwithstanding, be so construed,
Yelv. 96. as to answer the intention of the parties, rather than that the obli-
193. 206. gation should be void; as *quingageffimis libris*, for *quinquaginta*
Hob. 119. *libris*, has been held good; so, *trigintate* for *triginta*, *sexingenta* for
Cro. Jac. *sexaginta*; and it is said in general, that in most cases where the
290. 309. *gent* or *gint*, or the *sex* or *sept* are right, the obligation has been
355. 603. held well.
607. Cro. Brownl. 62.

2 Roll. Abr. 146. 5 Mod. 154. 2 Jon. 58. Comb. 60. 86. 187. 477. Ld. Raym. 335. 5 Mod. 287. 2 Salk. 462. pl. 2. [By statute 4 Geo. 2. c. 26. bonds must be in the English language, and not in Latin or French, or any other language whatsoever.]

A bond in *viginti nobilis* has been held a good bond for 6 *l.* 8 *s.*; for though *nobilis* be not a *Latin* word, yet it being a term signifying 6 *s.* and 8 *d.* it may properly be made use of.

Cro. Jac. 203. 2 Roll. 21. 85. Moor, 28. Styl. 97. (a) 2 Salk. 462. pl. 2. Ld. Raym. 335. 5 Mod. 281. *Vide tit. Misnomer and Addition.*

Debt brought upon a bond for 60 *l.* the bond was in *Italian*, and the sum therein expressed was in these words, *viz. in cessanti libris*, and adjudged to be good.

Cro. Jac. 208. Parker v. Rennaday.

In debt upon a bill obligatory, demanding thirty-two pounds four shillings and seven pence; the defendant demanded oyer of the bill, and it was threty-two ponds four shillings and seven pence, so threty for thirty, and ponds for pounds; and on demurrer for this cause, it was adjudged for the plaintiff.

Cro. Jac. 607. Hulbert v. Long.

So a bill, in which the party bound himself in the sum of *sewenty pounds*, has been held a good obligation for 17 *l.* in order to answer the intention of the parties.

20 Co. 133. 2. in Osborn's case. 2 Roll. Abr. 147. S. P. cited.

(C) Of the Ceremonies requisite to a Bond or Obligation: And herein of Signing, Sealing, Date, and Delivery.

It is said, that there are only three things essentially necessary to the making a good obligation, *viz.* writing in paper or parchment, sealing, and delivery; but it hath been (a) adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the obligation the obligor be named *Erlin*, and he signs his name *Erlwin*, that this variation is not material, because subscribing is no essential part of the deed, sealing being sufficient.

2 Co. 5. a. Goddard's case. Noy, 21. 85. Moor, 28. Styl. 97. (a) 2 Salk. 462. pl. 2. Ld. Raym. 335.

5 Mod. 281. *Vide tit. Misnomer and Addition.*

And though the seal be necessary, and the usual way of declaring on a bond is, that the defendant *per scriptum suum obligatorium sigillo suo sigillatum* acknowledged, &c. yet, if the word *sigillat.* be wanting, it is cured by verdict and pleading over; for when he says *per scriptum suum obligatorium*, &c. all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation.

Dyer, 19. a. Cro. Eliz. 571. 737. Cro. Jac. 420. 2 Co. 5. Vent. 70. 3 Lev. 348.

Also, though sealing and delivery be essential to an obligation, yet there is no occasion in the bond to mention that it was (b) sealed and delivered; because, as my Lord Coke says, these are things which are done afterwards.

2 Co. 5. a. (b) So, an obligation is good, though it 2 Co. 5. a.

want in *cujus rei testimonium*. Moor, 3. Leon. 25.

An obligation is good though it wants a date, or hath a false or impossible date; for the date, as hath been observed, is not of the substance of the deed. But herein we must take notice, that the day of the delivery of a deed or obligation is the day of the date, though there is no day set forth; and if a deed bear date one day, and be delivered at another, it was really dated when delivered, though the clause of (c) *gerens dat.* be otherwise.

2 Co. 5. Goddard's case. Noy, 21. 85, 86. Hob. 249. Styl. 97. Cro. Jac. 136. 264. Yelv. 193. Salk. 76.

(c) A difference has been taken between *gerens dat.* and *cujus dat.*, that the first refers to the express date, but that *cujus dat.* is always intended of the real date, which is the delivery.

5 Mod. 285.

Comb. 477. 2 Salk. 463. Ld. Raym. 335.

Cro. Eliz.
773.
3 Lev. 343.
Salk. 141.
pl. 7.

If a man declare on a bond, bearing date such a day, but do not say when delivered, this is good; for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply, that it was *primo deliberat.* at another day; for this would be a departure.

Brownl.
104.
Lev. 196.

But, if a bond bear date such a day, but was really delivered at a day after, the obligee may declare on a bond of such a date, but *primo deliberat.* at a day after; and if the obligee declare on a bond of such a date generally, the obligor may plead it was *primo deliberat.* on such a day after; but then he must traverse that it was delivered on the day of the date.

2 Co. 4. 6.
3 Keb. 332.

If the bond was delivered before the date, on issue, *non est factum*, joined on such a deed, the jury are not estopped to find the truth, *viz.* that it was delivered before the date, and it is a good deed from the delivery.

Vent. 9.
110. Salk.
274. pl. 1.
2 Ld. Raym.
303.

In debt on an obligation, the defendant pleads that he delivered it as an escrow, & *hoc paratus est verificare*: this is ill, for he ought to shew to whom he delivered it, and conclude *issint nient son fait*; & *de hoc ponit se, &c.*

Hob. 246.
Vent. 9.

So, pleading that he delivered it to the obligee as an escrow, to be his deed on certain conditions, is ill; for by the delivery of it to the obligee, it is become his deed absolutely.

Co. Lit. 36.
a. Cro. Eliz.
335. [That
circum-
stances may
amount to
delivery, see
Goodright
v. Strahan,
Cowp. 204.]
(a) Leon.
193. Cro.
Eliz. 122.
and that in the same leaf the defendant put his hand and seal thereto; and this was held to be sufficient evidence for the jury to find it his deed, which they having accordingly done, it was held good without question. Cro. Eliz. 613. Fox v. Wright.

A bond or deed may be delivered by words, without any act of delivery; as, where the obligor says to the obligee, go and take the said writing, or take it as my deed, &c. so an actual tradition, without speaking any words, is sufficient; otherwise, a man that is mute could not deliver a deed. But (a), where on an issue of *non est factum*, the jury found that the defendant signed and sealed the obligation, and laid it on a table, and that the plaintiff came and took it up, this was held not to be the defendant's deed, without other (b) circumstances found by the jury.

5 Co. 119.
b.

If an obligation be delivered to another to the use of the obligee, and the same be tendered, and he refuse, the delivery has lost its force.

Lord Love-
lace's case,
Sir Wm.
Jones, 268.
Ball v. Dunsterville, 4 Term Rep. 313.

[If A. and B. enter into a bond, and set but one seal to it, and A. execute it for himself and B. with the authority and in the presence of B., it is obligatory on both.]

(D) Of the Parties to the Obligation: And herein,

1. Who may bind themselves, or be Obligors,

5 Co. 119.
4 Co. 124.
Roll. Abr.
340.

ALL persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations.

But,

But, if a person is illegally restrained of his liberty, by being confined in a common gaol or elsewhere, and during such restraint, enters into a bond to the person who causes the restraint, the same may be avoided for durels of imprisonment.

Co. Lit. 253.
2 Inst. 482.
Vide tit. Du-
rels.

[If a man menace me unless I make him a bond for 40 l. and I tell him, I will not do it, but will give him a bond for 20 l. the court will not expound this bond to be a voluntary one; for *non videtur consensum retinuisse, qui ex præscripto minantis aliquid mutavit.*]

Bac. Res.
22.

So, in respect of that power and authority which a husband has over his wife, the bond of a feme covert is *ipso facto* void, and shall neither bind her nor her husband.

Vide tit.
Baron and
Feme (M).
Vol. 1. 507.

So, though an infant shall be liable for his necessities, such as meat, drink, clothes, physick, schooling, &c. yet, if he bind himself in an obligation, with a (a) penalty for payment of any of these, the obligation is void.

Doctor and
Student, 113.
Co. Lit.
172. Cro.
Jac. 494.
560. Sid.

312. (a) For this incapacity of an infant arises from his being incapable of contracting for any thing but for his benefit; but it can never be for his benefit to enter into a penalty. Cro. Elis. 920. Vide head of Infancy and Age.

Also, though a person *non compos mentis* shall not be allowed to avoid his bond, by reason of insanity and distraction, because no man can be allowed to stultify himself, because of the ill consequences that might attend counterfeit madness; yet, may a privy in blood, as the heir; and privies in representation, as the executor and administrator, avoid such bonds. Also, if a lunatick; after office found, enters into a bond, it is merely void.

4 Co. 124.
Beverly's
case. Vide
head of
Idiots and
Lunaticks.
[Modern
cases confi-
der the bond
of a lunatick

as absolutely void; and the obligee himself may, on *non est factum*, give loney in evidence. Yates v. Dean, 2 Str. 1104. A bond may be avoided in like manner by reason of excessive drunkenness at the time of executing it. Cole v. Robbins, Bull. N. P. 172.]

But, if an infant, feme covert, monk, &c. who are disabled by law to contract and to bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c.

Roll. Rep.
41.

If a servant make a bill in this form, *Memorandum, that I have received of Ed. Talbot, to the use of my master Serjeant Gaudy, the sum of 40 l. to be paid at Michaelmas following*, and thereto set his seal, this is a good obligation to bind himself; for though in the beginning of the deed the receipt is said to be to the use of his master, yet the repayment is general, and must necessarily bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no remedy against Serjeant Gaudy.

Yelv. 137:
Talbot v.
Godbolt.

2. Who may take such Security, or be Obligees.

Infants, idiots, as also a feme covert, may be obligees. And as to this the husband is supposed to assent, being for his advantage: but if he disagrees, the obligation has lost its force; so that after

3 Co. 119.
b. Co. Lit.
3. a.

the obligor, may plead *non est factum*. But if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is a turn to his advantage.

But for this
vide tit.

Baron and

Feme,

Letter (E).

[(a) A bond

given by the

husband to the intended wife prior to marriage, conditioned for payment of money to her after the obligor's death, is not extinguished by the coverture; and such a bond may be enforced *at law* against the heirs of the husband. *Milbourn v. Ewart*, 5 Term Rep. 381. *Cage v. Acton*, 1 Ld. Raym. 515.]

But a feme covert can neither be obligor nor obligee to her husband, nor *vice versa*, being but one person in law. Also, by the better opinion, a bond entered into, to a feme sole, by the person whom she afterwards marries, is, by the marriage, at law (a) extinguished.

Co. Lit.

129. b.

Moor, 431.

Cro. Eliz.

142. 683.

Cro. Car. 9.

Salk. 46.

pl. 1. Ld. Raym. 282. *Vide* head of Alien.

An alien may be an obligee; for since he is allowed to trade and traffick with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us.

Cro. Eliz.

464. Dyer,

48. a.

Co. Lit. 9.

a. 46. b.

Hob. 64.

Roll. Abr.

515. (b) As,

the Cham-

berlain of

London, whose successor, by custom, may have execution of a bond or recognizance acknowledged to his predecessor for orphanage money. 4 Co. 65. Cro. Eliz. 464 682.

Sole corporations, such as bishops, prebendaries, parsons, vicars, &c. cannot be obligees, and therefore a bond made to any of these shall enure to them in their natural capacities; for no sole body politick can take a chattel in succession, unless it be by (b) custom. But a corporation aggregate may take any chattel, as bonds, leases, &c. in its political capacity, which shall go in succession, because it is always in being.

3. Who shall be said the Obligee; and therein of making several Obligees.

2 Roll. Abr.

148. Frank-

lin v. Tur-

ner. [The

solvendum

will shew

to whom

bound,

though the

3 Lev. 21.

If *A.*, by his bill obligatory, acknowledges himself to be indebted to *B.* in the sum of 10 *l.* to be paid at a day to come, and binds himself and his heirs in the same bill in 20 *l.*, but does not mention to whom he is bound, yet is the obligation good, and he shall be intended to be bound to *B.* to whom he acknowledged before the 10 *l.* to be due.

obligee's name be omitted in the preceding part of the instrument. *Langdon v. Gook*, Lambert v. Branchwaite, 2 Str. 945.]

Dyer, 167.

a. Taw's

case. N.

Bendl. 75.

Co. Ent. 145.

Roll. Abr.

148. and

Salk. 301. S. C. cited. (c) In 3 Co. 26. b. where my Lord Coke cites this case, he says, that per-

If *A.* enters into an obligation to *B.*, which he delivers to *C.* to the use of *B.*, though this immediately, upon the execution and delivery to *C.* becomes the deed of *A.*, yet, if after it is presented to *B.* he (as he may) disagrees to it *in pais*, by such refusal the obligation (c) loses its force.

adventure in an action brought on the bond, *A.* cannot plead *non est factum*, because that it was once his deed.—But in 5 Co. 119. b. he says, that in such case the obligor may plead *non est factum*, in regard the obligation, by the refusal of the obligee, loses its force.

Though

Though there may be several obligees, yet a person cannot be (a) bound to several persons severally; and therefore an obligation of 100*l.* to two, *solvend.* the one hundred pounds to the one, and the other to the other, is a void *solvend.*

Dyer, 350.
1. pl. 20.
Hob. 172.
2 Brownl.
207. Yelv.
177. (a) But
March, 103.

a man may covenant with two severally, for that sounds only in damages.

A bond was worded in the words following: *Be it known, that I A. do acknowledge myself to owe and be indebted to B. and C. in the sum of 91*l.* 12*s.* 8*d.*, for which payment to be made I bind myself to B. in 100*l.*; and whether B. alone should bring the action for the 100*l.*, or both should join in an action for the 91*l.* 12*s.* 8*d.* *subtainer & adjournatur.**

Cro. Jac.
251. Fozall
v. Sands.

If an obligation be made to three to pay money to one of them, they must all join in the suit, for they are but as one obligee; and if he to whom the money is to be paid dies, the others must sue, although they have no interest in the sum contained in the condition.

Adv. 177.

So, if an obligation be made to three, and two bring their action, they ought to shew the third is dead.

Sid. 238.
420.
Vent. 34.

If A. bind himself in a sum to B., *solvendum* to C., who is a stranger, to the use of B., a payment to C. is a payment to B., and in an action upon it the count must be upon a bond *solvendum* to B.

Queen Mo-
ther v.
Challoner,
Sid. 295.
2 Keb. 81.
[In this case

the court only inclined to the opinion here stated: there was no determination: the matter was adjourned.—As courts of law now take notice of trusts, the defendant may plead, that the nominal obligee in the bond, is not the real owner of it, but merely a trustee for another, and so entitle himself to set off a debt due from the *cestui que* trust to him. Rudge v. Birch, Mich. 25 G. 3. B. R. Ramsey v. Brook, Mich. 22 G. 3. C. B. 1 Term Rep. 621-2.]

6 Mod. 228.
Robert v.
Harnage.
Ld. Raym.
1043.
2 Saik. 659.
pl. 5.

In debt the declaration was, that the defendant became bound in a bond of ——— for the payment of ——— to him, his attorney or assigns, and on oyer of the bond it appeared, that the *solvendum* was to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance it was held good; and that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon.

6 Mod. 228.
Robert v.
Harnage.
Ld. Raym.
1043.
2 Saik. 659.
pl. 5.

So, if A. make a bond to B., *solvendum* to such person as he shall appoint; if B. does appoint one, payment to him is a payment to B., and if B. appoint none, it shall be paid to B. himself.

6 Mod. 228.

4. Where there are several Co-obligors or Sureties; and herein, where they shall be said to be jointly and severally bound, and of the Obligee's Remedy against all or any of them.

It is clearly agreed, that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and severally; in which last case the obligee may sue them all jointly, or he may sue any one of them, at his election; but if they are jointly, and not severally bound, the obligee must sue them jointly.

2 Roll. Abr.
148. Dyer,
19. 310.
5 Co. 10.
Dalif. 85.
pl. 42.
Saik. 393.

pl. 2. jointly. Also, in such case, if one of them dies (a), his executor
 Carth. 61. is totally discharged, and the survivor and survivors only
 Lutw. 696. chargeable.
 (a) If two are bound jointly, and one dies, the survivor only is liable in equity; but it is otherwise, if they were bound jointly and severally. 2 Ventr. 99. *see Vol. 7. 506*

Dyer, 19. If three enter into an obligation, and bind themselves in the
 b. pl. 114. words following, *Obligamus nos & utrumque nostrum per se pro toto & in solido*; these make the obligation joint and several.

Cro. Jac. So, where two bound themselves, or any of them, their heirs, exe-
 322. cutors, or either of their heirs, &c. and the obligation was sealed
 Hawkinson and delivered by both of them jointly; this was held to be a joint
 v. Sandilana. and several, and not a joint bond only; and that the word *vel*
 should be understood the same as *et*; and that therefore the
 joint delivery and acceptance could not make that joint only,
 which by the words was joint or several, at the election of the
 obligee.

8 H. 6. 37. If two jointly and severally bind themselves in an obligation,
 2 Roll. which they severally deliver at different times and places, yet is
 Abr. 149. the obligation joint or several, at the election of the obligee.

Moor, 260. If three are bound in a bond by these words, *Obligamus nos &*
 pl. 407. *quemlibet nostrum conjunctim*; this is a joint obligation, and one of
 3 Leon. 206. them alone cannot be sued (b); for the word *conjunctim* makes the
 Wigmore obligation joint, which the word *quemlibet* cannot make several;
 v. Wells. being inserted for no other purpose, but to express more strongly
 [Spencer that they should be all bound, not that they were to be severally
 v. Durant, bound.]
 1 Show. 8. S. P.

(b) But if one is sued, he must take advantage of it by pleading in abatement; for if he demands oyer, and demurs, the plaintiff shall have judgment; for the court will presume, that the other never sealed it. *Gilbert v. Bath*, 1 Str. 503. They will presume the like, unless the plea state that the other actually did seal it. *Hollingworth v. Ascue*, Cro. El. 335.]

2 Roll. Abr. If by indenture between three on the one part, and two of the
 149. ad- other, the two covenant jointly and severally to perform a certain
 judged by act, and the three likewise covenant jointly and severally with
 three judges against the said two, that, after the performance of the said act, they
 against will pay the said two a certain sum of money, &c., and then
 Rolfe, who follow these words, viz. *Pro vera & reali performance omnium*
 held it to be *articularum & agreementorum predictorum alternatim una partium*
 joint and se- *predictarum obligavit se heredes, executores, administratores & assign-*
 veral; and *natos suos, in & subter penalitatem sexaginta librarum sterlingarum*
 of that opi- an action of debt for the 60 l. on this last clause, cannot be brought
 nion he says against one of the three only, being only joint, and not joint and
 were divers several, like the precedent covenant.
 of the judges
 and ser-
 jeants, at
 the table in
 Serjeants-Inn in Fleet-street, on its being proposed to them.

10 H. 7. 16. Although two or more may bind themselves jointly, or jointly
 Yelv. 26. and severally, in which case the obligee may sue them all jointly
 Sid. 238. or severally, at his election; yet, if three or more bind them-
 (c) Unless selves jointly and severally, the obligee cannot sue two of them
 'It appears to the court that the (c) only jointly.

other persons are dead. Hard. 198. Cro. Eliz. 494. Sand. 291. Sid. 238. 42b. Allen, 21. 41
 Lutw. 696. Cro. Jac. 152. Keb. 840. 936.

Also, if two be bound in a bond jointly, and one be sued alone, though he may plead this matter in abatement of the writ, yet he cannot plead *non est factum*; for it is his deed, though not his sole deed.

Case. Doct. Pl. 198. Cro. Jac. 152. Vent. 34. Poph. 161.

Co. Lit. 283. a.
5 Co. 119.
Whelpdale's
9 Co. 110.

And therefore in debt against one, on an obligation wherein two are jointly bound, after imparlance and oyer, the defendant cannot plead that the other sealed and delivered; for as that must come on the defendant's side, and it is too late to plead it after imparlance, it shall be taken, that the other did not seal, &c. nor will the oyer help it, for it does not appear by it, without special averment. But of (a) records oyer is sufficient, without averment.

Vent. 76.
135.
2 Keb. 795.
(a) And therefore in a *scire facias* brought against three bailies or sureties, upon a recog-

nizance a knowledge by them and the principal jointly and severally; on demurrer the writ abated, because, this being founded upon a record, the plaintiff ought to set forth the cause of the variance from the record; as, that one was dead. But, if an action be brought upon bond in the like case, there, the defendants ought to shew that it was made by them and others in full life not named in the writ; because the court shall not intend that the bond was sealed and delivered by all that are named in it; and therefore the defendants cannot demur upon it, though it be entered *in hæc verba*. Ailen, 21. Blackwell v. Ashton.

So, in debt against one, on a bond wherein two are jointly bound, after oyer the defendant demurred, and the plaintiff had judgment; for though another be named in the bond, yet it does not appear, without averment, that he sealed, and then the bond is single; but it ought to have been pleaded in abatement.

Saund. 291.
Sid 420.
Cabel v.
Vaughan.

Also, if two or more be jointly bound, though, regularly, one of them alone cannot be sued, yet, if process be taken out against all, and one of them only appear, but the other stand out to an outlawry, he who appeared shall be charged with the whole debt.

9 Co. 119. a.
in Whelpdale's case.

If two are jointly bound, and there is judgment against both, execution likewise must be taken out against both, and must be of the same nature: also, if two are jointly and severally bound, and there is judgment in a joint action against both, the execution must be joint against both, and of the same nature; so that you cannot take out a *capias* against one, and an *elegit*, &c. against the other; for though the plaintiff might have sued them severally, yet by suing them jointly he has made his election, and the execution must ensue the nature of the judgment; and though they be several persons, yet they make but one debtor, when *J. S.* sues them jointly. But if the obligee sues them severally, he may sever them in their kinds of execution; for though the obligation be but one, yet the originals, suits, pleadings, judgments, and executions are as different as if they were upon several obligations.

Hob. 59.
Cro. Eliz. 648.
2 Sid. 12.
Mod. 2.
Roll. Abr. 888. 9.

But, if there be a joint judgment against two, and one die, a *scire facias* lies against the other alone, reciting the death; and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at (b) common law, the charge upon a judgment being (c) personal survived; and the statute of *Westm. 2. 13 Ed. stat. 1. c. 45.* that gives the *elegit*, does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his

Raym. 26.
Lev. 30.
Keb. 92.
123. S. C.
Edfac v.
Smart.
(b) So adjudged
1 E. 3. 13.
pl. 41.
3 E. 3.

execution

pl. 37. & execution which way he pleases; for the words of the statute are, *Sit in elezione*. But, if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by (d) suggestion, or by *audita querela*.
 vide 29 Aff. pl. 37.
 29 E. 3. 29.
 (e) For the difference between a real and personal execution, and that a personal execution will survive, though a real will not, vide 3 Co. 14. Yelv. 2c2. Raym. 151. 2 Keb. 3. 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 3. Id. Raym. 44. Comb. 441. 5 Mod. 338. Carth. 320. 404. Show. 402. (d) For this vide F. N. B. 166. 44 E. 3. 10.

Hob. 2. If two are bound in an obligation jointly and severally, and Cro. Jac. judgment given against each in two several actions, one in *Banco*, 338. the other in *Banco Regis*, and after one is taken in execution in *Banco Regis*, and after an execution is taken in *Banco* against the other by *elegit*, and lands and goods (e) delivered in execution thereupon; 2 Bult. 97. &c. Godb. 257. Roll. Rep. 8, 9. S. C. adjudged between Crawley and Lidgest. (e) But if, after execution by *elegit*, the judgment in *Banco* is reversed, perhaps the other shall not have an *audita querela*; per Croke, contra Doddridge. 2 Bult. 100.—And my Lord Coke says, that if upon an *audita querela* the other be once discharged, although afterwards the judgment in *Banco* be reversed, yet he shall not be taken in execution again. Roll. Rep. 10. 3 Bult. 101.

5 Co. 86. If A. and B. are bound in an obligation jointly and severally, and judgment given against each upon several actions brought, and both taken in execution, and after A. escapes; yet B. shall not be delivered upon an *audita querela*; for though the obligee may have an action against the sheriff for the escape, yet, till he is actually satisfied, the other shall not have an *audita querela*, nor the obligee be compelled, whether he will or no, to take his remedy against the sheriff, who may die or be insolvent.
 Cro. Elis. 478, 479.
 555. Co.
 Ent. 85.
 vide tit.
 Escape.

8 Co. 136. If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is (f) a release of the debt, and the executor cannot sue the other obligor.
 Salk. 300.
 & vide Jon. 345.
 (f) But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged, but it remains assets in his hands, to pay both debts and legacies. Cro. Car. 373. Yelv. 260. & vide tit. Evidence, letter (G).

Hamond & A. and B. were jointly bound to J. S., who made the wife of A. executrix, and died; A. and his wife brought debt against B., who pleaded this matter in abatement: it was argued by Serjeant Turner, for the defendant, that by making the wife of one of the obligors executrix, the other obligor is discharged. Hob. 10. Fryer v. Gildridge, 21 E. 4. 81 b. Bro. Exor. 118. And that it would be so, if they were bound jointly and severally. Plow. 38. s. Platt's case. Keilw. 63. 8 Ed. 4. 3 Bro. Debt. 156. The reason is, because a debt, or personal thing, once suspended is gone for ever; and here the plaintiff, one of the obligors, is discharged, for he and his wife cannot sue himself; and of that the other shall take advantage. Dyer 140. Co. Lit. 264. b. It is a release in law, of which his companion shall take advantage, notwithstanding the opinion 21 H. 7. 37. But if it was but suspended for the time of the executorship, yet it is for the defendant, having pleaded in abatement. 11 H. 7. 4. b. 1 Roll. Abr. tit. Extinguishment,

acquittance, 940. *Moor*, 855. pl. 1174. 1 *Cro. Dorchester v. Webb*, 272. *Yelv.* 160. *Flud v. Ramsey*, 8 Co. 136. *Per cur.*—The plea being pleaded in abatement, it is for the defendant; for during the coverture and executorship there is a suspension of the debt. But it was agreed, that this debt due by the baron was assets in his hands, and liable to the creditors, though it should be adjudged an extinguishment; for as *North* said, this is a release, but it is but by will; and therefore in nature of a legacy, which shall not be preferred to a debt. But it was doubted, if it had been pleaded in bar, if it should be for the defendant; and *North*, *Ellis*, and *Woodham* thought not; but that, after the death of the baron, it might be sued for; for the suspension is but during the coverture, and the baron is executor only in right of his wife: but of this *Althyns* doubted. But in the principal case there was judgment for the defendant.

If a feme sole obligee take one of the obligors to husband, this is said to be a release in law of the debt, being her own act. 8 Co. 136. a. March, 128.

If one obligor makes the executor of the obligee his executor, and leaves assets, the debt is deemed satisfied; for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator *de bonis non*, &c. of the obligee can ever sue the surviving obligor. Hob. 10.

But, if two are bound jointly and severally to A., and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor. 2 Lev. 73.

If two are jointly and severally bound in an obligation, and the obligor releases to one of them, both are discharged. Co. Lit. 232. a. [26 H. 6.

T. Barre, 37. Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards: the other obligor pleads this in bar, and it was adjudged a good plea in bar. And, each was bound in the entirety, therefore it was joint and several. 34 H. 6. So, in the case of the king, if he releases to one of the obligors, the other shall take advantage. 5 Rep. 56. *contra*.—And as a release in deed to one obligor discharges the other, so of a release in law, as 8 Rep. 136. *Needham's case*. A woman obligee marries the obligor, that is another sort of discharge. But in 17 Car. 2. B. R. two were bound jointly and severally. The plaintiff sued both, and afterwards entered a retraxit against one: whether that discharged the other was the question? *Parkley* said it was, for it amounts to a release in law, as the plaintiff confesses thereby that he had not cause of action, and therefore he cannot have judgment, as in *Hickmot's case*, 9 Rep. and retraxit is a bar to an action; and the plaintiff by his own act has altered the deed from joint to several, and therefore the other shall have advantage of it. Co. Inst. *contra*; for a retraxit is only in nature of an estoppel, and therefore the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue further, that is in the nature of a release, but the other shall not take advantage of it; and in 21 H. 6. it is said, that there must be an actual release to one obligor to discharge the other. See *March's Rep.* 165.—*Pasch.* 18 Car. *Hannam v. Roll*. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay, and in an action on the case the matter was found specially; and *Rolle* argued, that the debt was not absolutely discharged, but only *sub modo*, viz. if the other can have the release to plead, and because the forbearance was a good consideration. But the court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient.—See *Hob.* 70. *Parker v. Sir John Lawrence*. In trespass against three, they divided on the pleading. Judgment against one. Then he entered a *noli prosequi* against the two others; it was held to be no discharge to him against whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him; but a *noli prosequi*, or nonsuit before judgment against one, would discharge all. *Lord Nott. MS. Co. Lit.* 232. a. note (i). last edit.]

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleads, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon demurrer it was adjudged, 2 Lev. 220. *Seaton v. Henson.* 2 Show. 28. pl. 20. S. C. ad.

judged *nisi*. (a) Where several merchants covenanted *separatim*, and the seal of one of them was torn off, it was held, that this should avoid the covenant, as to him whose seal was torn off only, but not as to the others. 5 Co. 23. Matthewson's case. March, 126. S. C. cited, and a difference there taken between a bond and a covenant.

March, 125. So, where three were bound in a bond jointly and severally, Bayly v. Garford. and the seals of two were eaten by the rats, the court inclined, 2 Show. 29. that the bond was void against all. S. C. cited, as adjudged to have been void.

Owen, 8. But, where two were bound jointly and severally, and it was Michael's found by special verdict, that after issue joined, and before the case. Dyer, *nisi prius*, the seal of one of the obligors was taken off the 59. pl. 12, bond; it was held, that this being after issue joined, the bond 13. S. C. was good. and S. P. where the jury were directed to try, whether it was his bond at the time of the plea pleaded.

Abr. Eq. 93. If *A.* be bound in a bond for payment of money, and *B.* be Sheffield v. bound with him, as his surety only; and the bond happen to be Lord Castle- lost; equity will set up the bond, as well against the (b) surety as ton. against the principal, because the bond was once a legal charge (b) Especially, if the money was against both. lent principally upon the surety's credit. Chan. Ca. 77. & vide 2 Chan. Ca. 22. Vern. 196.

Abr. Eq. 93. In equity, a bond creditor shall have the benefit of all counter- Maure v. bonds or collateral securities given by the principal to the surety; Harrison. as, if *A.* owes *B.* money, and he and *C.* are bound for it, and *A.* gives *C.* a mortgage or bond to indemnify him, *B.* shall have the benefit of it to recover his debt.

And. 121. A bond made to secure a just debt, payable with lawful interest, Moor, 752. shall not be avoided by reason of usury, or any corrupt agreement pl. 1035. between the obligors, to which the obligee was no way privy; as, Cro. Jac. where *A.* being indebted to *B.* in 100 *l.*, agrees to give him 30 *l.* 32, 33. for the forbearance of that 100 *l.* for a year, and gives him a bond Yelv. 47. of 60 *l.* for payment of the 30 *l.*, and for the payment of the 100 *l.* enters into a bond of 200 *l.* together with *B.* for the payment of a true debt of 100 *l.* due from *B.* to *C.*

5. Of their Remedies against each other.

(c) Or perhaps he may have remedy by writ De *compellable by law to assign the bond to him, but the surety's remedy must be in (c) Chancery.* *plegis acquietandis.* Lev. 72. [2*u.* Whether not in an action for money paid to the other's use?]

Sid. 89. And on this foundation, that there is a remedy in equity, it hath Lev. 71. been adjudged, that if *A.* together with *B.* is bound to *C.* for the Soot and proper debt of *B.*, &c. and *A.* pays the money, and *B.* dies, and Stevens. makes *D.* his executor, and *D.* in consideration that *A.* will Roll. Rep. forbear to sue him till such a time, assumes and promises to re- 27. S. P. pay per Croke.

pay him; this consideration is good, though *D.* was liable in equity only *. * Why was not *D.* liable

at law as executor, for money paid by plaintiff, for the use of testator ?

Also, it is held clearly in equity, that one surety may compel another to contribute towards payment of a debt, for which they were jointly bound. Chan. Ca. 246. Chan. Rep. 34. 120. 150. 2 Vent. 348.

Therefore it hath been held, that if the obligee sue in Chancery the executor of one obligor to discover assets, he must make all the obligors parties, that the charge may be equal. But it is made a *quere*, whether he may not sue the principal, and leave out them which are bound only as sureties.

But it is held, that if a judgment be had at law against one obligor, you may sue the executor of him alone, to discover assets, because the bond is drowned in the judgment. 2 Vent. 348.

If the principal in a bond, being arrested, gives bail, and judgment is had against the bail, and the sureties are afterwards sued on the original bond, and are obliged to pay the money; the sureties shall have the judgment against the bail assigned to them, in order to reimburse them what they had paid, with interest and costs; and the sureties in the original bond are not to be contributory, for the bail stands in the place of the principal. 2 Vent. 608. Parson v. Priddock.

(E) Of the Condition and Consideration of the Obligation.

[For the law on the subject of conditions of bonds, see tit. *Conditions*, K, L, &c.]

(F) How the Breach of the Condition must be assigned and set forth, and the Manner of pleading Performance, and in Bar.

THE usual way of declaring and setting forth the breach on a bond is, that the defendant *per scriptum suum obligatorium sigillo suo sigillatum* acknowledged, &c. and therein to lay a place where it was made, that it may receive trial, in case it be denied. Also, it is usual to say, that the bond was sealed and delivered; but this has been held not to be of necessity, and to be cured by pleading over, the calling it *scriptum suum obligatorium* implying so much. But it hath been held, not to be sufficient for the plaintiff to declare *quod reddat ei* so much, without adding *quas ei debet & injuste detinet*. Ca. Jac. 420. Cro. Eliz. 773. 3 Lev. 348. 6 Mod. 306. Ld. Raym. 336. 763. 2 Ld. Raym. 1043.

[The bond being the sole foundation of the action, the court must see that it is properly executed; and therefore it is matter of substance, that *proferat* be made of it. And the defendant being entitled to it by law, the court can in no case dispense with it. Soresby v. Sparrow, 2 Str. 1186. 1 Will. 16. S. C.

But

Read v. Brookman, 3 Term Rep. 151. *Totty v. Nesbitt*, *Id.* 353. n. 1 Cr. Pr. 141. *Matison v. Atkinson*, 3 Term Rep. 153. n. And see *Whitfield v. Faufllet*, 1 Vez. 392.

But where a bond is lost, it is now holden, that the plaintiff may declare specially, "that it is lost by time and accident," and without a *proferet*. And where he has made a *proferet*, and the deed is lost, he may move, that the production of a copy shall be oyer, or if he have no copy, to amend his declaration, and plead as above.]

(a) Cro. Jac. 439. Cro. Car. 436. Allen, 57. 2 Vern. 129. (b) 3 Bulst. Roll. Rep. 423. [(c) However, in such case, the plaintiff has his election to which bond to apply the money. *Blois v. Cutting*, 2 Str. 1194.]

(a) In an action of debt for part of a debt upon contract or obligation, the plaintiff must acknowledge satisfaction of the residue; for there must be no variance from the specialty. But (b) in debt upon two bonds, the plaintiff in his declaration may acknowledge the payment of 10 l. in part, without shewing upon which bond it was paid; for it is immaterial, and can no way prejudice the defendant. Besides, the money might have been paid generally, without any application to either bond (c).

Lev. 88. Salk. 326. [(d) Not if the condition be illegal upon the face of it, for in that case the demurrer is proper. 2 Bl. Rep. 1108. 11 Co. 26.]

In debt on a bond with condition, the plaintiff may declare generally, and it is on the defendant's part to shew the condition, which goes by way of defence; and if he demand oyer, and demur, the plaintiff shall have judgment (d).

Cro. Jac. 315. Kirby v. Hanfaker. Mod. 294. S. C. cited, and allowed to be law; and so in 3 Mod. 135. Vent. 84. 2 Lev. 37. but 3 Lev. 325. Mod. 66. seems contra; and there said by Jones, that, since this case, the statutes 21 Jac. 1. c. 13. and 16 & 17 Car. 2. c. 8. have greatly strengthened verdicts. (e) That in debt upon a bond to perform covenants, the replication must shew a certain breach; but in covenant, it is sufficient to assign a general breach. Salk. 139. pl. 5. *Ld. Raym.* 478.

Error upon a judgment in debt, upon an obligation of 600 l., the error assigned was, that there was not a sufficient breach alleged; for the condition being that he should enjoy such lands without eviction, the breach was assigned in the recovery by verdict in ejectment, upon a lease made by one E., and does not shew what title E. had to make the lease, but avers, that E. had a good title; and it might have been, that he had title from the plaintiff himself after the obligation made; and therefore he ought to have shewed a good and *eigne* title before the lease made: *Ex per cur.*—The replication is ill; for it ought to (e) comprehend a full and manifest breach, otherwise it is not good.

Salk. 140. pl. 6. *Ld. Raym.* 620.

If the condition of an obligation be to deliver, before the 5th of Jan., twenty quarters of corn out of a ship into a barge, to be brought by the plaintiff to receive the said corn; and the plaintiff assign for breach, that the defendant did not deliver it 5 Jan.; it is good; for when one is obliged to deliver, and the other to accept, it shall be presumed, that the plaintiff was there before the time, ready to accept the corn with his barge.

Sid. 307. *Champion v. Shipweth*; but the reporter says, that if the obligation be for payment of money, and the money become payable pending the action, this makes the action good;

If the breach be assigned after the action brought, it is ill; as, where in debt on an obligation for non-performance of covenants, the plaintiff replied and assigned a breach in non-payment of rent the 20th of June, 17 Car. 2., and the bill was filed Trin. 17 Car. 2. which term ended the 14th of June, this was held ill.

and; *see*, where the condition is for performance of covenants; *vide* Cro. Eliz. 325. 4 Leon. 98. *See* 106.

It is said, that in an obligation for performance of covenants, the breach ought to be more precise and particular than in actions of covenant; but that yet if what is material, and the substance, is alleged, it is sufficient; as, where the condition of an obligation was, that the defendant, a bailiff, should not let at large any prisoner arrested, without licence of the plaintiff an under-gaoler; and the breach assigned was, that the defendant had let at large such a one, whom he had arrested at *Westminster*, without licence, &c. this was held sufficient, though the particular time and place were not set forth, the escape being the material part of the covenant or condition.

Sid. 30.
Jenkins v.
Hancock,
Cro. Eliz.
132.

If the replication be repugnant to the declaration, it makes the declaration ill, because the subsequent pleading falsifies the declaration; as, if a man declares on a bond made 1 *Martii*, if the plaintiff replies, that the bond was delivered 30 *Martii*, this falsifies the declaration; because it could not be made the first: so, if the rejoinder falsifies the bar, the bar is vitious.

Cro. Jac.
264. Saund.
116. 226.

In debt on a bond, with condition for performance of several things, the defendant pleads *quod conditio ejusdem facti nunquam facta fuit per se ipsum*, &c. and held an ill plea; because, for using the bond it is necessary for the defendant to shew how he performed the condition; and this sort of pleading was never admitted.

2 Vent. 156.

So, if he had pleaded *performavit omnia*, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly. But, if the condition were for performance of covenants in an indenture, performance generally will be a good plea, if they are all in the affirmative.

1 Lev. 303.
1 Sid. 215.
Defendant
cannot plead
conditions
performed,
to a bond for

performance of covenants, without oyer of the deed, which contains the covenants. R. 1 Sid. 50. 97.
1 Vent. 37. R. AL. 72.—And he must make a *proferat in cur.* of the deed, otherwise it will be taken as a special demurrer. R. 1 Saund. 9.

Debt on a bond conditioned to deliver goods on such a day; the defendant pleads, that he delivered them according to the form of the condition; the plaintiff demurred, because he ought to have pleaded expressly, according to the words of the condition, that he delivered them on the day; and the court inclined to that opinion.—(a) So, in debt on a bond conditioned to pay a sum of money at D. such a day, the defendant pleads payment at the day *secundum effectum conditionis*; the plaintiff demurred specially, because he does not say where he paid it: and it was held to be bad at least; and the plaintiff having demurred specially had judgment. (b) And generally, where performance is pleaded, it ought to be pleaded in the words of the condition.

Lev. 145.
Nels. Lutw.
268.
(a) 3 Lev.
245.
(b) 2 Salk.
520. pl. 22.
2 Ld. Raym.
1138. Salk.
208. pl. 8.
6 Mod. 157.
197.

[But, where the condition of a bond was, "that the defendant should from time to time render a just and true account of all monies received by him as treasurer of the parish of B." &c. and the breach assigned was, that on the last account furnished by the defendant, there appeared to be due by him a large sum of money, which he had not paid over; the defendant demurred, be-

Bache v.
Proctor,
Doug. 382.

cause

cause the breach was not within the condition, which was only to account : but *per curiam*, the intention of the parties, and fair construction of the condition is, that the money should be paid ; for to construe it a condition to enforce the making out a paper of items and figures is idle and nugatory.

African Company v. Malcom,
Glib. Rep.
238. cited
2 Burr. 73.
and 1 Str.
227.

Where the defendant, being appointed agent to the plaintiffs, gave a bond, conditioned for the payment of all sums of money by him received to the use of the Company ; and the breach assigned was, " that the defendant had received from J. S. and several other persons divers sums of money, which he had not paid to the Company ;" it was holden, that the assigning of the breach in the receipt of *divers sums* from *several persons*, was too general and uncertain, and therefore bad.

Cornwallis v. Savery,
2 Burr. 772.

But where in debt on a bond as security for a person appointed agent to a regiment, the breach assigned was, " that the defendant had received several sums of money from the paymaster-general, for the use of the regiment, which he had not paid over to the officers according to their respective proportions," this breach was, on demurrer, holden to be well assigned ; for the money was received from one person, (not from many, as in the last case,) and for one purpose, to pay the regiment ; and the defendant's omitting to pay any part of it was a breach of the bond.

Jones v. Williams,
Doug. 214.

In debt on a bond given as a security for the faithful service of a clerk, the breach assigned was, " that a large sum of money, viz. 13 l. came to the clerk's hands on account of the plaintiff, which he (the clerk) had spent and embezzled." This breach is ill assigned, inasmuch as it does not shew how and from whom the money so embezzled had been received.

Stibbs v. Clough,
1 Str. 227.

The condition of a bond was, " that the plaintiff should furnish the defendant with ale and beer, to be used in his house, at such prices, and that he should take it of nobody else ; but might take his other liquors from whom he pleased, malt liquors only excepted." The breach assigned was, " that such a quantity of *liquors* was drawn and unpaid for." On demurrer, it was holden, that the breach was improperly assigned, for it did not appear, that the liquors unpaid for were *malt liquors*, which only the defendant was bound to take from the plaintiff.

Box v. Day,
1 Will. 59.

The defendant's wife, when sole, gave a bond to the plaintiff in the penal sum of 1200 l. if she married *any other person* than the plaintiff, or refused to marry him within one month after her father's death. She married the defendant in her father's lifetime, upon which the plaintiff brought debt on the bond, and assigned her marriage as a breach : and it was holden to be good, (though it was insisted, that she might still perform one part of the condition by marrying the plaintiff after her father's death, as he might survive her husband) ; for that by the breach of one of the conditions the bond became absolute.

Hallett v. Hodges,
Say. Rep.
29.

A bond was for the payment of a sum of money by instalments ; the condition was for the payment of these instalments, without the words *or any of them*. It was nevertheless resolved, that

that the obligee might, on default of payment of any of the instalments, bring his action on the bond.]

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place *paratus fuit* to pay the money, but that nobody was there to receive it; and held ill, on a general demurrer, for want of an *obtulit solvere*; for the tender only is traversable, not the *paratus*. 3 Lev. 104.

In debt on an obligation by a master of a ship against a merchant, for the performing of agreements in a charter-party; the declaration was, *Et ad performance conventionum ex parte dicti mercatoris obligasset se dicto magistro*, &c. Adjudged insufficient, for want of the word *ipse*, or *ipse predicti mercator obligasset*, &c. Vent. 196. Cro. Eliz. 913. Salk. 26. pl. 13. & vide tit. Amendment and Joinders.

In debt on a bond with condition, the defendant pleaded a collateral plea, which was insufficient; the plaintiff demurred, and judgment without assigning a breach; for the defendant by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not. But, if the plaintiff had admitted the plea, and made a replication which shewed no cause of action, it had been otherwise. But, if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment, without assigning a breach. Lev. 55. 84. 3 Lev. 17. 24. Tryon v. Carter, 2 Burr. 944. S. P.

And in all cases of debt on an obligation with condition, (that of a bond to perform an award only excepted,) if the defendant pleads a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the special matter alleged; for he that excuses a non-performance admits it, and the plaintiff need not shew that which the defendant hath supposed and admitted. Salk. 138. pl. 2. vide tit. Arbitrament.

But, if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach; for then he has no cause of action, unless he shew it; and this difference will give the true reason, and reconcile the cases in the (a) margin. Salk. 138. pl. 2. Tryon v. Carter, 2 Burr. 944. (a) Lev. 55. 84. 226. Yelv. 78.

Saund. 102. 159. 317. 3 Lev. 17. 24. Vent. 114. Cro. Eliz. 320. Yelv. 78.

In debt on an obligation to pay for what goods an appren- Lev. 194.
tice shall waste; the plaintiff in pleading need not shew what [2] the pas-
the goods were, for he is to recover the penalty of the bond: sage in Le-
otherwise, in covenant. v. nts. The
reference is faulty.]

Pleading the breach of a condition of a bond, *eo quod* it was Saund. 116.
not paid, &c. is a good affirmation; as in avowry, *Et quia* the 2 Vent. 278.
rent was arrear, is good: so, in all *assumpsits* on collateral pro- Lev. 194.
misses to pay on request, *licet* such a day and place he requested,
is an affirmation, and traversable.

Pleading a bond by a *testatum existit* is not good, though it be a Lev. 12.
with a *hic in curia prelat*. 75. Saund. 275.

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to perform articles; the
the articles and perfo
be entered *in hac verba*, a
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ment; for perhaps he mi
omitted, of which advantage

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over; and then pleads, that the
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which is entered at large *in hac verba*
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— and judgment w
difficulty. And the reas
the defendant brings the indenture in
there are no covenants therein, on oy
part of the (s) plea; and it then
that he hath pleaded a fal
against the truth of that whic
very indenture which he himself hat
the plaintiff need not shew any mat
to maintain his action, as in the ca
was more proper. *Quod nota*, said

with condition to exhibit an inventory (t
such a day, it is not enough for th
there was no court held, but he mu
ready; for he must shew that he ha
his side toward a performance. So,
a writ in *Q. R. Hil.* by which the oblig
it is not enough for the de
covenant was sued out, but h
there ready at the day, and no writ c
So, if the condition were to pay mone
time and place, it is not enough for the de
that the obligee came not, without saying that h
and offered, &c.

for the payment of a certain fun
the defendant pleaded, that by articles of agree
between the plaintiff, her father, and the defendant, the in
tered

Interest of the money was to be paid to one of the sisters upon an event which had happened: but, as the plea did not allege the payment of the interest accordingly, it was holden bad.]

In debt on a bond, the defendant may have several pleas in bar; if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff; so, he may plead payment as to part, and as to the rest an acquittance.

Salk. 180.
[Bonds are within the act of 4 & 5 Ann. c. 16. which allows the de-

fendant to plead double: therefore, where the condition was to marry on request, *non est factum*, and was requested, were allowed to be pleaded together. *Dunn v. Vacher*, 2 Str. 908. So, *non est factum*, is a discharge by bankruptcy. *Atkinson v. Atkinson*, Id. 871. But not, *non est factum*, and *solvit* *Arnold v. Bass*, 2 El. Rep. 993.; or *solvit post diem*, *Fox v. Chandler*, Id. 905.; or *non est factum*, and a tender as to part. *Jenkins v. Edwards*, 5 Term Rep. 97.]

In debt on an obligation, if not guilty be pleaded, and there be a verdict for the plaintiff, it is aided by the 16 & 17 Car. 2. c. 8. because being an ill plea, and a false one, the plaintiff ought to get his judgment, both because of the badness of the plea, and of its falsehood. But, had the verdict been for the defendant, the plaintiff should have judgment, because the declaration is answered by the plea.

Noy, 564.
Cro. Eliz. 773.
2 Jon. 184.

In debt on a bond conditioned for the payment of 105 l. the defendant pleads payment of 100 l. *secundum formam effectum conditionis*; the plaintiff replies, *non solvit predict.* 105 l.: this is an immaterial issue not aided by the statute; for the plaintiff has not averred the same payment that is in the defendant's plea.

Cro. Jac. 585.
Cro. Car. 593.

In debt on an obligation, the defendant pleads payment of 50 l. *Junii 11 Jac.* according to the condition; the plaintiff replies, *non solvit 50 l. predict.* 14 Aug. anno 11 *supradict.*, *quas ad eundem diem soluisse debuisset*, & hoc, &c. the verdict found, *quod non solvit predict.* 14 Junii, *prout* the defendant had alleged. The objection here was, that no issue was joined; because they do not meet in the time the money was paid. But the word *August* was judged to be plainly surplusage; for when he said *quod non solvit predict.* 14 die, it is a sufficient traverse, without the word *August*; and *August* is plainly repugnant to the word *predict.*, for *predict.* refers to *June*; and such surplusage, being a repugnancy to what is before material, was idle and void.

Cro. Jac. 549.
Sand. 282.
286.

If one declared on a bond made 1 Martii, if the plaintiff reply, that the bond was delivered 30 Martii, this falsifies the declaration, because it could not be made the first, and is therefore vitious.

Cro. Jac. 264.
Sand. 116.
216.

In debt on an (a) obligation the defendant cannot plead *nihil factum*, but must deny the deed by pleading *non est factum*; for the seal of the party continuing, it must be dissolved *ea ligamine* *se ligatur*.

Hard. 332.
Hob. 218.
[(a) So held on a general demurrer.

[W. 10.] But, if the debt be due by simple contract, then he may plead *nil debet*; for it does not appear, that there is any debt continuing. 2 Inst. 651. Hob. 218.

Anonymous,
Colten v. Goodridge,
2 Bl. Rep. 1108.

[On the plea of *non est factum*, only questions of fact can arise. Where therefore the condition is void in law, the defendant should pray

Pigot's case, pray oyer, and demur, if the illegal condition appears upon the face of it; if not, plead the special matter to avoid it.

Thompson v. Leach, 2 Salk. 675.

Colborne v.

Stockdale,

1 Str. 493.

Hinton v.

Roffey,

3 Mod. 35.

Winch v.

Pardon,

Mich.

2 G. 1. Bull.

M. P. 174.

Hence, if a bond be given for a gaming debt, the statute should be pleaded. And in such plea, the defendant should set out the game played at, and conclude *contra form. stat.* that the court may see, that it was within the statute. So, in pleading simony or usury, the simoniacal or usurious contract must be shewn.

If the defendant has paid the money before the day, he may plead debt on bond conditioned to pay at a day certain, plead *solvit ad diem*, and give in evidence payment before the day, as he could not plead it: for if the defendant were to plead payment before the day, the issue would be immaterial, as it would still leave the presumption open that there might be payment at the day. And therefore a difference is to be observed between pleading where the condition of a bond is to pay at a day certain, and where at or before such a day: for to the first, the defendant may only plead payment at the day, for the reason now given; besides, that the performance of a condition ought to follow the terms of it: but, to a bond payable at or before such a day, the defendant may plead payment before the day, for it is within the condition. And therefore when it was so pleaded, and the defendant demurred to it as an immaterial issue, the court over-ruled the demurrer, and laid down the rule to be, "That where the defendant pleads performance of the condition, the plaintiff must assign an absolute breach, though it is not necessary where he pleads a collateral matter, as, release; and that, therefore, where the defendant had pleaded payment before the day, the plaintiff should have replied, that the money was not paid at the day mentioned in the plea, or at any time before, on, or after that day."

Tryon v.

Carter,

2 Str. 994.

Fletcher v.

Hennington,

2 Burr.

944. 1 Bl.

Rep. 210.

S. C.

But a tender and refusal of principal and interest at a subsequent day cannot be pleaded in bar under the statute, as not being within the equity of it; for such construction would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice.

Underhill v.

Matthews,

P. 1 G. 1.

C. B. Bull.

N. P. 171.

Sturdy v.

Arnaud,

3 Term

Rep. 599.

A. gave B. a bond to secure an annuity, and, before any payment became due, A. lent B. a sum of money, on which it was agreed, that B. should retain the payments of the annuity, as they became due, till that sum was discharged; then B. became bankrupt. The agreement to retain was holden to be a good plea to an action on the bond by B.'s assignees for the payments accruing after the bankruptcy; such agreement and retainer being equivalent to a plea of *solvit ad diem*.

1 Burr. 434.

Cowp. 109.

Oswald v.

Legh,

1 Term

Rep. 270.

If no interest has been paid on a bond for twenty years, it shall be in law presumed to be satisfied; and in such case the defendant may plead *solvit ad diem*, and rely on the presumption. Lord Raymond indeed left it to the jury on sixteen years, where there were circumstances to fortify the presumption. But without such circumstances a period of nineteen years and a half has been holden insufficient.

To a bond of thirty years standing the defendant pleaded *solvit ad diem*, and relied on the presumption: the plaintiff in answer could only prove payment two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for twenty-eight years past. The Chief Justice was of opinion, that this plea of payment at the day was to be taken as strictly in this case, which went only upon the presumption, as in any other case; and the plaintiff having falsified the plea by shewing a payment of interest two years after, it was not sufficient to say the other twenty-eight years were enough to let in the presumption; because, to take advantage of that, the defendant should have pleaded upon the act for the amendment of the law, that he paid the money *after the day*, in which case it would have been with him upon the evidence.

Moreland v. Bennett, Str. 652.

To debt on a bond, the defendant pleaded *solvit ad diem*, and relied on the presumption of non-payment of interest for twenty years: the plaintiff offered in evidence an indorsement on the back of the bond, being a receipt for interest on it ten years before the presumption accrued. This evidence was refused by the Chief Justice, on the ground, that it was the act of the obligee himself, and so inadmissible. But the court granted a new trial, for it was proper evidence to be left to a jury, whether the indorsement of the receipt of the money had not been made with the privity of the obligor, it being the constant practice for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by taking such an indorsement, than by taking a loose receipt. On a new trial the evidence was admitted, and the plaintiff recovered.

Searle v. Lord Barrington, 2 Str. 826. 2 Ld. Raym. 1370. S. C.

But in *Turner v. Crisp*, B. R. Hil. 14 G. 2. the Chief Justice refused to let the indorsement of a receipt of part of the bond, made after the presumption had taken place, be given in evidence; for that it differed from the above case, where the indorsement appeared to be made before it could be thought necessary to be made use of to encounter the presumption.

2 Str. 827. In Barnes v. Ransom, 1 Barnard. B. R. 432. a similar indorsement seems to

have been admitted, though made after the presumption had taken place. But in *Glyn v. Bank of England*, 5 Vez. 43. Lord Hardwicke took the same distinction as was done in the present case. In a copy of *Sidg. Cases of Evid.* 152. (where this case is also reported), formerly in the possession of the late Mr. J. Wilson, but now in that of Mr. Nolan, the editor of *Strange's Reports*, it is stated, that "at the sittings after Michaelmas term at Westminster, 6 Geo. 3., Lord Camden said, he was never much pleased with the determination of *Searle v. Lord Barrington*; however, he said, it was law."

Where the plaintiff shewed two writs of *testatum capias* sued out by him before the twenty years run, but not served, because defendant could not be found; Lord *Mansfield* said, there was no ground for the presumption.]

Moyle v. Lord Roberts, cited in 1 Term Rep. 271. Carth. 375.

If the condition of an obligation be, that the defendant shall discharge or acquit, or free the plaintiff of or from such a bond, or rent, or action, or from any other particular thing ascertained in the condition, there, the negative plea, *non damnificatus*, is not good, because the defendant hath undertaken to do an act in discharge of the plaintiff; but, where the condition is only to free, or to discharge or indemnify the plaintiff from any damage, or cost, or trouble which shall or may happen by reason of such

bond, rent, or action, or other particular thing therein mentioned; in such case, the negative plea is sufficient, because it doth not appear that any damage hath happened to the plaintiff; and if no damages have happened, then it is impossible that the defendant should shew in the affirmative the manner how he had freed or discharged the plaintiff; therefore it lies on the part of the plaintiff, by way of reply, to shew wherein he was damnified.

Holland v.
Malen,
2 Will. 126.

White v.
Cleaver,
2 Str. 681.

[To debt on bond to save harmless, the defendant can only plead, either that he has saved the plaintiff harmless, or, that if he has received any injury, it was through his own default.

Where the defendant pleads that he has saved the plaintiff harmless, he should shew *how he has done so*. But as the saving harmless is the substance; and *how* matter of form, the plaintiff must take advantage of this defect in the plea by special demurrer.

See further tit. *Covenant*, Vol. II. 83. and tit. *Set-off*, *infra*.]

Offices and Officers.

- (A) Of the Nature of an Office, and the several Kinds of Offices.
- (B) Offices, by what Authority created.
- (C) Who hath a Right of granting or assigning an Office: And herein of one Office being incident to another.
- (D) Of the Grant of Offices by Ecclesiastical Persons.
- (E) Of the Ceremony requisite to a complete Creation or Grant, and of the Oaths required by Statute.
- (F) Of the Offence of Buying and Selling an Office, and what Offices are prohibited to be thus disposed of.
- (G) What Remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.
- (H) Of

- (H) Of the Nature of Offices as to their Duration and Continuance: And herein of their being grantable in Fee, for Life, Years, at Will, and Reversion.
- (I) Offices by whom to be executed, and who are incapable thereof.
- (K) Of the Manner of executing them: And herein of Offices that are incompatible, and where an Office may be executed by two or more Persons.
- (L) Of the Execution of an Office by Deputy: And herein of Superiors being answerable for their Deputies.
- (M) Of the Forfeitures of an Office.
- (N) Where for Corruption and oppressive Proceedings Officers are punishable: And herein of Bribery and Extortion.

(A) Of the Nature of an Office, and the several Kinds of Offices.

IT is said, that the word *officium* principally implies a duty, and in the next place the (a) charge of such duty; and that it is a rule, that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer.

Carth. 478.
(a) Signifies a place of trust, and therefore the statute 3 Jac. 1. c. 5. 5 Mod. 431.

enacts, that no popish recusant shall exercise any office or charge.

There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, plough land, herd a flock, &c. which differ widely from that of steward of a manor, &c. 2 Sid. 142.

By the ancient common law, officers ought to be honest men, legal and sage, & *qui melius sciant & possint officio illi intendere*; and this, says my Lord Coke, was the policy of prudent antiquity, that officers did ever give grace to the place, and not the place only to grace the officer. 2 Inst. 32. 456.

Officers are distinguished into civil and military, according to the nature of their several trusts. Carth. 479.

Sec. 479. Offices are distinguished into those which are of a publick, and those which are of a private nature. And herein it is said, that every man is a publick officer, who hath any duty concerning the publick; and he is not the less a publick officer, where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority.

It hath been held, that the commissioners for purging corporations could not take notice of or remove an attorney of a court, it not being a publick office in which the government was concerned.

It hath been doubted whether the Cenfor of the College of Physicians, be such an officer as is compellable to take the oaths prescribed by the statute 25 Car. 2. c. 2. it being urged, that the oversight and inspection of medicines was of a private nature; and that no offices were within the intent of that statute, but such as relate to the revenue, or to the conservation of the peace; and that particular powers created for particular purposes were not within that statute.

Also, offices are distinguished into ancient offices, and those which are of a new creation. And herein it is observable, that constant usage hath not only sanctified the first establishment of such ancient offices as have existed time out of mind, but also hath prescribed and settled the manner in which they have and are to continue to exist, in what manner to be exercised, how to be disposed of, &c.

...but more authority than the act that creates him, or some subsequent act of the legislature; for he cannot prescribe as an officer at common law may do.

There is also another distinction of offices into such as are judicial, and such as are ministerial offices only; the first, relating to the administration of justice, or the actual exercise thereof, must be executed by persons of sufficient capacity, and by the persons themselves to whom they are granted; and herein also ancient usage and custom must govern.

(B) Offices, by what Authority created.

THE king is the universal officer and disposer of justice within this realm, from whom all others are said to be (b) derived; but yet he cannot create any new office inconsistent with our constitution, or prejudicial to the subject.

... who is king may grant or nominate to the office, but hath not the office in him to use
... 1 H. 7. 29. Plowd. 381. 2 Bulst. 4. 8 Co. 55. b.]

There are three things, says my Lord *Coke*, which have fair pretences, yet are mischievous; 1st, New courts; 2^d, New offices; 3^d, New corporations for trade. And as to new offices, either in courts or out of them, these, he says, cannot be erected without act of parliament; for that under the pretence of the common good,

good, they are exercised to the intolerable grievance of the subject.

An office granted by letters patent for the sole making of all bills, informations, and letters missive in the council of *York*, was held unreasonable and void. Jon. 231. Mounfon v. Lyfter.

One *Chute* petitioned the king to erect a new office for registering all strangers within the realm, except merchant strangers, and to grant the said office to the petitioner with or (a) without a fee; and it was resolved by all the Judges at *Serjeants-Inn*, that the erection of such new offices, for the benefit of a private man, was against all law of what nature soever. Co. 116. and several cases there cited to this purpose. (a) It hath been held clearly, that

in the constitution of a new office or officer, it is not necessary that an annual or casual fee should at first be annexed to such office. *Moor*, 809.

King *E. 4.* by his letters patent bearing date 10 *Oct. anno 15.* of his reign, reciting, that whereas there was no office of the Chancellour of the Garter, that there should be such an office of the Chancellour of the Garter, and that none should have it but the Bishop of *Salisbury* for the time being, willed and ordained, that *Richard Beauchamp*, then Bishop of *Salisbury*, should have it for his life, and, after his decease, that his successors should have it for ever. And amongst divers other points it was resolved unanimously, that this grant was void (b); for that a new office was erected, and it was not defined what jurisdiction or authority the officer should have, and therefore for the uncertainty it was void. 4 Inst. 200. Pasch. 6 Jac. 1. Bishop of Salisbury's case. Moor, 808. S. C. [The question, according to Moor, was, Whether the Bishop of Salisbury had, under

this grant, by *succession*, such a title to the office, that he ought to be admitted to it? It appeared, that *Beauchamp* accepted the office, executed it, and died bishop of *Salisbury* in the 22d year of *Ed 4th.*: but there was no proof extant of any succeeding bishop of *Salisbury* being admitted to the office, but the kings of England, one after another, had appointed chancellours at their pleasure. The three judges to whom the matter was referred, viz. the Chief Justices *Flemming* and *Coke*, and the Chief Baron *Tanfield*, agreed in opinion, and so reported to the king, that the bishop by *succession* had no title to the office, for two reasons: 1st, Because the patent originally was void as to the appointment of any succeeding bishop to the office, for *Beauchamp* took the estate for his life in the office in his natural capacity, not in his politick capacity; since if it had happened, that he had been removed from the bishoprick of *Salisbury*, yet, in respect of the express limitation to him for his life, he must have continued in the office, and his successor in the fee could not have taken it: then the consequence is, that he did not take an inheritance of succession in the office; and he could not take in his natural capacity for life, and also in his politick capacity; nor could the grant enure by such a fraction. Wherefore they all thought the grant void as to the succession. The other reason was, because there had been no use or exercise of this office by any succeeding bishop of *Salisbury*.—But this state of facts, from which the above judgment was formed, does not seem to be correct; for in truth, this office was enjoyed and executed by bishops of *Salisbury* from the time of the above grant to *Richard Beauchamp* to the reign of *Edward 6th.* Upon the Reformation of the order by that king, his statutes wholly leave out the ecclesiasticks, and appoint that the office shall be executed by one of the knights companions, and from that time till the reign of *C. 2.* it remained in the hands of laymen. It appearing, however, that there were several charters granted to the see of *Salisbury*, particularly one in the 4th of *El. zabeth*, which confirmed charters of *Queen Mary*, *King Henry 8th*, and *Henry 7th*, and also another in the 4th of *Car. 1.*, in which last the letters patent of *E. 4.* are recited *totidem verbis*, and expressly confirmed, the pretensions of the see of *Salisbury* to the office were revived in the last mentioned reign, and the claim was agitated in a chapter of the order, but the troubles which shortly afterwards followed, prevented a decision. The claim, however, was renewed soon after the Restoration, and at a chapter of the order in 21 *Car. 2.* was allowed on the ground of the above grant. It was declared, that the Bishop of *Sarum*, and his successors for ever should have and execute the office of Chancellour of the most noble order of the Garter, and receive and enjoy all the rights, privileges, and advantages thereunto belonging, immediately upon the first vacancy. *Whome's Institution, &c. of the Garter, c. 8. § 2.* (b) So, if the king grants an office by the name of an office *cur. sedis inde spectantibus*, and it appears to the court to be new, the grant is void. g E. 4. 10. 2 Sid. 141.

Offices and Officers.

The king cannot grant to any person to hold a court of equity, though he may grant *tenere placita*; for the dispensation of equity is a special trust committed to the king, and not by him to any other, except his Chancellor.

It is a legal inconsistency, (unless we believe the royal authority to be superior to the law, as a title to any franchise, pre-supposes a title to the law, and a title to the law, Dav. 60. b., that counties palatine (to which the king may be created by the king without parliament, 4 Inst. 204. However, the authority of the king is not sufficient to determine any matter of equity, but it ought to be determined by the court of equity, which has the jurisdiction in such case immemorably, and had always the jurisdiction by the law, and such commissioners, or new courts of equity, shall never have jurisdiction, and shall be subject to be against law. 12 Co. 113. See 1 Wooddef. 188.]

Of the Right of granting or affigning an Office: And herein of one Office being incident to another.

Wherever one office is incident to another, such incident office is necessarily grantable by him who hath the principal office. It hath been held, that the king's grant of the office of Chamberlain was void, it being inseparably incident to the office of Chancellor, and could not by any law or contrivance be separated from it.

Co. Lit. 49. a. Vaugh. 178. cited.

The office of Chamberlain of the King's Bench Prison is incident to the office of Marshal; and therefore a grant of the office of Marshal, with a reservation of the office of Chamberlain, is void.

It is also held, that the office of Exigenter of London is incident to the office of Chancellor, and therefore a grant thereof by the king, or by any other, is null and void.

It is also held, that the justices of courts did ever appoint officers, who after by prescription grew to be officers, and who had of constitutions, and who were further confirmed to them by Westm. 2. The reasons whereof are twofold. 1st, For that the officers who have the greatest knowledge and skill in the law, and who are to be done. 2^{dly}, The officers and justices, or effect that which the justices do, and who are the sufficient doing whereof maketh the officers erroneous, than the which nothing is more reasonable and grievous to the justices, and pre-
judicial to the party.

(D) Of the Grant of Offices by Ecclesiastical Persons.

HERE it will be proper to take notice how far bishops, and other ecclesiastical persons, may grant offices to bind their successors, and how far not: wherein the rule is, that such offices as are ancient, and of necessity to be exercised by some other person, they may grant, together with the ancient fee for exercising thereof; and as these offices are not within 32 H. 8. c. 28. to be granted by the bishops or other ecclesiastical persons solely; so neither are they construed to be within the restraint of 1 Eliz. c. 19. & 13 Eliz. c. 10. and therefore remain perfectly at the common law, and, by consequence, to bind the successors, must be confirmed in the same manner as all other grants or alienations of ecclesiastical persons at common law must have been. These grants appear generally to have been made for the life of the grantees; for it were too severe and rigid a construction, to confine them to be made determinable on the death, translation, or other promotion of the bishop, dean, &c. who made them; and would discourage men of ability and capacity to undertake the exercise thereof; and to grant such offices for twenty-one years, or any other term of years, would introduce many inconveniencies, by letting in executors, strangers, and other unqualified persons to the exercise thereof; and therefore any grant of such offices for years, seems against the policy of the common law and the benefit of the successors, which those statutes intended to provide for, and, by consequence, will not bind them.

Co. Lit. 44.
2. Co. 58.
61. Bishop
of Sarum's
case. Cro.
Car. 49.
Ley, 71. 79.
[Notwith-
standing
what is said
here and in
several other
cases con-
cerning the
necessity of
the office,
yet that
point is not
at all mate-
rial. For it
hath been:
determined
upon solemn
hearing,
that an office
and fee
which exist-
ed before
the first of
Elizabeth
are not with-
in the re-
straint of

that statute, but that they may be granted as before the statute; and that the utility or necessity of the office is not more material since, than it was before the statute. Sir John Treawney v. the Bishop of Winchester, 1 Burr. 219.]

But, if such offices have been anciently granted to one for life, this induces no necessity of their being granted to two for their lives; and therefore such grant to two for their lives, will not bind the successor, though one of the grantees should die in the life of the grantor, so as there were but one life in being against the successor: because by such grant to two, the grant was faulty in its foundation, and therefore shall not be helped by any accident after. So, if the office hath been anciently granted to one with an ancient fee, and after a grant is made to another in reversion, after the death of the first grantee; this shall not bind the successor, for there can be no necessity urged to justify this; besides that, the grantee in reversion, by sickness or other accident, may become incapable to exercise such office before it comes into possession; and if the bishop, or other spiritual person, might grant such offices to two, or grant them in reversion, they might abuse that power, and grant them to twenty, or for twenty lives in reversion one after another, which as they cannot be justified from any necessity, so they would be inconvenient, by tying up the successor's hands from choosing such officers as he thought necessary and proper for the discharge of such offices; and therefore no confirmation will make good such grants against the successor.

10 Co. 61.
Cro. Car.
49. 11 Co. 4.

Cro. Elis.
636.
Scamblor
v. Watts.
10 Co. 61.
Cro. Car. 50.
Ley, 74.
Dyer, 80. b.
in margine.

The Bishop of *Norwich* having the office of high steward of his courts, to which a fee of 10 *l.* *per annum* appertained, and also the office of under steward of the same courts, to which a fee of 4 *l.* *per annum* appertained, granted the office of under steward to three for their lives, whereof one was within age, and the other two being dead, the infant grants over the office to the defendant, and then the bishop grants both these offices to the plaintiff, with the fees. By the books, both these grants seem to be void; the first, because it was granted to three, where the custom warranted a grant thereof only to one; and also, because the surviving grantee was an infant, and so not capable of a judicial office, as the steward of a court is. The 2d, because both were granted to one person, where they had usually been granted to two severally, with distinct fees, and therefore, the grant of both to one person neither necessary nor convenient, and, by consequence, not binding against the successor. Also, such grant of either the said offices in reversion would not bind the successor, for the reasons before given.

10 Co. 61. b.
Cro. Car. 48.
a Brownl.
137. Bishop
of Ely's case.
Ley, 78, 80.

But, although the bishoprick, deanery, &c. were founded but of late times, yet the grant of such offices as are necessary, and cannot be exercised by the bishop, dean, &c. in person, may be allowed, together with a reasonable fee for the exercise thereof; (the reasonableness whereof the court where the cause depends is to be judge); for these cannot be said to tend to the impoverishment of the successor, but rather for his benefit, by providing officers fit and qualified to take care of the revenues; and therefore such grants are not within the restraint of 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10.; but not being warranted by 32 *H. 8. c.* 28. they must be confirmed by all persons interested therein; because they remain at common law, untouched by any of the statutes.

2 Lev. 136.
3 Keb. 472.
506. Ridley
v. Parnall.

In an action upon the case, for disturbing the plaintiff in his office of registrar to the Bishop of *Bristol*, which was a new bishoprick taken out of the bishoprick of *Sarum*, and founded in the time of *H. 8.*, and which had been granted *separalibus temporibus* after the foundation to one, and his assigns for three lives, &c. these differences were taken and agreed to by the court. 1st, That the bishop of a new bishoprick may grant offices of necessity for life. 2^{dly}, If an office hath been usually granted by the bishop of a new bishoprick, for three lives, with the consent or confirmation of the dean and chapter (a), before 1 *Eliz. c.* 19. it may be now granted accordingly. 3^{dly}, Be the bishoprick new or old, if it was not so granted, but granted always before 1 *Eliz. c.* 19. for one or two lives, it cannot be granted by the bishop after 1 *Eliz. c.* 19. for three lives. 4^{thly}, If it was granted before 1 *Eliz. c.* 19. for three lives, and after the statute but for one life, yet this shall not abridge the power of the bishop, but he may grant it for three lives, &c. And in the principal case, the verdict finding that it had been granted *separalibus temporibus* after the foundation to one and his assigns for three lives, was held defective, because it might be so granted after the foundation, and yet be after 1 *Eliz. c.* 19. and therefore a *venire facias de novo*, was awarded to supply that defect.

(a) Cro. Car.
258. 279.
Jon. 311.
March, 38.
accord., that
such grant
before 1 *Eliz.*
is a badge of
their having
been an-
ciently so
granted.

The

verdict of the money was to be paid to one of the sisters upon an event which had happened: but, as the plea did not allege the payment of the interest accordingly, it was holden bad.]

In debt on a bond, the defendant may have several pleas in bar; as, if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff; so, he may plead payment as to part, and as to the rest an acquittance.

Salk. 120.
[Bonds are within the act of 4 & 5 Ann. c. 16. which allows the de-

endant to plead double: therefore, where the condition was to marry on request, *non est factum*, and *non requested*, were allowed to be pleaded together. Dunn v. Vacher, 2 Str. 908. So, *non est factum*, and a discharge by bankruptcy. Atkinson v. Atkinson, Id. 871. But not, *non est factum*, and *solvit diem*, Arnold v. Baas, 2 Ll. Rep. 993.; or *solvit post diem*, Fox v. Chandler, Id. 905.; or *non est factum*, and a tender as to part. Jenkins v. Edwards, 5 Term Rep. 97.]

In debt on an obligation, if not guilty be pleaded, and there be a verdict for the plaintiff, it is aided by the 16 & 17 Car. 2. c. 8. because being an ill plea, and a false one, the plaintiff ought to have his judgment, both because of the badness of the plea, and for its falsehood. But, had the verdict been for the defendant, yet the plaintiff should have judgment, because the declaration is not answered by the plea.

Noy, 56.
Cro. Eliz.
773.
2 Jon. 184.

In debt on a bond conditioned for the payment of 105 l. the defendant pleads payment of 100 l. *secundum formam effectum conditionis*; the plaintiff replies, *non solvit predict.* 105 l.: this is an immaterial issue not aided by the statute; for the plaintiff has not traversed the same payment that is in the defendant's plea.

Cro. Jac.
585. Cro.
Car. 593.

In debt on an obligation, the defendant pleads payment of 50 l. 14 Junii 11 Jac. according to the condition; the plaintiff replies, *quod non solvit 50 l. predict.* 14 Aug. anno 11 supradict., *quas ad eandem diem solvisse debuisset, & hoc, &c.* the verdict found, *quod non solvit predict.* 14 Junii, *prout* the defendant had alleged. The objection here was, that no issue was joined; because they do not meet in the time the money was paid. But the word *August* was adjudged to be plainly surplusage; for when he said *quod non solvit predict.* 14 die, it is a sufficient traverse, without the word *August*; and *August* is plainly repugnant to the word *predict.*, for *predict.* refers to *June*; and such surplusage, being a repugnancy to what was before material, was idle and void.

Cro. Jac.
549. Sand.
282. 286.

If one declared on a bond made 1 Martii, if the plaintiff reply, that the bond was delivered 30 Martii, this falsifies the declaration, because it could not be made the first, and is therefore vitious.

Cro. Jac.
264. Sand.
116. 226.

In debt on an (a) obligation the defendant cannot plead *nihil debet*, but must deny the deed by pleading *non est factum*; for the seal of the party continuing, it must be dissolved *ea ligamine quo ligatur*.

Hard. 332.
Hob. 218.
[(a) So held on a general demurrer.
Anonymous,

2 Will. 10.] But, if the debt be due by simple contract, then he may plead *nihil debet*; for it does not appear, that there is any debt continuing. 2 Inst. 651. Hob. 218.

[On the plea of *non est factum*, only questions of fact can arise. Wherefore the condition is void in law, the defendant should pray

Cotton v.
Goodridge,
2 Bl. Rep.
1108.

Sails and Officers.

19, yet the court held this sufficient to have the same mandatorily grantable to two, before the prescription must be to warrant it; and the court was of opinion, that if it could be made some time after the first, that such were also made a special verdict finding this matter, that the grant was sufficient regard to the object which cannot by law be granted, and no diminution of the same were made to secure.

...the office and ancient fee an
...yet, if the distres
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being usually so granted, it might proceed at first from a person of convenience and necessity, that the office might always be kept full, and a person always ready to execute it, for the benefit of the king's subjects; for though there is no reversion of an office, unless it be an office of inheritance, yet it may well be granted in reversion, *habend.* after the death of the present officer; which is no more than a provision of a person to supply it, when it becomes void; and if such provision has been usually made, the custom and usage gives sanction to it. But then such grant must be confirmed, as is said before; and therefore, where some books hold such grant of offices in reversion not good, it must be taken in this diversity, that they have not usually been so granted, but in possession, and then to grant them in reversion is not warranted by the custom, nor shall bind the successor.

But in the last case, where the office of registrar was granted by the bishop to an infant, then about eleven years of age, *habend.* after the death or surrender of the present officer, *exercend. per se suffic. deput. suum cum vadiis*, &c. and when the tenant for life of the grantee in reversion was then thirty years of age; all the court held his infancy, at the time of the grant, no cause to void it; because, at the time it fell into possession, he was of sufficient age to execute it; and though it had fallen vacant during his minority, yet, as this case is, the grant would have been good, because it is to be exercised *per se vel per suffic. deput.* &c. and therefore though he were not capable of exercising it himself, (as writing and a little *Latin* would sufficiently qualify him for, it being only to write and register acts done in court,) he might have put in a sufficient deputy; and therefore they cited the opinion *Co. Lit.* 3. b. that the grant of the office of steward of the court of a manor, either in possession or reversion, to an infant was void, as incapable, and wanting knowledge to execute it, unless it were to be understood that there was no clause exercising it, *per se vel suffic. deputat.*, and that the infant himself was of such tender age, that by no intendment he was capable of exercising it himself. But they held, that (a) if there were such clause, then it would be good, and he might appoint a sufficient deputy; and if he did not, it would be a forfeiture of his office, notwithstanding his infancy; and of the sufficiency of the deputy the lord of the manor, or judge of the court, were to be judges; and if the deputy should misdemean himself, or prove unfaithful in his office, it would be a forfeiture at the infant's peril; and this seems to be the diversity taken in the books. Besides, if the case in *Co. Lit.* be meant of the office of steward of a court-baron, it may be good law, because that is a judicial office, which perhaps cannot be executed by deputy; but, if it be meant of a court-baron, then, the general opinion of the (b) books is against it, which hold, that the steward of a court-baron may make a deputy, though there were no express power given him for that purpose; for that it is an office purely ministerial, (for the suitors are judges in the court-baron,) and consists in entering complaints, renders, admittances, &c. in the nature of a registrar; and though

Cro. Car.
279. 555.
557.
Jon. 310.
2 Roll.
Abr. 123.

(a) *Vide* Cro.
Jac. 18.
Hob. 148.
11 Co. 87.
8 Co. 44.

(b) *Vide*
9 Co. 48,
49. 2 Lev.
245. 2 Jon.
126. Hob.
145. 11 Co.
87. Cro.
Jac. 18.

though an infant should have the stewardship of both courts, the court-leet and court-baron together, and that he should be incapable to exercise that of the court-leet, and therefore grant thereof to him should be void; yet for the court-baron grant would continue good, and he might either exercise it in person, or by a sufficient deputy. And perhaps upon this diversity the books may be reconciled; for they agree, that if an officer of judicature or learning be given to a man utterly incapable of no clause of exercising it by deputy, or otherwise, will not make the case, or make the grant good; for it must radically vest in the grantee before it can go in title of procurator, or deputation, to another.

Noy, 153.
Prebend of
Hatcher-
ley's case.

But where the dean of *Windsor*, having ordinary jurisdiction by deed made such a one his commissary, which was confirmed by the dean and chapter, yet, after his death, it was held that his successor was not bound thereby, because this was a judicial office and authority; which, though it may be exercised by a substitute, yet it is in law in the ordinary himself; and though excommunication, probate of testaments, and such like, may be transacted by the commissary, yet it must be in the name of the ordinary, and if the substitute offends, the ordinary shall be punished. And therefore this grant can continue no longer than the ordinary himself who grants it; for if it should bind the successor, then he could not remove him, though he were answerable for his acts and offences; which would be hard; therefore this grant determines with the death or removal of the ordinary, and then a new confirmation can make it good after; and the archbishops, in the several provinces, have the ordinary jurisdiction *sede vacante*; and the archbishop, dean and chapter, cannot grant the jurisdiction of guardian of the spiritualties after the death of the bishop; which is a stronger case.

17 E. 3. 23.

(E) Of the Ceremony requisite to a complete Creation or Grant, and of the Oaths required by Statute.

Roll. Abr.
152.
Co. 121.
2 Sid. 137.
Dyer, 260.
b. pl. 62.
Hard. 351.

Wherever the right of granting and erecting new offices is vested in the king as the head and fountain of justice, he must use proper words for that purpose; as, in the erection of new office the words *erigimus, constituimus*, &c. must be made use of; and it hath been adjudged, that the word *concessimus* is not sufficient, unless there be an office already in being, and then grant by the word *concessimus* is good.

Mod. 123.

If an officer be created by letters patent, he is a complete officer before he is sworn, and before any investiture.

Leon. 248.
Mod. 123.
Cent. R. 3.
A. 154.
Leon. 219.
3 Mod. 147.
5 Sid. 322.

But if a person be created herald at arms, investiture is necessary before he is a complete officer.

An office, being a thing which lies in grant, cannot regularly be granted or transferred from one to another, but by deed duly executed

recuted, which is an instrument the law hath appointed instead of livery.

But it is said, that one may retain (a) a steward to keep his port-baron and court-leet without deed, and that such retainer shall continue until he be discharged.

Stewards without deed cannot take surrenders out of court. Godb. 142. and 1 Ld. Raym. 159. This hath been frequently denied, and indeed seems unsupported by any good reason. Cro. Jac. 526. 1 Rep. 83. Hargr. Co. Lit. 59. a. n. 6. (a) That a corporation may make a bailiff without deed. *Corporations*, Letter (E). [But a patent is necessary to the making of stewards of the king's ex. Co. Comp. Cop. 56. § 45.]

Also it hath been adjudged, that a parol appointment of clerk of the peace by the *custos rotulorum*, by the words following, spoken in open court, is good, *I do nominate the said Philip Owen to be clerk of the peace, according to the act of parliament*. But in *B. R.*, though the parol appointment was held good, yet that court reversed the judgment, because the form of the words used in the nomination were insufficient; for he did not name any certain party of which he should be clerk of the peace, nor distinguish which statute he intends; for there are two statutes which concern this matter, *viz.* 37 H. 8. c. 1. § 3. and 1 W. & M. stat. 1. c. 1. § 5. and moreover by his adding this word, *viz.* said Philip Owen, it is altogether infensible. But the judgment of *B. R.* was reversed in the House of Lords.

By the 13 Car. 2. stat. 2. c. 1. it is enacted, "That no person shall be placed, elected, or chosen to any office or place of mayor, alderman, recorder, bailiff, town-clerk, common councilman, or other office of magistracy, place of trust, or other employment relating to the government of any city, corporation, borough, cinque-port, or other port-town, who shall not have received the sacrament according to the rites of the church of England, within one year next before such election; and that every person so placed or elected shall take the oaths of allegiance and supremacy at the same time when the oath for the due execution of the said office, &c. shall be administered; and that the said oaths shall be administered and (b) tendered by those who administer the oath of office; and in default of such, by two (c) justices of peace of the corporation; and that in default hereof every such election, placing, and choice shall be void."

that he did not take them before two justices of peace. 5 Mod. 317. 2 Salk. 428. pl. 3.

[But now by stat. 5 G. 1. c. 6. for quieting and establishing corporations, it is enacted, "That all persons in the actual possession of any office that were required by the above act to take the sacrament within one year next before their election into such office shall be confirmed in their several offices, and shall be indemnified and discharged from all incapacities and penalties arising from such omission; and that none of their acts shall be questioned by reason of such omission; nor shall any persons who shall be hereafter placed or elected in or to any of the offices aforesaid, be removed by the corporation, or otherwise prosecuted

Co. Lit. 61.

b. [Some have thought,

Godb. 142. and 1 Ld. Raym. 159.

Cro. Jac. 526.

1 Rep. 83.

Hargr. Co. Lit. 59.

a. n. 6.

Carth. 426.

2 Salk. 467.

pl. 4.

5 Mod. 386.

Saunders v.

Owen.

12 Mod.

200. S. C.

Lill. Entr.

278. S. C.

(b) It hath

been adjudged,

that it is

no excuse

that the

oaths were

not tendered.

5 Mod. 316.

2 Jon. 121.

Salk. 428.

(c) Which

makes it ne-

cessary in a

return to a

mandamus,

setting forth

that the

party did not

take the

oaths before

the mayor,

&c.: to add,

428. pl. 3.

who by their industry and diligence have qualified themselves for them, conferred on those who have no other recommendation, but that of being the highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expence they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations.

For the exposition
hereof, vide
the Earl of
Macclesfield's trial.
[State Trials,
6 vol.
477.]

For which reasons, among many others, it is expressly enacted by 12 Ricb. 2. c. 2. " That the chancellour, treasurer, keeper
" of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and of
" the other, barons of the exchequer, and all other that shall be
" called to ordain, name or make justices of the peace, sheriffs,
" escheators, customers, comptrollers, or any other office or minister of the king, shall be firmly sworn that they shall not ordain, name, or make any of the above-mentioned officers for any
" gift or brokerage, favour or affection; nor that none that sueth
" by himself, or by others, privily or openly, to be in any manner of office, shall be put in the same office, or in any other,
" but that they make all such officers and ministers of the best
" and most lawful men, and sufficient, to their estimation and
" knowledge."

And by the 4 H. 4. c. 5. it is enacted, " That no sheriff shall
" let his bailiwick to farm to any man for the time that he occupieth such office."

But the principal statute relating to this matter is the 5 & 6 E. 6. c. 16. which is *verbatim* as follows, § 1. " For avoiding of corruption which may hereafter happen to be in the
" officers and ministers in those courts, places, or rooms, wherein
" there is requisite to be had the true administration of justice, or
" services of trust, and to the intent that persons worthy and
" meet to be advanced to the place where justice is to be ministered, or any service of trust executed, shall hereafter be preferred to the same, and no other:"

§ 2. " Be it therefore enacted, That if any person or persons
" at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of
" them, or receive, have, or take any money, fee, reward, or any
" other profit, directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any
" money, fee, reward, or other profit, directly or indirectly, for
" any office or offices, or for the deputation of any office or
" offices, or any part of any of them; or to the intent that any
" person should have, exercise or enjoy any office or offices, or the
" deputation of any office or offices, or any part of any of them,
" which office or offices, or any part or parcel of them, shall in
" anywise touch or concern the administration or execution of
" justice, or the receipt, controlment, or payment of any of the
" king's highness's treasure, money, rent, revenue, account, aulneage, auditorship, or surveying of any of the king's majesty's
" honours

honors, castles, manors, lands, tenements, woods, or hereditaments, or any the king's majesty's customs, or any administration or necessary attendance to be had, done, or executed in any of the king's majesty's custom-house or houses, or the keeping of any the king's majesty's towns, castles, or fortresses, being used, occupied, or appointed for a place of strength and defence; or which shall concern or touch any clerkship to be occupied in any manner of court of record wherein justice is to be ministered; that then all and every such person and persons, that shall so bargain or sell any of the said office or offices, deputation or deputations, or that shall take any money, fee, reward, or profit, for any of the said office or offices, deputation or deputations, or any of the said offices, or any part of any of them, or that shall take any promise, covenant, bond, or assurance for any money, reward, or profit, to be given for any of the said office or offices, deputation or deputations of any of the said office or offices, or any part of any of them, shall not only lose and forfeit all his and their right, interest, and estate, which such person or persons shall then have of, in, or to any of the said office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift or nomination of any the said office or offices, deputation or deputations, for the which office or offices, or for the deputation or deputations of which office or offices, or for any part of any of them, any such person or persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward, or profit, or any promise, covenant, bond, or assurance to have or receive any reward, money, or profit; but also that all and every such person or persons that shall give or pay any sum of money, reward, or fee, or shall make any promise, agreement, bond, or assurance for any of the said offices, or for the deputation or deputations of any the said office or offices, or any part of any of them, shall immediately, by and upon the same fee, money, or reward given or paid, or upon any such promise, covenant, bond, or agreement had or made for any fee, sum of money, or reward, to be paid as is aforesaid, be adjudged a disabled person in the law to all intents and purposes to have, occupy, or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money, fee, or reward, or make any promise, covenant, bond, or other assurance to give or pay any sum of money, fee, or reward."

§ 3. "It is further enacted, That all and every such bargains, sales, promises, bonds, agreements, covenants, and assurances, as be before specified, shall be void to and against him and them by whom any such bargain, sale, bond, promise, covenant, or assurance shall be had or made."

§ 4. "Provided always, that this act, or any thing therein contained, shall not in anywise extend to any office or offices whereof any person or persons is, are, or shall be seised of any estate of inheritance; nor to any office of parkership, or of the

" keeping of any park-house, manor, garden, chafe, or foreft, or to
 " any of them; any thing in this act heretofore mentioned to
 " the contrary thereof in anywife notwithstanding."

§ 5. " Provided alfo, that if any perfon or perfons do hereafter
 " offend in any thing contrary to the tenor and effect of this act,
 " yet that notwithstanding, all judgments given, and all other act
 " or acts, executed or done, by any fuch perfon or perfons fo of-
 " fending by authority or colour of the office or deputation,
 " which ought to be forfeited, or not occupied, or not enjoyed,
 " by the perfon fo offending, as is aforefaid, after the faid offence
 " fo by fuch perfon fo committed or done, and before fuch per-
 " fon fo offending for the fame offence be removed from the ex-
 " ercife, adminiftration, and occupation of the faid office or de-
 " putation, fhall be and remain good and fufficient in law to all
 " intents, conftructions, and purpofes, in fuch like manner and
 " form as the fame fhould or ought to have remained and been, if
 " this act had never been had or made."

" Provided alfo, that this act fhall not extend to be prejudicial
 " or hurtful to any of the Chief Juftices of the king's courts,
 " commonly called the King's Bench or Common Pleas, or to any
 " of the Juftices of affize that now be, or hereafter fhall be; but
 " that they and every of them may do in every behalf, touching
 " or concerning any office or offices to be given or granted by
 " them or any of them, as they or any of them might have done
 " before the making of this act; any thing above mentioned to
 " the contrary in anywife notwithstanding."

In the conftruction of the laft-mentioned ftatute the following
 opinions have been holden :

Cro. Jac.
 269.
 3 Inf. 148.
 12 Co. 78.
 Salk. 468.
 pl. 6.
 3 Lev. 289.
 2 Vent. 187.
 267.

1. That the offices of Chancellour, Registrar, and Commiffary
 in ecclefiaftical courts are within the meaning of the ftatute, in-
 asmuch as thofe courts do not only determine matters which are
 brought before them *pro falute anime*, but alfo have the decifion
 of difputes concerning the lawfulness of matrimony, and legiti-
 mation of children, which touch the inheritance of the fubject;
 and alfo hold plea of legacies and tithes, &c. in which refpects
 they are courts of juftice.

2 Lev. 151.
 Ellis v.
 Ruddle.

2. It hath been adjudged, that offices in fee are out of the ftatute: fo, if the king be feifed in fee of a bailiwick, and he demife the fame to *A.* who demifes to *B.* rendering rent, the demife to *B.* is not within the ftatute; for offices in fee being excepted out of the ftatute, under-leafes of fuch offices are alfo excepted incluſively.

1 Telf. 91.
 Sir Arthur
 Ingram's
 cafe. Co.
 Lit. 234.

3. It hath been refolved, that the place of cofferer is within this ftatute, and a perfon having once purchafed this place is forever difabled to enjoy the fame; and that the king is bound by this ftatute.

S. C. and there ſaid, that the king could not difpenſe with this ftatute by any *non obſtante*. Cro. Jac. 385. S. C. cited.

4 Leon. 33.
 Godbolt's
 cafe.
 4 Mod 227.
 S. C. cited.

4. It hath been agreed, that the fale of a bailiwick of a hundred is not within the ftatute, for fuch an office doth not concern the adminiftration of juftice, nor is it an office of truſt.

5. If *A.* being surveyor of the customs, agrees with *B.* that *B.* shall be his deputy, and that in consideration thereof *B.* shall pay *A.* 600*l.* and 100*l.* annually, and it is further agreed, that *A.* will surrender his patent, and procure a new one in the name of *A.* and *B.*, which is done accordingly, and *B.* gives *A.* a bond for performance of the whole agreement; the bond is void, as being within this statute; for though part of the condition, such as procuring a new patent, &c., may not be void within the statute, yet being joined with that which is so, it makes the whole void.

6. It hath been adjudged, that a seat in the Six-Clerks Office is not within the statute, being a ministerial office only; and they are but under-clerks, who have so much a sheet for copying, &c. But one judge held it not saleable at common law, for the following reasons; 1st, Discouragement of merit and industry. 2^{dly}, Its being the occasion of extortion and exaction of excessive fees. 3^{dly}, From its being a great charge to suits. 4^{thly}, It exempts the persons, who enter by these means, in a great measure from the due regulations under which they ought to be; for they are not so easily removed, as if they were at the will of him who hath the disposal of them.

7. It hath been held, that this statute doth not extend to military officers (a); and that the 7 *W. & M.* which requires, that every commission officer, before his commission is registered, should take the oath there mentioned, that he had not directly or indirectly given any thing for procuring the commission, but the usual fees, extends only to horse, foot, and dragoons, but not to the marines.

But see 1 H. Bl. 326., where it is said by Lord Loughborough, C. J. that this case in 2 Vern. is contrary to an evident principle of law. And clearly, if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corrupter and corrupted. *Purdy v. Stacey*, 5 Burr. 2698.]

8. It hath been adjudged, that the sale of the deputation of the office of Provost Marshal of *Jamaica*, is not within this statute (b); because this statute does not extend to the plantations. 2 Ld. Raym. 1245. S. C. cited. (b) 2 Mod. 45. S. P. undetermined, and there said *arguendo*, that so good a law should have as extensive a construction as possible.

9. In a writ of error on a judgment in *Ireland*, it was held clearly, that the office of clerk of the crown, and clerk of the peace, was within the statute; but that this law did not extend to *Ireland*, not being enacted there.

10. It hath been held, that one who makes a contract for an office, contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it by any grant or dispensation whatsoever.

11. It is held, that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a less sum out of the salary, it is good: so, if the profits be uncertain arising from fees, if the principal make a deputation, reserving

2 And. 55.
107. Smith
v. Coteshill.

Patch. 26.
Car. 2. in
C. B. Spar-
row v. Key-
nold.

Ive v. Ash,
Prec. Chan.
199.
[(a) 1 Vern.
98. Nor to
the purser of
a ship.
2 Vern. 308.
Ca. temp.
Talb. 140.

4 Mod. 222:
2 Salk. 411.
Blankart v.
Galdy.

Trin. 9 G. 2.
in B. R.
Maccarty v.
Wickford.

Hob. 75.
Co. Lit. 234.
Cro. Car.
361. Cro.
Jac. 386.
Ca. temp.
Talb. 107.

2 Salk. 458.
6 Mod. 214.
Godolphin
v. Tu o
Comb. 356.
S. P.

serving a certain sum out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay, unless the profits arise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute.

Bellamy v. Burrow, Ca. temp. Talb. 97. (a) Lordyce v. Willis,

[12. It hath been adjudged, that a trust may be created of an office clearly within this statute. But subsequent determinations (a) have made this doctrine exceedingly questionable, if not entirely over-ruled it.]

Trin 9 G. 2. in B. R. Maccarty v. Wickford. (b) Hornby. v. Comford, Fitzg. 45.

13. It hath been holden, that this being a publick law, the judges *ex officio* are to take notice of it; yet it seems the more regular and safe way to plead it (b). But it hath been resolved, that a person in pleading this statute need not allege, that the party against whom it is pleaded is not within any of the provisos or exceptions in the statute; but that if he be, it must come on his side to shew it.

[As the provisions of this statute do not extend to all cases within the mischief which it was intended to prevent, it has become necessary for courts of equity, in many cases, to interpose: for though it be true, that penal laws are not to be extended as to penalties and punishments, yet, if there be a publick mischief, and a court of equity see private contracts made to elude laws enacted for the publick good, it ought to interpose, and that, upon the publick policy of the law, though the office be not within the statute of E. 6. For it is a rule of equity, "that if a man sell
" his interest, to procure a person an office of trust or service
" under the government, it is a contract of turpitude. It is acting
" against the constitution, by which the government ought to be
" served by fit and able persons, recommended by the proper
" officers of the crown for their abilities, and with purity."

Morris v. McCulloch, Amb. 432.

The defendant, who was a linen-draper, entered into a treaty with the plaintiff, who was a livery-servant, to procure him a commission in the marines for 200*l.*, which the defendant effected by means of a lady, who was intimately connected with one of the lords of the Admiralty, and afterwards received the money. The plaintiff, after six months, being discovered to have worn a livery, was discharged, upon which he filed a bill to be repaid the sum he had advanced to the defendant. Lord *Henley* decreed the money to be repaid with interest; for though commissions in the army may be sold, yet that is with the leave of the crown, and the person to succeed is examined by the Secretary at War, and approved

as a proper person: that that was not the case here: but the defendant sold his interest with the lady to procure a commission. The case of *Ive v. Alb*, he said, was very different, the commission was sold by leave of the crown, the defendant surrendered, and it was the plaintiff's fault that he did not take it.

The offices of collector and supervisor of the excise are clearly within the statute; and though a bond given to a person to influence a commissioner to appoint one to either of those offices, be not directly a sale within the statute, yet in effect it is so, and equity will therefore relieve against it.

Law v. Law,
Ca. temp.
Talbot, 140.
3 P. Wms.
391. S. C.

The late Lord Rochford, being groom of the stool to his majesty, and, in consequence of that office, recommending pages of the presence, &c., treated with the plaintiff's testator, to recommend him upon a vacancy, on condition that he should grant two annuities, one of 100 l. to *St. Ferrol*, the defendant's testator, who had been Lord Rochford's travelling tutor, and was then a bond creditor of his Lordship for 600 l., and the other of 40 l. to another person. An action being brought upon the annuity bonds by defendant's testator for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been over-ruled, and upon the motion to continue the injunction upon the merits, the answer being put in; it was argued on the part of plaintiffs, that this bond was *pro turpi causa*; that Lord Rochford having a confidence placed in him by the king, had abused that confidence, by selling his recommendation, and that upon the public policy of the law, such an agreement ought not to stand. On the other hand, it was argued, that it was allowed this was not an office within the statute of E. 6. that it was merely an office respecting the king's private, not his public character; and that if it was *turpis contractus*, that might have been pleaded at law. Lord Thurlow expressed his doubts, whether it might not have been brought upon the record at law by a plea, and made a defence there to the action, but thought that not a sufficient reason to prevent his interposition, the court of law never having determined, that it could be so brought there as a defence. He then, admitting that it was not within the statute of E. 6., but treating it as a matter of public policy of the law, and similar to marriage brokerage bonds, where, though the parties are private persons, the practice is publicly detrimental, ordered the injunction to be continued till the hearing; and afterwards, upon the hearing, ordered it to be perpetual.]

Haneington
v. Du-Cha-
tel, 1 Br.
Ch. Rep.
124.

That the
illegality of
the consi-
deration can
be pleaded
to an action
on a bond is
denied by
the court in
Andrews
v. Eaton,
Fitzg. 73;
but see
Colins v.
Blantyre,
2 Will. 341.

(G) What Remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.

It was held clearly, that an assize lay at common law for an office, and that therefore though the statute of West. 2. 13 Ed. 1. Stat. 1. c. 25. speaks only of offices in fee, yet an assize lies for an office

8 Co. 47. a.
John Webb's
case. 2 Inst.
412. S. P.

office in tail or for life. But this is to be understood of offices of profit; for of an office of charge and no profit an assise does not lie.

8 Co. 49. b. But a man shall not have an assise of the whole office, unless he
2 Inst. 412. be disseised of the whole; for if a man be disseised of parcel of the profits of an office, he may have an assise of that parcel only.

8 Co. 49. In an assise for an office newly erected and constituted, the de-
Webb's mandant in his plaint must shew what fee or profit is granted for
case. the exercise thereof; for this office cannot have a fee or profit appurtenant to it, as an ancient office may, and for an office without fee or profit no assise lies.

8 Co. 49. But in an assise for an ancient office, the demandant in his
plaint need not shew what fee or profit is belonging to it, for it shall be intended there is some fee or profit.

Roll. Abr. In an assise for an office, the demandant must shew a seisin;
270. but it hath been held, that the taking of 3 d. for a *capias* against *B.*, is a sufficient seisin of the office of filazer *de banco*.

2 Lev. 108. So, if one be committed by the House of Commons to *A.*, who
Cragg v. before and long after was in possession of the office of *serjeant at*
Norfolk, arms to the House, and the prisoner compound with *B.* for his fees,
adjudged. and give him twenty shillings; this is a good seisin of the office by
B., for he cannot be disseised thereof, but at his election. It was
likewise held, that proving that *B.* being in the *lobby* of the *House of Commons*, took hold of the door of the House, and laid his hand upon the mace, then being in the hands of *A.* to take it, but hindered by *A.*, was good evidence both of a *seisin* and *disseisin*.

Lev. 108. But, where the serjeant of the mace to the *House of Commons*,
et vide in an action upon the case for a disturbance, recovered damages;
Mod. 122. whether this was a sufficient seisin, the damages being recovered
where such in satisfaction of the fees, and he then being out of possession
recovery is of his office, was doubted; some of the judges inclining one way
held to be and some the other; and it was intended to have been found
a sufficient specially, but the plaintiff being unwilling to stand to it was non-
seisin. suit.

3 Mod. 273. Also, in an assise for an office, the demandant in his plaint must
Savile v. set forth a title.

Lenthol; by which book it appears, that the demandant not being ready to set forth a title, the assise was adjourned till the next day, when he appeared and set forth a title, and process was prayed against the defendant.—But by Salk. 82. S. C. the demandant was nonsuited the second day for not counting; and the court told him, he might bring a new assise. Comb. 173. S. C. and the plaintiff nonsuited;
et vide Dyer, 124 pl. 63. 149. pl. 81. 152. pl. 9. 8 Co. 45. b.

8 Co. 47. An assise lies for the office of registrar of the (a) Admiralty; for
2 Inst. 412. though their proceedings are according to the civil law, yet
11 Co. 99. b. the (b) right of their offices is determinable at common law. So,
Dyer, 152. of the mastership of an hospital, being a lay fee.

(a) So, the right of the office of registrar to a bishop is to be determined at common law, and not to be tried in the spiritual court, though the subject-matter is spiritual; because the office itself being matter of freehold, is for that reason of temporal cognizance.—For this vide Roll. Abr. 285. 4 Mod. 27, 28. Carth. 169.
(b) So, chapellours, registrars, proctors, &c. being officers of temporal profit, are to sue for their fees in the temporal courts.—For this vide tit. Fees, letter (D).

A man may bring an action on the case (a) for the profits of an office, though he never had seisin. Mod. 122.
per Hale,
C. J.

[But if the perquisites of an office are mere gratuities, not known and accustomed fees, neither an assise, nor an action for money had and received, will lie to recover them. Boyter v. Dodsworth, 6 Term Rep. 681.] (a) An action on the case for disturbing a person in the exercise of the office of parish clerk. 2 Salk. 463. pl. 7. But not so advisable as an assise; because a jury may not well compute the damages in proportion to the loss of a man's livelihood. Carth. 169.

If the king grant the office of comptroller of the customs to A, and B. *durante beneplacito*, and A. die, and afterwards the king grant the said office to C., and yet B. under pretence of survivorship exercise the said office, and receive the profits thereof; C. may have an *indebitatus assumpsit* for so much money had and received to his use. 2 Mod. 169.
adjudged,
upon a special verdict
between
Arris v.
Stukely.
2 Jon. 126.

1 Lev. 245. S. P. between Haward v. Wood; where the defendant, under pretence of title, received the fees belonging to the plaintiff as steward of a court-baron.

[The head of a college hath not such an estate in his office as will entitle him to maintain an assise for it; for he hath no sole seisin.] Per Holt,
C. J. in
Phillips v.
Bury, 2 Term Rep. 335.

(H) Of the Nature of Offices as to their Duration and Continuance: And herein of their being grantable in Fee, for Life, Years, at Will and Reversion.

OFFICES, in respect to their duration and continuance, are distinguished into those which are of inheritance, or in fee, or fee-tail, those of freehold or for life, those for years or a limited time, and those which are at will only. And here we must again observe, that though all offices, in relation to the administration of justice, are originally and inherently lodged in the crown, yet cannot the king himself grant these in any other manner than warranted by ancient usage, or so as to be injurious or inconvenient to the publick. 9 Co. 97.

But, where no inconvenience can ensue to the publick, there, offices are allowed to descend as inheritances; as, the offices of (b) earl marshal of England; so, of park-keeper, forester, gaoler, (c) sheriff, &c. Dyer, 285.
7 Co. 33.
Plow. 2.
2 Inst. 382.
2 Roll.
Abr. 153.

(b) So, the office of seneschal of England formerly belonged to the earldom of Leicester, and came afterwards to the Staffords, and dukes of Buckingham, and the last who had it in fee was Edward Duke of Buckingham, who was attainted 13 H. 8., but now it is never granted to any subject only *pro hac vice*. 4 Inst. 58. 127. 7 Mod. 125. cited. (c) The mayor and citizens of London have the shrievalty of London in fee, and the sheriffs of London are guardians under them, and removeable from year to year. 2 Inst. 382.

And if one hath the office of park-keeper, forester, gaoler, sheriff, &c. to him and his heirs, he may grant these offices to one for life, remainder to another for life, &c. for *omne majus continet in se minus*; and as they are grantable over in fee, so may they be granted in succession to one for life, with remainders over. Plow. 379.
b 381. a.
9 Co. 48.
97.

7 Co. 33.
Co. Lit.
20. a.
Roll. Abr.
838.

So, offices may be entailed; as, the office of earl marshal of England, or the office of steward, bailiff, or receiver of a manor, may be entailed; because they are demandable in a *præcipe ut tene-menta*, and being exercisable within the manor, are therefore looked upon as members or branches of it.

Perk. § 342.
Co. Lit. 32.
Roll. Abr.
676.
Plow. 379.
b. F. N. B.
149.

So, a woman may be endowed of an office; as, of the office of the *Marshalsea* to have the third part of the profits, and in such case she shall be contributory to a third part of the charge. So, she may be endowed *de tertiâ parte exituum provenient. de custodiâ gaolæ abbatissæ Westm.*, or of the third part of the profits of courts, fines, heriots, &c.

4 Mod. 167.
Show. 428.
said argu-
endo.

It is said, that, at common law, all officers of justice had estates in their respective offices during life, and could not be removed but for misdemeanors: so, was the office of clerk of the crown in *B. R.* and in Chancery: so, are the clerks in the Exchequer, and the filazers in *C. B.* And in this respect the wisdom and policy of the law was very great; because, when men held their offices for life, it was an encouragement to the faithful execution of their duties; it was then also they endeavoured to acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not liable to be displaced at the pleasure of those who put them in.

Co. Lit. 42.
Roll. Abr.
844.
Show. Parl.
Cases, 161.

If an office be granted to a man to have and enjoy so long as he shall behave himself well in it; the grantee hath an estate of freehold in the office; for since nothing but his misbehaviour can determine his interest, no man can prefix a shorter time than his life; since it must be his own act (which the law does not presume to foresee) which only can make his estate of shorter continuance than his life. So, if the office be granted to a man *quamdiu se bene gesserit tantum*, his estate will not be less for the word *tantum*; for the grant is of equal extent with the former, and his misbehaviour in each case determines his interest.

4 Mod. 167.
Show. 426
to 536.
Harcourt
v. Fox,
Show. Parl.
Cases, 158.
S. C.
Ll. Raym.
161. S. C.

Therefore, where by the statutes (a) directing in what manner the *custos rotulorum* shall be appointed, &c. it is among other things provided, that the *custos* shall appoint and nominate the clerk of the peace, when void, who may execute it by himself or deputy, for so long time only as he shall demean himself well; in the construction of these words it was held, that the clerk had an office for life, and that it did not determine with the *custos*.

Comb. 209.
12 Mod. 42. S. C. [(a) By stat. 37 H. 8. c. 1. § 3. the *custos rotulorum* is authorized to appoint a fit and able person to hold the office of clerk of the peace, during the time that the said *custos rotulorum* shall occupy the said office of *custos*, so as the said clerk of the peace demean himself justly and honestly. By stat. 1 W. & M. c. 21. the *custos* is authorized to nominate a clerk of the peace, for so long a time only as such clerk of the peace shall well demean himself in his said office; and if he do not well demean himself in his office, the sessions of the county, on application and proof made as the act requires, may remove him.]

4 Inst. 74.
117.

The Judges of the several courts at *Westminster* held formerly their places *durante bene placito*, but now by the 12 & 13 W. 3. their commissions are *quamdiu se bene gesserint*, by which they hold their offices for life; but upon the address of both Houses of Parliament it may be lawful to remove them.

It hath been determined, that at common law the patents of the judges (a), sheriffs, escheats, commissioners of oyer and terminer, gaol-delivery, and of the peace, and of the attorney and solicitor general, are determined by the death of the king, in whose name they are made.

Sherriff in such places where he is chosen by a corporation, having by its charter the inheritance of the office, does not determine by the demise of the king. 7 Co. 30. b. — Nor the authority of a coroner or recorder. Dalif. 15. Dyer, 165. 2 Inst. 175. Lev. 120. — Nor does any corporation officer, who by the charter is invested with judicial authority, lose it by such demise. 2 Hawk. P. C. 3. & vide the Statutes 7 & 8 W. 3. c. 27. and 1 Ann. c. 1. for continuing all patent officers for six months after such demise, tit. Courts, letter (C). — [And by Stat. 1 G. 3. c. 23. the offices of the judges do not become vacant on the demise of the crown.]

And. 44.
Dyer, 165.
Cro. Car.
1, 2.
N. Bendl.
79. (a) But
the office of

It hath been adjudged in Sir George Reynold's case, that the office of the King's Bench Prison * could not be granted for years, for that being an office of great trust concerning the administration of justice, in keeping of prisoners till they pay their debts, if it should be granted for years, might be injurious to the publick, in that it would go to the executors or administrators, or might be in suspense till probate of the will, or administration taken out; and if the officer should die indebted, so that none would prove his will, or take out administration, then there would be no officer at all, and executors or administrators would be in by act of law, without allowance of the court. Also, it might be a question, if such office should not be forfeited by outlawry, or be assets in the executor's hands; and many other inconveniencies would follow if such grant for years were allowed. For the same reasons it was held likewise, that the offices of *custos breviarum*, chirographer, clerk of the pipe of the king's silver, or of the crown, remembrancer, or chamberlain of the Exchequer, prothonotaries, and other officers in the several courts of justice, could not be granted for years.

9 Co. 27.
Koll. Abr.
847. a Roll.
Abr. 153.
Cro. Car.
587.
Jon. 563.
Hob. 153.
3 Mod. 145.
* The power
of appoint-
ing the mar-
shal of the
King's
Bench pri-
son, reseat-
ed in the
crown, by
27 G. 2.
c. 17. which
vide.

But such offices as do not concern the administration of justice, but only require skill and diligence, may be granted for years, because they may be executed by deputy, without any inconvenience to the publick; therefore, where a grant for years was made of the office of garbler of spices in London, it was adjudged to be a good grant, or at least a good appointment for years, within the intent of the statute of 1 Jac. 1. c. 19.

Hard. 45.
353. Jones
v. Clerk.

The office of registrar of policies of assurance in London, concerning merchants, was granted by the king for years, and adjudged to be a good grant, because it did not concern the administration of justice in any court, but required only the skill of writing after a copy. So, the office of making and sealing *subpenas* was granted for years, and allowed to be good; and there, several precedents are cited of offices granted for years; as, first, offices in which the safety of the realm was concerned; as, the office of warden of a haven or port by H. 6., of gunpowder, 1 Car. 1., of making gunpowder by Car. 2. Also, offices concerning the trade of the realm have been granted for years; as, 1 H. 7. of the exchange of money; 18 H. 8. of gauger; 17 R. 2. of aul-

Hard. 351.,
&c.
Hob. 146.
Dyer, 303.
3 Keb. 80.
1 Vern. 11,
12.

nager

nager though a seal belongs to it, with which the officer is intrusted; of the letter-office, 13 Car. 1. Also, offices in courts of justice have been granted for years; as, the office of surveyor of the green-wax; of the 6d. writs in Chancery and *subpœnas*; of the comptroller and customer, and making out process in C. B. And these and several others have been granted for years; but no dispute having been made of the validity of them, how far some of them would hold at this day may be a question.

2 Lev. 245.
2 Jon. 126.
6 Mod. 57.

But, where one made a grant for years of the stewardship of a court-leet and court-baron, this was held void as to the court-leet being a judicial office, but good as to the court-baron, being only ministerial, and the suitors judges thereof: but the grant appearing afterwards to be for years, determinable on the death of the lessee, it was held good for both; because there was no danger of its coming to executors or administrators.

4 Co. 32. a.
(2) Where a sheriff may grant to his under-sheriff to hold at will only, for he is his deputy, and according to the nature of a deputation must be removable, as an attorney.
Hob. 13. Noy, 55. — * See the stat. 24 G. 2. c. 48.

The king may grant the office of sheriff * (a) *durante beneplacito*; and although he may determine the office at his pleasure yet he cannot determine it for part, as for a vill, &c. nor can he abridge the sheriff of any thing incident or appurtenant to his office.

Dyer, 176.
pl. 28.

The king may grant the office of chirographer of the Common Pleas *quandiu nobis placuerit*, and it is good.

9 Co. 97.
3 Mod. 140.
† See 24 G. 2. c. 17.

The office of the king's *Marshalsea* † may be granted at will.

Co. Lit.
42. a.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exercise of his office, this is no absolute estate for life; because the rent being granted on account of the office, and in discharge of the duty of the place, whenever his interest in the office ceases, the rent is determined; because it was first granted for the exercise of the office, which he is no further concerned in.

Co. Lit.
42. b.
(4) So, an office partly ministerial and partly judicial, cannot be granted in reversion; as the office of auditor of the Court.
Watson. 11 Co. 4. 2 Roll. Abr. 152.

A (b) judicial office cannot be granted in reversion; for though the grantee be never so fit at the time of the grant, he may become unfit when it takes effect.

But for the difference between the king's grant of an office in reversion, and such a grant in reversion by a subject, vide Dyer, 80. pl. 58. 259. pl. 18. 3 Leon. 31. Hob. 15. 2 Roll. Abr. 154. Cro. Car. 279. 11 Co. 4. 8 Co. 55. b. Carth. 350. 2 Salk. 465. pl. 1. 4 Mod. 275.

The king may grant an estate in an office to commence *in futuro* or upon a contingency, which estate shall arise out of the inheritance he hath in the office itself, for such he may have in point of interest, though not in execution.

Cro. Car.
39. 888.
Jon. 110.
A Roll.

It hath been adjudged, that the office of registrar being usually granted as well in reversion as possession, a grant to one of such office for life, when by the death or surrender of the present office

It shall become void, is good; for though there is no reversion of an office, unless it be an office of inheritance, yet it may well be granted in reversion, *habend.* after the death of the present officer; which is no more than a provision of a person to supply it when it becomes void; and if such provision has been usually made, the custom and usage (*a*) give sanction to it. it is not grantable in reversion. Abr. 153. March, 38. 3 Leon. 31. (a) But unless there have been such usage, 2 Vent. 188.

(I) Offices, by whom to be executed, and who are incapable thereof.

If an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same *pro modo regis & populi*; for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people. An. (b) infant therefore is not capable of an office of stewardship of the court of a manor, either in possession or reversion. Co. Lit. 3. b. (b) That an infant cannot be a steward, for he cannot by intendment execute it; much less may he assign it over. Cro. Eliz. 636-7. per Popham. — But a ministerial

office may be granted to an infant, in possession or reversion, for he may exercise it by a deputy. 31 Co. 4. 2.—As, where the office of registrar to the Bishop of Rochester was granted to J. S. who was an infant of twelve years of age at the time of the grant, *habend.* after the death of J. D. (who was the registrar in possession) for his life, to be exercised by him or his deputy, and afterwards J. D. died, J. S. being of the age of thirty; this was held a good grant at the time of making of it, the office being to be exercised by him or his deputy. Cro. Car. 279. 2 Roll. Abr. 153. Young v. Stowel. Cro. Car. 555-6. March, 38. S. P. adjudged. 4 Mod. 279. 2 Vent. 188. Pollerf. 136. S. P. cited, and adjudged to be law.

Lord Broke gave the office of chief prothonotary to G., but he appearing unfit, he revoked it, and granted it to W., and a precedent was shewn, where the office of clerk of the crown was granted by the king to one Vintner, who exhibited his patent, and desired to be admitted; and the justices of the King's Bench refused to admit him (c), because he never had exercised that office, nor ever was brought up in it; and recommended a fit person, whom the king *ore tenus* commanded to be admitted, and was sworn. Dyer, 150. b. Cro. Car. 557. S. C. cited. 2 And. 118. S. P. (c) If an office of learning be given to a man utterly insufficient, it mends

it is void; and though it be to him and his assigns, or to be exercised by a sufficient deputy, it mends the case, but it must radically vest in the first grantee, before it can go in procuration or deputation to any other. Hob. 148.—If the king should grant an office in B. R. the judges may remove such an officer for insufficiency, because they are proper persons to judge of his abilities. 4 Mod. 30.

The Bishop of Gloucester granted the office of chancellor of his diocese to one S., who, because he was unskilful in the civil and canon law, was adjudged incapable. Car. 95. Larch 228. Noy, 91. Palm. 450. And in 4 Mod. 27. S. P. was argued, where the grant was to him or his deputy; in which case it was insisted, that insufficiency did not create an original incapacity, so as to avoid the grant; because that he might appoint a deputy learned in those laws, and that if he appointed one who was unskilful, it would be a forfeiture of the office.

Cro. Jac.
17. Lady
Ruffel's
case.

If the king by his letters patent grants the office of custody of the castle of *Dunnington* to a woman, to be exercised by her, or her sufficient deputy, the grant is good, and it shall not be intended a castle of war rather than a private house.

(a) How far
dissenters
from the
church are
rendered in-
capable or
excused from
serving any
publick office,
vide 2 Mod. 299.
2 Jon. 81. 137.
4 Mod. 269.
Salk. 167. pl. 1.
Skin. 574.
Carth. 306.
5 Mod. 431.
Comb. 315.
10 Mod. 101. 179.
11 Mod. 132. pl. 11.
12 Mod. 67.
2 Stra. 1193.
Ld. Raym. 29. &
supra (E).

By the 3 Jac. 1. c. 5. it is enacted, "That no (a) popish recusant convict shall exercise any publick office or charge in the commonwealth, but shall be utterly disabled to exercise the same by himself or his deputy."

(K) Of the Manner of executing them: And herein of Offices that are incompatible, and where an Office may be executed by two or more Persons,

4 Inst. 300.

OFFICES are said to be incompatible and inconsistent, so as to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability; or when their being subordinate and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty. And this my Lord Coke says is of that importance, that if all offices civil, ecclesiastical, &c. were only executed each by a different person, it would be for the good of the commonwealth, advancement of justice, and preferment of deserving men.

Inst. 100.

(b) Sid. 305.

And hence it is, that the king himself, though he may grant an office, yet cannot execute it himself (b); nor can the Ch. Just. of B. R. be prothonotary or clerk of the papers, though he may dispose of those places.

4 Inst. 310.

So, if a forester, by patent for his life, is made Justice in *Eyre* of the same forest *pro hac vice*, the forestership is become void, for these offices are incompatible; because the forester is under the correction of the Justice in *Eyre*, and he cannot judge himself. The same law of a warden of a forest, and of a Justice in *Eyre* of the same forest.

Sid. 305.

2 Keb. 92.

Rex v.

Pergam.

(c) Upon
a writ of
error up-
on a judge-
ment in
Northamp-
ton, the er-
ror assigned
was, that
the *venire*
facias was
awarded to
the two bailiffs,
and the court was held before the mayor and the two bailiffs, so that the bailiffs being judges

Upon a *mandamus* to restore one to the place of town-clerk, it was returned, that he was elected mayor and sworn, and therefore they chose another town-clerk; and the court were strongly of opinion that the offices were incompatible, because of the subordination. A coroner made sheriff ceases to be coroner; so, a parson made a bishop; a judge of C. B. made a judge of B. R., and the town-clerk's office is to be attendant on the mayor. In re-diffusion the sheriff is minister and judge, but that is by act of parliament; and by the (c) customs of some places the mayor has other offices annexed to his place of mayor, but here they are distinct; and the court recommended the case to the town for an amicable composition.

the two bailiffs, and the court was held before the mayor and the two bailiffs, so that the bailiffs being judges

judges of the court could not be officers; but the court conceived it might be good by custom, and not error; for the judges are not the bailiffs only, but the mayor and bailiffs; and it is a common course in many of the ancient corporations, where the bailiffs are judges, or the mayor or they be judges, yet in respect of executing process they be the officers also. Cro. Car. 158. Crane v. Holland. 4 Mod. 66. S. C. [But this case, as is well observed by Buller, J. will not assist in the determination of the point in question. For in a writ of error in a civil action, the question, Whether the judges in the court be or are properly judges or not? can never be decided: it is sufficient, if they be judges *de facto*. 2 Term Rep. 67.]

[The corporation of *Hastings* consists of a mayor, twelve jurats, Milward v. freemen, and a town-clerk, which latter is elected by the others, Thatcher, and the jurats sit as judges in a court of record, and hold pleas of 2 Term Rep. 81. the crown; and any two of them with the mayor may hold a court, but all the jurats have a right to attend as judges without being summoned. It was holden, that the acceptance of the office of town-clerk, though an inferior office, vacated that of jurat, for that these two offices were incompatible, notwithstanding there were several instances within the borough of their having been vested in the same person.]

Ministerial offices may be granted to two, and so may also some judicial offices, which are established by act of parliament; but ancient offices cannot regularly be granted to two, nor otherwise than they have been. However, it seems to be in the discretion of the judges, if they see an office in their courts comprehend too much for one man to execute it, to put in more. But this must be where it is granted to several as one office; for if divided to two or three, the prescription is interrupted, and it is not a grant of the ancient office.

Therefore, a grant of the office of chief prothonotary of the Common Pleas to two hath been held void. Hob. 153. 3 Mod. 145. 4 Mod. 17. cited.

So, a grant to two to be chief justices of any of the benches hath been held void; but a grant to two to be clerks of the crown is good. 2 Roll. Abr. 152. 11 Co. 3.

If a grant be made to two of the office of one of the auditors of the Court of Wards, it is good; yet it is but one office, and partly judicial; but this is by the 32 H. 8. c. 46. 2 Roll. Abr. 152. 4 Mod. 18. S. C. cited.

The office of forester of *Wakham* forest was granted to two, and held good. Dyer, 167. a.

The clerk of the King's Bench office had granted the office of clerk of the papers to *A.* and *B.*, and the longest liver of them; *B.* makes a parol surrender, and prays that *C.* should be admitted in his room, which was done accordingly; *B.* dies; *A.* commenced a suit against *C.*, supposing that he had no right; but upon the trial it appeared that the plaintiff agreed that *C.* should be admitted, which was looked upon as a surrender of the former grant, and the taking of a new one; and it was ruled accordingly. Vent. 296. 2 Mod. 95.

The king granted the office of comptroller of the customs in the port of *Exeter*, *durante beneplacito* to two; one died; and the question was, Whether the other should have the whole by survivorship? *Et per cur.* He shall not, for there shall be no survivorship. 2 Mod. 260. Aris v. Stukely.

(a) It is said in general, ship of an office of (a) trust, if it is not granted to them and the survivor.

per cur. that

if an office be granted to two, and one die, the office does not survive, but determines; as, if two sheriffs, and one die, the other cannot act: otherwise, if granted to two and the survivor of them.

2 Salk. 465. pl. 1.

Carth. 213.

Jones v.

Bew.

Show. 283.

4 Mod. 16.

2 Salk. 465.

pl. 1.

12 Mod. 10.

S. C.

The Bishop of *Landaff* by deed granted the office of chancellor or commissary of his diocese to Doctor *Lloyd* and Doctor *Jones*, to hold the same *conjunctim & divisim* to them and to the survivor of them; Doctor *Lloyd* died, and the successor of the bishop granted the office to another, who sued *Jones*: it was agreed by counsel on both sides, that this office had been anciently and usually granted in this manner; and on a case stated out of Chancery, and referred to the Judges of *B. R.*, the only question was, Whether this was such a judicial office as could be granted in this manner? And after several arguments it was adjudged, that this was a good grant; and the principal reason of the judgment was, because of the long and constant usage; and it was said, that the offices of most of the bishopricks in *England* are and have been constantly so granted.

(L) Of the Execution of an Office by Deputy: And herein of Superiors being answerable for their Deputies.

(b) A deputy is said to be one who occupieth in right of another, and for whom regularly his superior shall answer.

AS to the execution of an office by (b) deputy, we must observe, that there are some offices which in their nature and constitution imply a power or right of exercising them by deputy; some that in their nature cannot be exercised by deputy; and some, that by having such a power annexed to the grant or institution may be so exercised, though without such an express provision they could not.

Perk. § 100. — The difference, says my Lord Coke, between a deputy and an assignee is, that an assignee is a person who has an estate or interest in the office itself, and does things in his own name, for which his grantor shall not answer, unless in some special cases; but a deputy has not any estate or interest in the office, but is as servant to the officer, and does every thing in the name of the officer, and nothing in his own name, and for whom the grantor shall answer. 9 Co. 49. But *per* Holt, C. J. it is said, that a deputy cannot regularly have less power than his principal, cannot be restrained from exercising any part of the office by covenant, or otherwise, must regularly act in his own name, unless it be in case of an under-sheriff, who acts in the name of the high sheriff, because the writs are directed to him. Salk. 95.

2 Inst. 382.

Plow. 380.

9 Co. 47.

Style, 357.

(c) The office of

Offices of inheritance for years, and those which require only a superintendency, and no particular skill, may regularly be exercised by deputy; such as that of (c) earl marshal of *England*, forester, park-keeper, &c.

high constable of *England* may be exercised by deputy. Keilw. 171. a. — John Wiltshire held lands in Heyden in Essex by grand serjeanty, to hold a towel when the king should wash his hands before dinner the day of the coronation; but he having no dignity was allowed to make a deputy. Co. Lit. 107. b. — Anne, wife of the Earl of Pembroke, held lands of the king to perform the office of napery at his coronation; but because a woman could not do it in person, she was allowed to make a deputy: So, the heir of the said earl was by tenure to carry the gold spurs before the king at his coronation; but because he was not of age, he was allowed to make a deputy. Co. Lit. 107. b.

A sheriff,

A Sheriff, though he is an officer made by the king's letters patent, and though it be not said that he may execute his office *per se vel sufficientem deputatum suum*, yet he may make a deputy, which is the under-sheriff against whom actions may be brought by the parties grieved.

Roll. Rep.
274.
Phelpe v.
Winicombe.

And it is said in general, that when an officer hath power to make assigns, he may (a) implicitly make a deputy.

9 Co. 49.
(a) A bishop
on his crea-

tion hath power of appointing deputies. 2 Sid. 138. The office of clerk of the outlawries of the Common Pleas belongs to the Attorney-General, who exerciseth it by deputy. 4 Inst. 101.

A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his patent to enable him; because his judgment is relied on in matters relating to his office, which might be the reason of the making of the grant to him; neither can a ministerial officer deputate one in his stead, if the office be to be performed by him in (b) person; but when nothing is required but a superintendency in the office, he may make a deputy.

3 Mod. 150.
cited argu-
endo.
(b) There-
fore the
esquire of
the king's
person can-
not assign
his office;

for the law supposes it to have been given him in consideration of his diligence, fidelity, and skill. 11 E. 4. 1. 2 Roll. Abr. 154. — The office of carver, being a personal trust, cannot be assigned. Dyer, 7. b.

It is clear, that the Judges of *Westminster-hall*, as well as all (c) others having judicial authority, must hold their courts in their proper persons, and cannot act by deputy, nor any (d) way transfer their power to another.

9 E. 4. 30,
31. a.
Bro. tit.
Judges, 11.
Perk. § 101.
(c) But the

judges of the ecclesiastical courts may act by deputy, as the ancient custom hath been. Latch. & wide Apra letter (D). (d) And therefore where the Council of the Marches of Wales referred a suit to certain persons to hear and determine it; this was held to be illegal, and a prohibition awarded to the court, to stay their proceedings against the party for refusing to obey the order of the referees. Roll. Abr. 72. March, 102. — So, justices of the peace cannot delegate a certain number of themselves, and invest them with a power to make rates and orders. 6 Mod. 87.

A coroner cannot make a deputy, nor an escheator; because these are judicial offices, which they must exercise in person: 446. but it is said, that the king by special commission may appoint a deputy escheator, to inquire by office of the death of a nobleman, or, as the book seems to hold, of any other person, though under that degree.

Litt. Reg.
446.

It is held, that the office of constable being wholly ministerial, and no way judicial, he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself; for the publick good requires, that there should be always some officer ready at hand to execute such warrants; and the too rigorous restraint of the service of them to the proper officer could not but sometimes cause a failure of justice. But it is said, that a constable cannot make a deputy, without some such special cause.

Roll. Abr.
591.
Moor, 845.
Crompt.
222.
3 Bult. 77.
Dalt. c. 1.
Roll. Rep.
274.
Sid. 355.
Lev. 233.
2 Keb. 309.

[The high constable appointed a deputy to billet soldiers under the mutiny act. This appointment was by parol only, and the deputy was not sworn. By the court. — The high constable hath power by the act to billet soldiers; and he may appoint a deputy to this particular ministerial act: This is a ministerial, not a judicial,

Midhurst
v. Waite,
3 Burr.
1259.
1 Bl. Rep.
350. S. C.

judicial, act; and a constable may appoint a deputy to do ministerial acts.]

Web. 639.
per Windham, J.
& vide

1 Lev. 76.

(a) A bailiff of a liberty may have a deputy. Cro. Jac. 241-2. adjudged.

Roll. Abr.

752. 754.

Style, 183.

191. 203.

219.

2 Keb. 385.

39 H. 6. 34.

2 Roll.

Abr. 154.

(b) That

neither ten-

nant at will

nor tenant for life can make a deputy, if, in the very grant made to them, there is not an express clause

for the execution of the office *per se vel sufficientem deputatum suum*. 3 Mod. 147. — † See the stat.

27 G. 2. c. 17. whereby the power of appointing the marshal. is reserved in the crown.

Bryant's

case, 4 Term

Rep. 716.

5 Term Rep. 511.

Cro. Eliz.

187.

Watkins

v. Johns.

Salk. 95.

Ld. Raym.

658. Parker

v. Kett.

(c) For a

deputy be-

ing only

one who is

authorised

himself, he

cannot de-

legate that

authority;

and if a de-

puty might

make a de-

puty, so such

second de-

puty, and so *ad infinitum*; which would be highly inconvenient. Lil. Reg. 446. (d) Where the deputy

of a deputy of a custom, sitting in the custom-house with other officers, and acting as an officer,

his acts were held good as an officer *de facto*, though not *de jure*; and that it would be very hard to put

those who have to do with custom-house officers, to inquire into the legality of their institution.

Cro. Eliz. 534.

4 Inst. 291.

The Chief Justice in *Eyre* may by the statute of 32 H. 8. c. 35.

make his deputy; yet all the writs of summons ancient and late are

coram the justice itinerant aut ejus deputato.

Leon. 219.

3 Mod. 147.

(e) A deputation of an

office is in its own nature grantable by parol; and therefore though it should happen to be granted by

writing, yet since it is in itself grantable by parol, it may be revoked by parol. Ca. Law & Eq. 74.

But

It seems the better opinion, that a (a) recorder of a town cannot make a deputy, without a special grant or custom for that purpose, being a judicial office relating to the administration of justice.

And therefore, where a writ was directed to the mayor, aldermen, and recorder of *Lancaster*, and the record was certified by the mayor, aldermen, and deputy recorder, without shewing that the recorder had power to make a deputy; the return was held naught.

It is held, that the marshal of the King's Bench, having the inheritance of the office, with power to grant the same for life, cannot notwithstanding give power to such grantee for (b) life to make a deputy.

[The offices of clerk of the papers, and clerk of the day-rules in the King's Bench Prison, cannot be executed by deputy.]

The office of aulnage, or sealing of cloths, cannot be exercised by deputy, being an office of trust, unless there be a clause in the patent for that purpose.

Regularly, a deputy cannot make a deputy (c), because it implies an assignment of his whole power, which he cannot assign over. But, if A. be appointed steward of a copyhold court, to be exercised *per se vel deputatum suum*, and he appoint B. his deputy, who hath long exercised the said office, and B. authorise C. and D. jointly and severally, to take a surrender of a copyhold tenement from F. S., which is done by C., without reciting his power, or any relation had to it, the surrender is good, being only a single act; for the constitution in this manner gives C. the colour and reputation of an authority to act as a steward (d) *de facto*; and what he does as such is sufficient among the tenants, for they have no power to examine his authority, nor is he to render them any account of it.

(d) Where the deputy of a deputy of a custom, sitting in the custom-house with other officers, and acting as an officer, his acts were held good as an officer *de facto*, though not *de jure*; and that it would be very hard to put those who have to do with custom-house officers, to inquire into the legality of their institution.

The Chief Justice in *Eyre* may by the statute of 32 H. 8. c. 35. make his deputy; yet all the writs of summons ancient and late are *coram the justice itinerant aut ejus deputato*.

It is said, there cannot be an officer without deed, (e) nor can there be any deputation of an office without deed, being a matter which lies in grant.

office is in its own nature grantable by parol; and therefore though it should happen to be granted by writing, yet since it is in itself grantable by parol, it may be revoked by parol. Ca. Law & Eq. 74.

But

But the high sheriff may make an under-sheriff, or his deputy, without deed, for he claims no interest in the office, but as servant; and therefore (a) where an action on the case was brought against the deputy of a sheriff for an escape, who pleaded, that the sheriff made him his deputy to take bail of prisoners, and that he took bond, &c., and shewed no deed of deputation; yet the plea was held good on a demurrer.

appoint a deputy by parol, see *supra* Midhurst v. Waite, 3 Burr. 1259.]

By the statute of 2 H. 6. c. 10. it is ordained, "That all officers made by the king's letters patent within the king's courts, who have power and authority, by virtue of their offices of old time accustomed, to appoint clerks and ministers within the same courts, shall be charged and sworn to appoint such clerks and ministers for whom they will answer at their peril."

Upon the rule of *respondent superior*, regularly, all officers shall answer for their (b) deputies, in the same manner as if the act were done by themselves, unless it be in criminal cases; and therefore, sheriffs shall answer for the escapes, amerciaments, &c. of their deputies, &c.

except any thing, he himself shall be punished, and not the master of the office, because he takes a fee for it. Leon. 146. & vide Hob. 13.

[A constable shall answer for his deputy upon any miscarriage, unless the deputy is allowed and sworn; for then the deputy is constable.]

If the coroner be insufficient, the whole county who made election and choice of him shall *tanquam elector & superior* answer for him.

franchise shall answer for a bailiff put in by him.

If a person be appointed customer or collector of the customs in a certain port, who is empowered by the statute 1 Eliz. c. 12. to appoint a deputy, and a deputy so appointed by him conceal the goods of a merchant, and the customer himself, being ignorant thereof, return on oath into the Exchequer the customs of this port, according to the information of his deputy; he shall, notwithstanding his ignorance, answer for the act of his deputy, and shall forfeit treble the value of the merchandize, and be fined, &c. pursuant to the statute 3 H. 6. c. 3.

If a deputy suffers escapes, it is a forfeiture by the principal, unless such deputation be made for life, and then the grantee for life only forfeits the office.

2 Lev. 71. Raym. 216. 3 Mod. 146. 3 Lev. 288. like point.

It is said, that if one put in a deputy, without any allowance of salary, he has no remedy but by *quantum meruit*, and that against his principal.

It hath been held, That though a *mandamus* will not lie for a deputy, that yet it lies for him who deposes him, to have such his deputy either admitted or restored; for that otherwise he might be deprived of his power to make a deputy. And in this case, on a *mandamus* to restore a deputy secretary of the courts of Marches,

3 Mod. 150.
(a) Cro.
Eliz. 67.
Clecott v.
Dennys,
adjudged.
— [That a
high con-
stable may
3 Burr. 1259.]
4 Inst. 114,
115.
2 Lev. 121.
4 Co. 33.
2 Inst. 466.
2 Lev. 160.
Dyer, 278.
(b) But if a
clerk in an
office mis-
takes a fee
Wood's Inst.
b. 1. c. 7.
2 Inst. 466.
— So, the
lord of a
2 Lev. 160.
Dyer, 238.
b. pl. 38.
adjudged in
the Exche-
quer cham-
ber, as
Saunders,
Ch. Bar.
informed
the reporter.
Dyer, 278.
Cro. Eliz.
534.
Poph. 119.
6 Mod. 235.
Lev. 306.
2 Keb. 738.
742.
Vent. 110,
111. S. C.
adjudged,
because re-

turns must be certain, there being nothing to be pleaded to them.

it was held to be no good return, that at the time of the writ delivered he was not constituted deputy, for that they might have put him out of his place before the writ came to them.

(M) Of the Forfeiture of an Office.

11 E. 4. 2.
b. 2 Roll.
Abr. 155.

IT is laid down in general, that if an officer acts contrary to the nature and duty of his office, or if he refuses to act at all, that in these cases the office is forfeited.

Co. Lit. 233.
9 Co. 50.
3 Mod. 143.
(a) If a sheriff suffer felons to escape voluntarily, it is a forfeiture of his office, though the office be for life or in fee. Dyer, 151. b. Sir John Savage's case. 2 Roll. Abr. 155. 2 Bulst. 58. 3 Mod. 146. S. P.

But herein it will be necessary to consider more minutely, what shall be said such acts as are contrary to the duty of his office, and how far the same, whether they be acts of omission or commission, amount to a forfeiture; wherein it hath been clearly agreed, that a gaoler by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in gaol after they have been legally discharged and paid their just fees, forfeits his office; for that in the grant of every office it is implied, that the grantee execute it faithfully and diligently.

39 H. 6. 33.
2 Roll.
Abr. 155.
2 Vern. 173.
¶ vide stat. 8 & 9 W. 3. c. 27. tit. Gaol and Gaoler, letter (D), vol. 3. 353.

But it is held, that one negligent escape is not a forfeiture, though one voluntary one is, but that two negligent escapes amount to a forfeiture.

6 Co. 50.
Co. Lit.
233. b.
And where non-attendance or non-user of an office is a forfeiture, vide 2 Roll. Abr. 155. Keilw. 194. Dyer, 151. 3 Mod. 146. 4 Mod. 29. — That non-attendance is a good cause of the forfeiture of the office of recorder. 1 Salk. 435. [2 Ld. Raym. 1237.

There are, says my Lord *Coke*, three causes of forfeiture or seizure of offices by matter in deed. 1st, By abuser. 2^{dly}, Non-user. 3^{dly}, Refusal. 1st, By abuser; as by a marshal, or other gaoler's permitting escapes. 2^{dly}, By non-user; in which there is this difference, when the office concerns the administration of justice or the commonwealth, the officer *ex officio* ought to attend without any demand or request, there, by non-user or non-attendance the office is forfeited: but, where an officer is not obliged to attend, but upon demand or request made by him whose officer he is, there, without such demand or request, there can be no forfeiture. And herein also, my Lord *Coke* in another place takes the following diversity, viz. that non-user of itself, without some special damage, is no forfeiture of private offices, but that it is otherwise of a publick one, which concerns the administration of justice. 3^{dly}, As to refusal, he says, that in all cases where an officer is bound upon request to exercise his office, if he does not do it upon request, he forfeits it; as, if the steward of a manor be requested by the lord to hold a court, if he does not do it, it is a forfeiture.

But the bare being absent, without any particular circumstance of aggravation, will not induce a forfeiture. Rex v. Corporation of Wells, 4 Burr. 199. — Where to a *scire facias* to repeal the patent of a searcher of a port for non-attendance, the officer pleaded that he was sick, and that he was confined in prison at the king's suit, vide Cro. Car. 491, 492.

The king granted to the abbot of *St. Alban* to have a gaol, and to have a gaol-delivery, and divers persons were committed to that gaol for felony; and because that the abbot would not be at the expence of making deliverance, but had detained persons in prison a long time, it was resolved, that the abbot had for that cause forfeited his franchise, and that the same might be seized into the king's hands.

2 Inst. 43.

If a *scire facias* be brought to repeal the patent of a searcher of the customs in a port-town for non-attendance; and upon evidence it appear, that such a ship was imported and unladen, and others also were exported beyond seas, not being searched, and that when these ships were so imported or exported, neither the searcher himself, nor any of his deputies were there, though it does not appear to be by negligence or voluntarily, yet this voluntary absence and neglect, so as neither himself nor servants were there to search, is not only *crassa negligentia*, but a voluntary permission and forfeiture.

Cro. Car.
491. The
King v.
Rooks, ad-
judged.
3 Mod. 146.
S. C. cited.

So, if a gaoler should leave his prison doors unlocked, and the prisoners escape, it is not only a negligent but a voluntary escape.

Cro. Car.
492. per
cur.

If conditions in law, which are annexed to offices, be not observed and fulfilled, the office is lost for ever, for these conditions are as strong and binding as express conditions; and therefore if the office of forester, &c. descend to an infant or feme covert, (where by law they may so descend) and these are not exercised by sufficient deputies, they become forfeited.

Co. Lit.
233. b.
8 Co. 44.
Cro. Car.
556.
Hard. 11.

If a parker or a forester cut a tree, not for browse or reparations, this is a forfeiture in law of his office; because he breaks the condition in law annexed to his office, which is, that he will preserve the game, and not do any thing that may impair or destroy them. But other books hold, that the cutting down of trees is no forfeiture, if he leaves sufficient for browse and shade for the deer, and to cover them.

9 Co. 50. a.
Cro. Eliz.
285.
And. 29.
Poph. 117.
Contr. Moor,
707.
2 Mod. 121.

Insufficiency is an original incapacity which creates the forfeiture of an office. So, if a superior puts in a deputy into an office, which may be exercised by deputy, who is ignorant and unskilful, this is a forfeiture of the office.

4 Mod. 29.
arguendo.

If the king grants an office in any of the courts at *Westminster*, the judges may remove such an officer for insufficiency, and are the proper persons to judge of his abilities.

4 Mod. 30.
arguendo.
—Where
an officer

may be removed, but cannot be abridged of his fee. Roll. Rep. 82-3.

A filazer of *C. B.* being absent two years, and having farmed out his office from year to year, without the licence of the court, was discharged by the Chief Justice, *ex assensu sociorum suorum*, by words spoken openly in court. And though there was no record made of the discharge, nor any legal summons for him to answer to any accusation, yet the discharge was held good.

Dyer, 114.
b. pl. 64.
Roll. Abr.
155. S. C.

An officer was turned out, because that he *spoliavit quendam recorda contra officii sui debitum*; and it was objected, 1st, That it was not certain enough, because not shewn what records; to which the court answered, that it would be prolix, and then he

Keb. 597.
Pilkington's
case. —
Clerk of the
peace in-

having

dicted and removed for not delivering the records to the new *custos rotularum*.

having spoiled the records, they are not now to be had. 2d Objection, That it may be he did it by chance, and not wilfully; to which the court said, that the conclusion *contra officii sui debitum* included that.

4 Mod. 31, 32. Show. 282. 12 Mod. 17. [On the removal of the clerk of the peace, the evidence need not be set out in the order. *Rex v. Lloyd*, 2 Str. 996.]

Cro. Jac. 17, 18.

If *A.* hath the custody of a castle with all profits, &c., granted to him for life, of which the inheritance hath been granted to *B.*, and *A.* refuses *B.* to let him inhabit in the house, this is a forfeiture in *A.*

11 E. 4. 1.
20 E. 4. 56.
39 H. 6. 32.
22 Aff. 34.
8 H. 4. 18.
2 H. 7. 11.
14 H. 7. 1.
3 Mod. 146.

If tenant in tail of an office commit a forfeiture, this shall bind the issue, by force of the condition tacitly annexed by law to such estate. But, if an officer for life commit a forfeiture, this shall not affect him who hath the inheritance.

2 Roll. Abr. 155. 7 Co. 34. Poph. 119. 2 Lev. 71. Raym. 216. 3 Lev. 288. Skin. 114. 2 Vern. 173. 2 Vent. 189, 269. Bridgm. 27.

Plow. 378.
Sir Henry
Nevil's
case.

The Archbishop of *Canterbury* granted the office of guardian and keeper of *Alyngton Park* to Sir *Edward Nevil*, and to *Henry* one of his sons, with a certain fee during their lives, and the longest liver of them, which was confirmed by the prior of *Christ Church, Canterbury*, to be exercised by them or their sufficient deputy, for whom they shall answer; Sir *Edward* was attainted; and the question was, if the king should have the office by the attainder? and it was resolved, that being only an office of skill and confidence, the same was not forfeited to the king, but that the survivor should hold the same with the profits incident thereto.

Plow. 180.

But, if the king grants an office which concerns trust and diligence to two, and one of them is attainted, the entire office is forfeited to the king; for he cannot make one to occupy in common with another.

But for this
vide Dyer,
155. 198.
211.
9 Co. 98.
Co. Lit.
233. Cro.
Car. 60, 61.

Wherever an officer who holds his office by patent commits a forfeiture, he cannot regularly be turned out without a *scire facias*, nor can he be said to be completely ousted or discharged without a writ of discharge; for his right appearing of record, the same must be defeated by matter of as high a nature.

Sid. 81. 134. 8 Co. 44. b. Roll. Abr. 580. 3 Mod. 335. 3 Lev. 288.

(N) Where for Corruption and oppressive Proceedings Officers are punishable: And herein of Bribery and Extortion.

That if a man be made an officer by act of parliament, and misbehave himself in his office, he is indictable for it at common law, as is every publick officer, who misbehave himself in his office. 6 Mod. 96.

THERE can be no doubt but that all officers, whether such by the common law or made pursuant to statute, are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their offices, &c.

But besides the punishment by indictment, information, &c., all courts of record have a discretionary power over their own officers, and are to see that no abuses are committed by them, which may bring disgrace on the court themselves. Also, the court of King's Bench, by the plenitude of its power, exercises a superintendency over all inferior courts, and may grant an attachment against the judges of such courts for oppressive, unjust, or irregular practice, contrary to the obvious rules of natural justice.

Dyer, 218.
Palm. 564.

As to extortion by officers, it is so odious, (being more heinous, as my Lord Coke says, than robbery, as it is usually attended with the aggravating sin of perjury,) that it is punishable at common law by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed; and is defined to be the taking of money by any officer by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

Co. Lit.
368. b.
2 Inst. 209.
10 Co. 102.
2 Roll. Abr.
32. 57.
Cro. Car.
438. 448.
Raym. 315.

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of *Westm. 1. 3 Ed. 1.*, and therefore such fees may be legally demanded and insisted upon, without any danger of extortion.

21 H. 7. 17.
Co. Lit. 368.

Also it seems, that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success.

2 Inst. 210.
3 Inst. 149.
Co. Lit. 368.

But it has been always held, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made.

Roll. Roll.
16. Roll.
Rep. 313.
Noy, 76.
Jon. 65.
Cro. Jac. 103.

Cro. Eliz. 654. Moor, 468.

If an indictment of extortion charges *J. S.* with the taking of 50 s. as bailiff of a hundred *colore officii*, without (a) shewing for what he took it, this is good, at least after verdict, for perhaps he might claim it generally, as being due to him as bailiff, in which case the taking could not be otherwise expressed.

Sid. 91.
The King
v. Cover.
(a) That an
information
for extor-
tion must

set forth the time when the offence was committed. 4 Mod. 101. 103.—That the court of King's Bench will not quash an indictment for extortion or oppression, though erroneous, but will oblige the party to plead or demur to it. 5 Mod. 13.

As to bribery, it is said, in a large sense, to be the receiving or offering of an undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of publick justice, in order to incline him to do a thing against the known rules of honesty and integrity; but that, in a strict sense, it signifies the taking of any thing valuable by one in a judicial place, of any one who hath to do before him any way, for doing his office, or by colour of his office, but of the king only. Also, it signifies the taking or giving a reward for offences of a publick nature, which manifestly tending to discourage men, and to

Fortescue de
Laud. c. 51.
3 Inst. 143.
149.
Hob. 9.
Cro. Jac.
65.

introduce all kinds of corruption, is highly punishable by the common law.

3 Inst. 145. And these several offences are so odious in the eye of the law, that they are punishable not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment. Leon. 291. Cro. Jac. 65. Rushw. Collections, Part. 1. fol. 31. It is also said, that at common law bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason, before the statute 25 Ed. 3. stat. 5. c. 2.

Co. Lit. 233, 234. Also, it is said in general, that all wilful breaches of the duty of an office are forfeitures of it, and also punishable by fine, &c.; for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both able and willing to take care of it, and that he should be punished for his neglect, or oppressive execution. But the particular instances wherein a man may be said to act contrary to the duty of his office, though various, are yet so generally obvious, that it seems needless to endeavour to enumerate them.

Outlawry.

Co. Lit. 128.
Doct. &
Stud. Dial.
2. c. 3.
Roll. Abr.
302.

OUTLAWRY is a punishment inflicted on a person for a contempt and contumacy, in refusing to be amenable to, and abide by, the justice of that court which hath lawful authority to call him before it. And as this is a crime of the highest nature, being an act of rebellion against the state or community of which he is member, so doth it subject the party to divers forfeitures and disabilities; for hereby he loseth *liberam legem*, is out of the king's protection, &c.

Co. Lit. 128.
3 Inst. 161.

And as to forfeitures for refusing to appear, herein, the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as to outlawries in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and, without requiring further proof or satisfaction, accounts him guilty of the fact, on which ensues corruption of blood, and forfeiture of his whole estate, real and personal.

Flow. 342.
9 H. 6.
20. b.
Show. Part.
73.

But outlawry in less crimes, or in personal actions, does not occasion the party to be looked upon as guilty of the fact, nor does it occasion an entire forfeiture of his real estate: it is however,

ever, very fatal and penal in its consequences; for hereby he is restrained of his liberty, if he can be found, forfeits his goods and chattels, and the profits of his lands while the outlawry remains in force.

It hath been said, that anciently any one might as lawfully kill a person outlawed as he might a wolf, or other noxious animal (a); but that the law herein was changed in *Edw. III.*'s time, which provides, that a person outlawed shall be put to death by the sheriff only, having lawful authority for that purpose.

was said caput grece lupinum; yet it was never permitted any one who met him to kill him with impunity, but only in case he would not surrender himself peaceably; for if he made no attempt to fly, his death would be punished as that of any other man: though it seems, that in the counties of Hereford and Gloucester, in the neighbourhood of the Marches of Wales, outlaws were treated as having *capita lupina*. *Braeton*, 128. b.]

Co. Lit. 128. b. [(a) But this is a vulgar error, for though an outlaw

Also, from the heinousness of the offence the sheriff may, on a *capias ulagatum*, break open the house of the person outlawed; for it would be unreasonable, that this privilege or protection, allowed of in other cases, should be extended to him who is declared a contemner and violator of the law; and therefore, the seizing him as an outlaw, doth imply the liberty of entering and seizing him wheresoever he lies hid.

Cro. Car. 537. 4 *Leon.* 41. 2 *Hal. Hist.* P. C. 202. 9 Co. 91. Bullst. 146. *Cro. Eliz.* 908. *Moor.* 606. 668. *Yelv.* 28. 2 *Jon.* 233.

But, as the punishment of outlawry is of a very severe nature, the law hath provided and takes great (b) care, that no person should be outlawed without due notice, and apparent contempt to the court; as will appear under the following heads:

4 *Burr.* 2551. (b) That no person is to be outlawed nisi per le- five county-

gem terra. 2 *Inst.* 47.—That three *capias*'s are required, and the party to be called in courts, a month between every court. *Braet. Lib.* 3. tract. 2. c. 11.

(A) In what Cases Process of Outlawry lies.

(B) By what Jurisdiction such Processes are to issue.

(C) Against whom Process of Outlawry may be awarded: And herein,

1. Whether it may be awarded against a Peer.
2. Whether Process of Outlawry may be awarded against an Infant.
3. Of awarding Process of Outlawry against a Feme Sole or Covert, and the Proceedings thereon.
4. Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.
5. Of awarding Process of Outlawry against Principal and Accessary.

(D) What Forfeitures and Disabilities an Outlawry subjects the Parties to: And herein,

1. Where it is of the same Effect with a Sentence or Judgment,

2. Of the Difference as to Lands, Goods, &c., and herein of the Difference between Outlawries in Criminal and Civil Cases, and of the King's and Party's Interest at whose Suit the Outlawry was had: And herein,

3. Of the Difference between a Forfeiture in a Criminal and Civil Case.

4. What Things are forfeited by the Outlawry.

5. To what Time the Forfeiture shall relate.

6. Of the King's and Party's Interest at whose Suit the Outlawry was had, and of the Rights and Effects of the Party outlawed, and what Remedies for the same.

7. Of the Party's Liability to bring any Action.

8. What manner Outlawry subjects the Party to.

III. Of the Reversibility of the Proceedings on an Outlawry, and of what Errors it may be reversed:

And herein,

1. Where the want of such Process as is required by Law, the Outlawry may be reversed.

2. Where the want of Fact in such Process, the Outlawry may be reversed.

3. Where the Want of Law in such Process, the Outlawry may be reversed.

4. Where the defective Execution and Return, the Outlawry may be reversed: And herein,

5. To what Part the Process is to issue and be directed.

6. To what Part the Process is to issue; and herein of the Summons, and Proclamation on an Outlawry.

7. What shall be a good Execution and Return.

IV. Of the Manner of reversing an Outlawry: And herein of the Difference between Errors in Fact and in Law.

(1) What the Party must do in order to entitle him to a Reversal: And herein,

2. Of appearing in Person, or by Attorney, and giving Bail.

3. Of suing out a *Scire facias*.

(2) The Effects and Consequences of a Reversal: And herein,

3. Where the Proceedings on the Reversal are in the same Point as if no Outlawry had been.

4. To what the Party shall be restored on Reversal of the Outlawry.

(A) In what Cases Process of Outlawry lies.

It seems, that originally process of outlawry only lay in treason and felony, and was afterwards extended to trespasses of an enormous nature. And herein it is laid down by Serjeant (a) *Wolkins*, that process of outlawry at this day lies in all appeals and in all indictments of treason or felony, and in all indictments of trespass *vi & armis*; and on all returns of rescous; and, as it seems probable, in all indictments of conspiracy or deceit, or other crimes of a higher nature than trespass *vi & armis*; but that it lies not on an action, or, an indictment on a (b) statute, unless it be given by such statute, either expressly, as in the case of *premunire*; or impliedly, as in cases made treason or felony by statute, or, where a recovery is given by an action in which such process lay before, as in the case of a (c) forcible entry.

In the statutes against forestalling. 21 Ed. 4. 11. b. 2 Hal. Hist. P. C. 194. (c) On a conviction by justices on view of a forcible entry process of outlawry lies. 1 Keb. 563.—[Whether the common law gives process of outlawry against crimes, being merely *constructive* breaches of the peace, was questioned in the case of the King v. Wilkes on a libel. But Lord Mansfield, in delivering the judgment of the court of King's Bench, spoke at large to prove, that such process lies against crimes *unintentionally*. 4 Burr. 2537. However, the reasoning on which this opinion is grounded, stands opposed by a former judgment of the Common Pleas on a prior case relative to the same offender. 2 Will. 151. But it was adopted by both Houses of Parliament, when, in Wilkes's case, they resolved, that privilege of parliament doth not extend to *libels*. See Ann. Reg. 1764.]

In an assise a *capias pro fine* lies, and upon that, process of outlawry, if the assise be found with force; but being a mixed action, as favouring of the realty, it is out of the statute of additions, 1 H. 5. c. 5. which extends only to personal actions, appeals, and (d) indictments.

dictment, on which process of outlawry lies.

So, process of outlawry lies in replevin, and is given by the statute 25 E. 3. c. 17. which gives the *capias* in this manner: when on the *pluries replegiari facias* the sheriff returns *averia elongata*, then a *capias in quithernam* issues, and on that being returned *nulla bona*, a *capias* issues, and so to outlawry: but it does not lie on the original writ of replevin, which is *vicountiel* and determined; and therefore as no addition is required in such original writ, so neither ought there to be any in the second writ; for where a writ or process is founded on a former, it must pursue the former, and cannot vary from it.

By the common law, in all actions of trespass *quare vi & armis*, and in which there is a fine to the king, a *capias* was the process; and herein process of outlawry lay by the common law.

293. 10 Co. 72. 2 Roll. Abr. 805.

But in account, debt (e), detinue, annuity, covenant, and such actions as are grounded upon negligence or laches merely, no *capias* lay at common law, but only summons and distress infinite; and therefore, the *capias* and outlawry in these actions were introduced by divers acts of parliament (f).

Yelv. 158. Raym. 128. Keb. 890. 908. Sid. 248. 258. (e) Whether process of outlawry lies in a writ of detinue of charters. Dyer, 223. 2. *dubius*. [(f) This opinion, that the writ of

Staunf. 192. Bro. tit. Outlawry, 26. 36. 59. Co. Lit. 128. b. Dyer, 213, 214. (a) 2 Hawk. P. C. c. 27. § 113, 114. and several authorities there cited. (b) It does not lie on an indictment

2 Inst. 665. 6 Mod. 85. (d) But a presentment is the same with an indictment. 2 Leon. 200.

6 Mod. 84. Salk. 5. Earl of Banbury v. Wood. 2 Ld. Raym. 987.

35 H. 6. 6 b. 22 H. 6. 13. Raft. Ent.

Co. Lit. 128. b. 3 Co. 12. 2 Bulst. 63. 2 Inst. 143. Cro. Jac. 222. 261.

capias

capias did not lie at common law for debt and damages, is contradicted by the history of our legal process. For in the reign of Henry 3. the process in all personal actions was as follows: If the party did not appear upon the summons, he was attached by pledges; and afterwards by better pledges: if he still did not appear, the sheriff was commanded *quod habeat corpus*: if the sheriff returned *non inventus*, there issued a *distingas per terras et catalla*; after that, another *distingas*, commanding him also to take the body; after that, another *distingas*, *ne manum apponat*; and lastly, a writ to take the lands and chattels into the king's hands. Thus, there might be one summons, two attachments, a *capias* (as it was afterwards called), and four distresses. To this, it is added by Bracton, that should the defendant not be found, nor have any lands or goods, whether the action was for money, or for a trespass, he was to be demanded from county to county, and outlawed: and persons so outlawed were condemned to perpetual imprisonment, or to abjure the realm. Bract. 440-1. Reeves' Hist. of the Law, vol. 1. 483-4. vol. 2. 439.]

2 Inst. 145. By the statute of *Marlebridge*, 52 H. 3. c. 23. the writ of *mon-*
380. *stravit de compoto* was given, where before, the process in account
F.N.B.259. was summons, attachment and distress infinite; and by *Westm.* 2.
13 Ed. 1. stat. 1. c. 11. process of outlawry is given in account.

3 Co. 12. By the 25 E. 3. c. 17. it is accorded, that such process shall be
2 Roll. Rep. made in a writ of debt and detinue of chattels, and taking of
295: beasts, by writ of *capias*, and by process of exigent, by the sheriff's
2 Bult. 63. return, as is used in a writ of account.

And by the 19 H. 7. c. 9. reciting, "That forasmuch as
" before this time there have been great delays in actions of the
" case that have been sued as well before the king in his bench,
" as in the court of his common bench, by reason of which
" delays many persons have been put from their remedy; it is
" therefore ordained, enacted, and established, that like pro-
" cesses be had hereafter in actions upon the case as well sued and
" hanging, as to be sued in any of the said courts, as in actions of
" trespass or debt."

Leon. 329. But it hath been adjudged, that process of outlawry lies in no
2 Roll. Abr. case but where a *capias* lies; and that therefore where the proceed-
76. Sid. 159. ing is by bill and not by original, as there can be no *capias*, so there
Keb. 577. can be no process of outlawry, as in a bill of privilege by or against
an attorney.

(B) By what Jurisdiction such Processes are to issue.

2 Hal. Hist. IT is clear, that the courts at *Westminster* may issue process of
P. C. 198. outlawry, and that the court of King's Bench, either upon an
indictment originally taken there, or removed thither by *certiorari*,
may issue process of *capias* and exigent into any county of *England*,
upon a *non est inventus* returned by the sheriff of the county where
the party is indicted, and a *testatum* that he is in some other
county.

2 Hal. Hist. Justices of oyer and terminer may issue a *capias* or exigent, and
P. C. 31. so proceed to the outlawry of any person indicted before them,
199. directed to the sheriff of the same county where they held their
session at common law; and by the statute of 5 E. 3. c. 11. they
may issue process of *capias* and exigent to all the counties of *Eng-*
land, against persons indicted or outlawed of felony before them.

2 Hal. Hist. But justices of gaol delivery*, regularly, cannot issue a *capias* or
P. C. 199. exigent; because their commission is to deliver the gaol *de prisioni-*
* But now *bus*

bus in ea existentibus, so that those whom they have to do with are they have commissions of oyer and terminer, and other commissions, &c. giving them full power in all cases, always intended in custody already.

Justices of the peace may make out process of outlawry upon (a) 2 Hal. Hist. 199. (a) Justices of assize, justices of nisi prius, justices of oyer and terminer, and justices of gaol delivery, and also justices of the peace in their sessions, may proceed to outlawry in cases of indictments found before them, and that by the common law; and in cases of popular actions may proceed to outlawry by the statute of 21 Jac. 1. c. 4. 2 Hal. Hist. P. C. 52.— But they cannot issue a *capias utlagatum*, but must return the record of the outlawry into the King's Bench, and there process of *capias utlagatum*, shall issue. Dalt. 406. 2 Hal. Hist. P. C. 52.

It is made a *quare* by *Hale*, whether a coroner can by law make 2 Hal. Hist. P. C. 199. *Per Hawk-* out process of outlawry against a man indicted by inquisition before him. ins, a co-

roner may award process until the exigent, on a bill of appeal before him; and that by the better opinion, such process shall be awarded by him only, and not by him and the sheriff jointly, and that he may proceed thereon to outlawry; but that since *Magna Charta*, c. 17. by which it is enacted, *That no sheriff, constable, coroner, or other bailiff of the king, shall hold pleas of the crown*, he cannot proceed to the trial of the appellee. 2 Hawk. P. C. c. 9. § 41. and several authorities there cited.

It hath been held, that though the process in inferior courts be 2 Hal. Hist. P. C. 199. *Cro. Jac.* a *capias*, that yet they cannot proceed to outlaw the person, 222. 261.

Raym. 128. Sid. 248. 259. Keb. 890. 908.

The process to the outlawry, viz. the *capias* and exigent, must 2 Hal. Hist. P. C. 199. (b) Where the *capias* be in the king's name, and under the judicial seal of the king appointed to that court that issues the proofs, and with the (b) *teste* of the chief justice or chief judge of that court of sessions. was *est* *Ed-* *mundo An-*

deson without a T., for this error the outlawry was reversed; for the *teste* is the warrant of the writ, as it is of all judicial writs. *Cro. Eliz.* 592. *Oronby v. Iffham*.

(C) Against whom Process of Outlawry may be awarded. And herein,

1. Whether it may be awarded against a Peer.

If a nobleman, or peer of the realm, be indicted and cannot be 2 Inst. 49. 3 Inst. 31. Staunf. 130. shall be outlawed *per judicium coronatorum*. 2 Hawk. P. C. c. 44. § 16.

But in civil actions between party and party, regularly, a *capias* or exigent lies not against a lord of parliament of *England*, whether secular or (c) ecclesiastical; yet, in case of an indictment for treason or felony, yea, but for a trespass *vi & armis*, as, an assault or riot, process of outlawry shall issue against a peer of the realm; for the suit is for the king, and the offence is a contempt against him: and therefore, if a rescue be returned against a peer, or, if a peer be convicted of a disseisin with force, or deny his deed, and it 2 Hal. Hist. P. C. 199. 200. *Cro. Eliz.* 170. 503. 5 Co. 54. Roll. Abr. 220. (c) That an abbot or prior ought

not to be
outlawed.
3 E. 3.
2 Roll. Abr.
805.

it be found against him, a *capias pro fine* and exigent shall issue for the king is to have a fine: and the same reason holds upon an indictment of trespass or riot, and much more in the case of felony.

2. Whether Process of Outlawry may be awarded against an Infant.

3 H. 5.
Uttag. 11.
Fitz. tit.
Outlawry,
11. 2 Roll. Abr. 805.

An infant above the age of fourteen may be outlawed, and the outlawry is not erroneous: but an infant under the age of fourteen cannot be outlawed; for if he be, it is erroneous.

Dyer, 239.
a. 2 Roll.
Abr. 805.

But the outlawry of such infant is not void, it being of record but voidable only by writ of error.

3. Of awarding Process of Outlawry against a Feme Sole or Covert, and the Proceedings thereon.

Co. Lit.
122. b.
Lit. § 186.

A woman is said to be waived and not outlawed; and the reason, says my Lord Coke, why the outlawry of a woman is legally called *waivaria mulieris* is, because women are not sworn in oaths or tithes, as men are, who are above the age of twelve; and therefore, says he, men are called *utlagati*, i. e. *extra legem positi*; but women are *waiviate*, i. e. *derelictæ*, left out or not regarded because they are not sworn to the law.

Cro. Jac.
353.
Middleton's
case.
Roll. Rep.
407. S. P.

Therefore, where a *capias* and exigent were awarded against three men and two women, and the return was *utlagati existunt* where, as to the women, it ought to have been *waiviate existunt* this was held to be error.

For this,
vide Dyer,
271. b.
Cro. Jac.
445. Cro.
Elli. 370.
Hut. 86.
Sid. 21.
Cro. Car.
58, 59.
Smith v.
Ald. & W.
Hut. 86.
S. C.

If, in an action against husband and wife, the husband is outlawed, and wife waived, and she is taken upon the *capias utlagati*, though she is to be discharged of the imprisonment, (because the plaintiff cannot proceed against her alone,) yet she still remains waived, and when her husband is taken he must bring her in.

In an action for a debt due by a wife before marriage, the husband was returned outlawed and the wife waived, but, before the return of the exigent, an attorney procured for the wife a *superseas*, surmising, that the wife had appeared by him as her attorney: on motion that this appearance of the wife should be received, all the court conceived, that if, upon the exigent, the sheriff had returned *reddidit se*, or, upon *pluries capias*, had returned *capi corpus* for the wife, then her appearance should be entered, but not by attorney, as it is here; and the exigent should only issue against the husband, & *idem dies* should be given to the wife. But, when the husband upon the exigent is returned outlawed, then, it shall be entered *aler sans jour* for the wife, for the process is determined; and if he will purchase his pardon, he shall not have any allowance thereupon in a *scire facias*, unless he appear for himself.

himself and his wife. But if for the husband the sheriff should return *epi corpus* upon a *pluries copias*, and a *non est inventa* for the wife, yet an exigent shall issue against both, because it must be presumed the husband might bring in his wife: but, if upon the exigent the sheriff returned *reddidit se* for the husband, and for the wife, that she is waived, the husband shall go *sine die*: but in his case, because the exigent was returned against both to be outlawed, the *superfedeas* supposing the appearance of the wife is merely idle and void; whereupon it was disallowed, and the exigent appointed to be filed against both.

Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.

If two are sued in a joint action, and neither of them will appear, process of outlawry must be taken out against both. Cro. Eliz. 648. Beverley v. Beverley.

If an exigent is awarded against two, and the return is *primo non fuerunt & non comparuerunt*, without saying *nec eorum aliquis comparuit*, it is erroneous. 2 Roll. Abr. 802. Taverner's case. 2 Hal. Hist. 204. S. C. cited, and S. P. said to have been often adjudged. Cro. Jac. 358. S. P. adjudged, and to be manifest error. 3 Mod. 89, 90. S. P. adjudged. Roll. Rep. 406. Palm. 338. S. P. adjudged.

If two in a writ of account are adjudged to account, and one is (a) outlawed in the suit, and the other appears, he shall count alone. 41 E. 3. 3 Roll. Abr. 127. S. C. Brownl. 25.

(a) But if sued by bill upon which no outlawry can be, what proceedings shall be, *quare*; vide Sid. 159. Keb. 577. [In such case the plaintiff must discontinue, and take out an original, on which he will proceed to outlawry against the one, after which he may go on in the action against the other. *Woods v. Carter*, 1 Str. 473. *Symonds v. Parmenter*, 2 Str. 1269. 1 Willf. 78. 1 Bl. Rep. 20. In action upon a contract, if the defendant plead, that the promise was made by another jointly with him, the plaintiff cannot reply that such other person is out of the kingdom, and that it is not possible to summon or attach him, but must proceed to outlawry. *Sheppard v. Baillie*, 6 Term Rep. 327.]

When two are adjudged to account, and one is outlawed and counts, if he discharges himself upon the account, this shall be a charge to the other, when he sues a *scire facias* upon a charter of pardon; and if he be charged by the account, this shall be a charge upon the other, because they were judged to account jointly. 41 E. 3. 13. b. Roll. Abr. 127. & vide Moor, 188. 2 Leon. 76.

If in debt due upon an obligation against B. and C., sons and heirs of the obligor, and against D. the daughter and heir of A., who was another of the sons and heirs of the obligor in gavelkind, process is continued till the uncles are outlawed and the niece waived; and after, the uncles are pardoned, and bring a *scire facias* against the plaintiff, who thereupon declares against them *simul* with the niece; and the uncles plead, their niece is but of the age seven, *unde non intendunt quod durante minori etate sua* they ought answer, &c., yet the parol shall not demur; for the niece is out of court, and *quoad* her the original is determined, and at her full age no re-summions could be sued against her, but the uncles only, because she never appeared in court. Dyer, 239. pl. 203. Hawtry v. Anger. N. Bendl. 148. pl. 205. Moor, 74. pl. 203. and And. 10. S. C. adjudged.

Sid. 173.
Keb. 642.
S. C. Guy
v. Barnard.

An action of trespass was brought against two; one was outlawed; after the entry of the writ it was entered, *& sciendum est quoad predict.* J. S. (one of the defendants) *utlagat. est*, and then counts against one of them: on motion in arrest of judgment, the court held the declaration naught, and the course of pleading in such cases, after the entry of the writ, was to say, *& quod predict.* J. S. *utlagat. est in breve illo*; and that the last words are essential, because that he might be outlawed in another writ, and not in this.

5. Of awarding Process of Outlawry against Principal and Accessary.

Herein we must first take notice, that by the statute of *West. 1. 3 Ed. 1. c. 14.* it is recited, "That it had been used in some counties to outlaw persons being appealed of commandment, force, aid, or receipt, within the same time that he which is appealed for the deed is outlawed; and thereupon it is provided, that none be outlawed upon appeal of commandment, force, aid, or receipt, unless he that is appealed of the deed be attainted, so that one like law be used therein through the realm; nevertheless, he that will so appeal, shall not by reason of this intermit or leave off to commence his appeal at the next county against them, no more than against their principals which he appealed of the deed, but their exigent shall remain until such as be appealed of the deed be attainted of outlawry, or otherwise."

In the construction of this statute, the following particulars are laid down by Serjeant *Hawkins* as most remarkable.

1st *Inst.* 183.
2 *Hawk.*
P. C. c. 27.
§ 129.

1st, That it seems agreed, that it extends as well to indictments as to appeals, not only because the word *appeal* in the statute may in a large sense be taken for an accusation in general; but because indictments are certainly as much within the reason of the statute as appeals; and the common law, for the settling whereof this statute was made, did not make any distinction in this respect between appeals and indictments.

2^{dly} *Hawk.*
P. C. c. 27.
§ 130.
2 *Hal. Hist.*
P. C. 200.

2^{dly}, That it seems to be agreed, that wherever some of the defendants are expressly charged as principals, and others as accessaries, before the award of this exigent, the outlawry thereon of those charged as accessaries cannot but be reversible, because it appears upon the record that the exigent issued contrary to the direction of the statute. But, if several be outlawed on a writ of appeal, which chargeth them all alike without any distinction, there can be no advantage taken of the appellant's not having pursued the statute, since it appears not but that he might have charged them all as principals.

3^{dly} *Hawk.*
P. C. c. 27.
§ 131. &
vide 2 *Hal.*
Hist. P. C.
200.

3^{dly}, That it is strongly holden, that if an appellant take out the exigent at the same time against all the defendants, he must, when they appear, count against them all as principals; and shall be concluded from charging any of them as accessaries, because he has taken out such process as is erroneous where all are not principals.

principals. But he makes a doubt, whether this be law at this day, since all errors, as the law seems now to be holden, are salved by appearance.

4thly, That it seems the better opinion, that where there are more than one principal, the exigent shall not issue till all of them be arraigned: And herein it is said by *Hale*, that if *A.* and *B.* be indicted as principals in felony, and *C.* as accessory to them both, the exigent against the accessory shall stay till both be attainted by outlawry or plea; for that it is said, if one be acquitted, the accessory is discharged, because indicted as accessory to both, and therefore shall not be put to answer till both be attaind. But thereof he adds a *dubatur*, because, though *C.* be accessory to both, he might have been indicted as accessory to one, because the felonies are in law several; but if he be indicted as accessory to both, he must be proved so.

In treason all are principals; and therefore process of outlawry may go against him that receives, at the same time as against him that did the fact.

2 Hawk.
P. C. c. 27.
§ 132.
2 Hal. Hist.
P. C. 200,
201.

Hal. Hist.
P. C. 238.

D) What Forfeitures and Disabilities an Outlawry subjects the Parties to: And herein,

Where it is of the same Effect with a Sentence or Judgment.

If a man be outlawed of treason or felony, though there be no other judgment (a) but *utlagatus est per judicium coronatorum*, yet it is of itself an attainder, and subjects the party to such an award upon, to be made by the court where he is brought, as is liable to the offence for which he is indicted and outlawed.

Of the exigent, or by the coroner's return of a *certiorari* to them directed, to certify whether the party be outlawed or not, the party is as much attainted, and shall forfeit and lose as much, as if sentence were given against him upon verdict or confession. 2 Hawk. P. C. c. 48. § 22. *sed vide* 2 Hal. P. C. 205. 6. — That those malefactors who wilfully fly from justice, add a new crime to their offence, and therefore ought to have no benefit of the law. 3 Mod. 72.

2 Hal. Hist.
P. C. 199.
(a) Whether the outlawry appear by the sheriff's re-

But, if such outlawry appear to the court to be erroneous, thereof any one as *amicus curie* may inform them, the party shall be counsel assigned him to take advantage of the error. But, if he will neither bring a writ of error, nor plead in convenient time, and the outlawry be voidable only, and not void, the proper execution shall be awarded against him, but no sentence pronounced; because the outlawry is a judgment, and no man shall have two judgments for one offence.

And herein it is said by *Hale*, that though the court *ex officio* is to prefix the party a day to purchase a writ of error, and in the mean time to respite execution; yet that must be on his alleging error in fact, or error in law upon the outlawry; for if the court be satisfied that it is merely a pretence, they may choose whether they will allow him a day to sue forth a writ of error, but may award execution presently.

2 Hawk.
P. C. c. 28.
§ 23.

2 Hal. Hist.
P. C. 408.

default upon an indictment of petit larceny, and that wherever goods are so forfeited, they are not saved by an acquittal at the trial; but by a reversal of the award of the exigent they are saved, whether such reversal be for an error either in fact or in law; as, for the imprisonment of the defendant at the time when the exigent was awarded, or for a defect in the indictment, appeal, or process.

5 Co. 110.
Co. Lit. 259.
Cro. Jac.
464.

2. What Things are forfeited by the Outlawry.

Outlawry in a capital case being, as hath been said, an attainder and conviction, it is clear, that all lands of inheritance, as all other the real and personal estate whereof the party outlawed is seized or possessed in his own right, are forfeited absolutely.

For which
vide tit.
Forfeiture.

Also, the king hath by the common law such a power to require his subjects to answer all demands of law and justice, that the non-appearance on process in a civil action, is such a contempt, that the party guilty is put out of the law, forfeits his goods and chattels, his leases for years (a), and his trust in such leases, and the profits of his lands of freehold.

Salk. 209.
5 Mod. 114.
[(a) If the
outlaw die
before his
term is sold
by a *venditioni exponere*

nor, the court of Exchequer will let the widow in to plead this matter against a purchaser. *Watts v. Robinson*, Bunn. 220.]

But outlawry in trespasses, or any civil action, works no corruption of blood; and therefore, if the husband be outlawed in any such action, the wife shall notwithstanding have dower, and the issue shall inherit; for it is a forfeiture of the issues and profits of the lands (b) only during the life of the party outlawed, and so long as the outlawry remains unreversed. Also it seems, that if the wife herself be outlawed or waived in any such action, yet her dower is not forfeited.

Bro. tit.
Outl. 32.
Perk. §388.
Co. Lit. 31.
a. [(b) But
of copyhold
lands be-
longing to
the outlaw,
the king is
not entitled

even to the profits, by reason of the prejudice which would accrue thereby to the lord, who hath not committed any offence, and therefore shall not lose his customs or services. *Rex v. Budd, Parker*, 190.
Edward v. Everard, Owen, 37.]

It is said to have been agreed by the whole court, that arrearages of rent reserved upon an estate for life are not forfeited by outlawry, because they are real, and no (c) remedy for them but by distress: otherwise, if upon a lease for years.

Hedl. 164.

Also it is held, that there are other things of the party outlawed which are forfeited to the king; and that therefore an executor or administrator cannot plead in excuse of assets, that his testator or intestate was outlawed, because he might have debts (d) due upon contract: so, goods taken for trespass before the outlawry, for which he may have trespass, and recover the value of the goods, which shall be assets in his hands.

(c) For this
vide tit.
Rents.
Cro. Eliz.
851.
Hut. 53.
& *vide*
4 Co. 93. a.
2 Roll. Abr.
806.
Cro. Eliz.
203.
(d) That

debtors may pay debts to the executor or administrator of a person outlawed, and their release shall be a good discharge to them, though the executors shall be accountable to the king for them. *Hut. 54.*

So, if the testator had mortgaged his land upon condition, that if the mortgagee pay not at such a day to him, his executors or his heirs, 100*l.*, that then it shall be lawful for him or his heirs to re-enter;

Hut. 53.

re-enter; and after, but before the day, the testator is outlawed, and makes his executor, and dies; and at the day the mortgagee pays the money to the executors; this is affets, and not forfeited to the king.

9 H. 6. 21. If tenant for term of years be outlawed, the term is forfeited to the king, and he may seize it, and use it at his pleasure.
2 Roll. Abr. 306.

2 Roll. Abr. 307. So, if *A.* being possessed of a lease for years grant it over to *B.* in trust for himself, and afterwards is outlawed in a personal action, this trust shall be forfeited to the king.

9 H. 6. 21. If tenant at (*a*) will sows the land, and afterwards is outlawed, the king shall have the corn.
2 Roll. Abr. 306.

(*a*) If a man leases at will, and the lessee sows the land, and the lessor is outlawed, the king shall not have the corn, and can have only the rent, for he is entitled to no more than the lessor himself. 5 Co. 116.

2 Roll. Abr. 307. If the conusee of a statute-staple takes the conusor in execution upon the statute, and afterwards is outlawed in a personal action; the debt shall be forfeited to the king, and the king may discharge the conusor out of execution.
North v. Fines.

2 Roll. Abr. 308. So, if there are two conusees of a statute, and they take the body of the conusor in execution, and one of the conusees is outlawed in a personal action; it is said to be a forfeiture of the debt against both.

22 Aff. 33. If a man be outlawed in a personal action, the king shall present to his churches, although he hath a freehold or inheritance in them.
2 Roll. Abr. 308. S. C.

2 Roll. Abr. 307. So, if a person outlawed hath an advowson, that happens to become void (*b*) during the time the outlawry is in force, such avoidance is forfeited to the king, whether the outlawry were in a capital case, an action of trespass, or other personal action.
(*b*) If after the outlawry the party purchases any more goods, the property is immediately vested in the king. Carth. 442.

Peverley v. Cornwall. If pending a *quare impedit* brought by *A.*, he is outlawed, and judgment is given for him in the *quare impedit*, and thereupon the incumbent resigns, and takes a new presentation from the queen by virtue of the outlawry, and accordingly he is instituted and inducted, and afterwards *A.* reverseth the outlawry, and brings a *scire facias* to have execution of the judgment; though the presentation was vested in the queen, and executed before the outlawry reversed, yet *A.* shall have execution of his judgment; for upon a recovery in a *quare impedit*, any incumbent that cometh in *pendente placito* shall be removed.
Cro. Eliz. 44. Anj. 148. Mo. 269. Savil. 89. Gouldi. 103. Owen, 3. S. C. *W. & P.* (H. 1).

Hob. 214. Things personal, settled by way of trust on the offender, are as much forfeited as if he had the legal interest, or were in possession of them; as, if a bond be taken in another's name, in trust for a person who is afterwards outlawed, this is forfeited in the same manner as if taken in his own name.
Cro. Jac. 112. (c) And shall be executed by an information in the Exchequer-chamber, or in Chancery. Hal. Hist. P. C. 243.

Lane, 54. So, the trust of a term granted by a man for the use of himself, his wife and children, &c. is liable in like manner to be forfeited, if
113. Mod. 26. 38.

if fraudulently made with an intent to avoid a subsequent forfeiture: but it shall be forfeited so far only as is reserved for the benefit of the party himself, if made *bonâ fide*, whether before or after marriage for good consideration, without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the court, where it is not expressly found.

Abr. 34. Roll. Abr. 343. March, 45. 88. Sid. 260.

2 Keb. 564.
608. 644.
763. 772.
Lev. 279.
Hard. 496.
And. 204.
Raym. 120.
2 Roll.

So, where upon an indictment of recusancy, the party, intending to go beyond sea, made a deed of gift of all his goods and chattels upon some feigned consideration, and then he went out of the realm, and was afterwards outlawed on the same indictment; it was adjudged, that the deed of gift was void to defeat the queen of the forfeiture of the goods, and this by the statute of 13 *Eliz. c. 5.* and that the queen was entitled to his leases and goods by the forfeiture.

The forfeiture, as hath been said, must be of goods which the party has in his (a) own right, and not the right of another; and therefore an executor or administrator outlawed forfeit nothing which they have in right of their testator or intestate.

Cro. Car. 566. (a) So, a term limited to executors, and not vested in the party himself, is not forfeitable. 2 *Leon. 5, 6.* And. 19. *Moor, 100.* *Dyer, 309.*

3 *Co. 82.*
Pawncfoot
v. Blunt,
cited in
Twine's
case; &
vide Dyer,
295. a.

So, if an executor recovers in account against the receiver of the testator, and afterwards is outlawed, yet he shall not forfeit this debt; for it continues the debt of the testator, and is only put in certainty by the judgment.

Debts and duties upon simple contract are forfeited to the king by the outlawry of the party, though the debtor might have waged his law on such contract on an action brought by the creditor; of which privilege he is deprived by the outlawry.

It hath been adjudged, that the cattle of a stranger, (b) *levant* and *couchant* on lands extended on an outlawry, may be taken for the king upon a *levari facias* as the issues and profits of the lands; for that otherwise there might be no issues at all, or the person outlawed may take in other men's cattle to agist, and so defeat the outlawry.

S. C. 5 Mod. 112. S. C. Comb. Rep. 51. S. C. (b) That it is necessary to aver that the cattle were *levant* and *couchant.* *Carth. 441.*

11 *H. 6. 17.*
37.
Cro. Eliz.
575. 851.
2 *Roll.*
Abr. 806.

20 *H. 6. 8. b.*
2 *Roll.*
Abr. 806.

4 *Co. 95.*
Slade's case.

Britton
v. Cole,
Carth. 441.
Salk. 395.
408. *S. C.*
Ld. Raym.
305. *S. C.*
Skin. 617.

So, if the person outlawed should after the inquisition make a feoffment of his lands, the cattle of the feoffee may be taken for the issues of those lands, for the land is (c) debtor to the king.

life is outlawed, and dies, *qu.* Whether the issues can be extended on the reversioner?

Carth. 442.
per cur.
(c) But if
tenant for
Carth. 442.

But if the owner of the soil is outlawed, the cattle of a commoner cannot be taken as issues: however, if they should be taken, he must plead his title in the Exchequer, unless his right of common is found by inquisition on the outlawry.

Carth. 442.

[Upon a seizure of goods of an outlaw in a civil suit, the landlord is entitled, under the statute 8 *Ann. c. 14.*, to be satisfied one year's rent out of the money in the sheriff's hands.]

Graves v.
d'Acastro,
Bunp. 194.

3. To what Time the Forfeiture shall relate.

Co. Lit.

13, 14.
(a) But, if the defendant had appeared, and the plaintiff had declared upon his writ, and the defendant had been convicted and attainted by verdict

or confession; or, if the appeal had been by bill, and thereupon the party had been outlawed, though, before appearance, the escheat had related to the time of the fact committed to avoid mesne incumbrances; for in the declaration in the one case, and in the bill in the other, the year and day of the felony is set forth. Hal. Hist. P. C. 251-2.

Co. Lit.

288. b.
41 Aff. 13.

As to goods and chattels, the very issuing of the writ of exigent in case of treason or felony gives to the king, or the lord of a franchise to whom that liberty is granted, the forfeiture of all the goods of the party so put in exigent, from the time of the *teste* of the writ of exigent.

Staunf.

P. C. 174.
41 Aff. 13.
4 E. 3. 17.
5 Co. 111. a.

And as the award of the *exigent* gives the forfeiture, so, if that be well awarded, the forfeiture shall continue, though the outlawry be reversed for error in law or in fact, subsequent to the award of the exigent; for the king's title being by the exigent, and that being of record, must be awarded by matter of as high a nature; therefore it is necessary for a party outlawed in treason to bring his writ of error specially, *tam in adjudicatione brevis de exigi facias quam in promulgatione utlagariae*. Also, a writ of error lies to reverse the very award of the exigent; and though no error subsequent to the award of the exigent will avoid it, yet, if there be error in the exigent, or in the appeal or indictment upon which it issues, both outlawry and exigent shall be reversed.

Co. Lit. 197.

And as the award of the exigent gives the forfeiture of the goods, so the outlawry gives the forfeiture or loss of the lands of the party outlawed; but the bare judgment of outlawry by the coroners, without the return thereof of record, is no attainder, nor gives any escheat, but it must be returned by the sheriff with the writ of *exigi facias*, and the return indorsed.

Reg. 284.

Dyer, 223.
a. 317. a.

And therefore, if there be a *quinto exactus*, and thereupon *utlagatus est per judicium coronatorum*, but no return thereof be made, there lies a writ of *certiorari* to the coroners, or to the sheriff and coroners, to certify the outlawry into the King's Bench: but this is only either to ground a charter of pardon on it, or to amerce the sheriff where he returned only a *quarto exactus*. And as to the effect it has otherwise, my Lord Chief Justice Hale thinks as follows:

Dyer, 317 a.
a Hal. Hist.
P. C. ac6.

1/1. That it doth not disable the party to bring an action, because in relation to party and party it stands as nothing, till returned by the sheriff.

2dly, That, consequently, barely upon such a return of an outlawry upon a *certiorari*, without the writ of exigent indorsed and returned together with the *certiorari*, it seems no escheat lies for the lord. But this he makes a *quare*,

2 Hal. Hist.
P. C. 206.

3dly, But, if the writ of *certiorari* be directed to the sheriff and coroners, and the writ of exigent be extant in court, and they return this outlawry; possibly, this may be a sufficient warrant to enter it of record, as a return upon the *exigent* for the king's advantage, and to issue upon it a *capias utlagatum* to have the forfeiture of his goods,

2 Hal. Hist.
P. C. 206-7.

4thly, But unless the writ is some way returned or extant, it gives the king no title to land or goods; for the writ of *exigi facias* is the warrant of the outlawry, and that which gives the coroners their authority in such a case to give judgment of outlawry: and it is not like the case where there was once a writ and return of outlawry, and the record since lost; for that, upon circumstances, a jury, upon the general issue, may find a record, though not shewn in evidence; but, here, the writ was never in truth indorsed or returned.

2 Hal. Hist.
P. C. 207.

5thly, But if the writ of *certiorari* were directed to the coroners alone, though it may be a ground to cause the sheriff to mend his return, and make it according to the truth; yet the certificate of the coroners will not make a record to entitle the king or lord to any thing without the writ of exigent extant, and the return upon it amended by the sheriff; for without the *exigi facias*, and the return of the outlawry upon it, there is neither disability, forfeiture, nor escheat; and therefore, a *certiorari* shall not be so much as granted to the coroners to remove an outlawry after the party's death.

2 Hal. Hist.
P. C. 207.

A. was outlawed, and afterwards made a lease of his lands, and afterwards these lands amongst others were found by inquisition; and this lease was pleaded in bar, to bind the king, being before the inquisition: the court held, that a lease or other estate, made by the party after outlawry, and before an inquisition taken, will prevent the king's title, if it be made *bonâ fide* and upon good consideration; but if it be in trust for the party only, it will not be a bar; but that no conveyance whatsoever made after the inquisition will take away or discharge the king's title.

Hard. 101.
Attorney
General v.
Sir Ralph
Freeman.

A. was outlawed at the suit of *B.*, and his lands extended; afterwards *C.* claiming title to them brought his ejectment, and pleaded to the inquisition; and upon a bill in the Exchequer, an injunction was prayed for the king to stay the proceedings at law, but denied: for though a person outlawed cannot after an extent prevent the king's title by any alienation whatsoever; yet such outlawry gives no (a) privilege to the possession of a disseisor, but that the disseisor may enter and bring his ejectment; for by the outlawry the king had no interest in the land itself, but only a title to recover the profits.

Hard. 176.
Hammond's
case.
(a) Any one
that has an
estate or a
right, may
grant the
same over,
if his title
be precedent
to the out-
lawry.

— *A.* owes money to *B.* on a judgment, and to *C.* on a bond; *A.* is outlawed at the suit of the obligee, and his lands seized on the outlawry; and the question was, Whether the nonuse of a judgment could

Hard. 422.

could extend those lands? it was held, the outlawry should be preferred, and that the king's hands should not be moved, unless the conusor could shew covin and practice between the obligor and obligee. 2 Salk. 495. pl. 2. Attorney-General v. Baden.

Raym. 17.
Lev. 33.
Keb. 57.
74. 76.
Windfor v.
Seywell.

It was found by special verdict in ejectment, that *A.*, being outlawed in a personal action, levied a fine, and the king seised the lands in the hands of the conussee; and it was resolved, that if the seisure was before the fine levied, the king may well retain against the conussee; but, if the fine was levied before the seisure, the conussee may well take.

Salk. 395.
Carth. 442.
S. C. And
that if a
person out-
lawed do
alien his
lands before
any inquisi-
tion taken
for the king,
which he may lawfully do, yet the alienee must plead off the extent in the Exchequer, by shewing the
title precedent.

From these cases the law seems to be now settled, as laid down in *Salk.* viz. That by a bare outlawry the party immediately forfeits his personal goods, and they are vested in the king, but that he does not forfeit the profits of his lands, nor chattels real, till inquisition taken; and that therefore an alienation after outlawry and before inquisition, is good to bar the king of the pernanity; but if he makes a feoffment after inquisition, the feoffee has the estate, and the king shall have the profits.

Parker, 90.

[As to the preference upon outlawries, the following difference were stated by *Parker, C. B.*, as settled in *Easter* term, 11 *W.* 1699. First, Where there are two outlawries at different times the first inquisition shall prevail: this was *Bradnell's* case, *Mich.* 36 *Car.* 2. Secondly, Where there are two outlawries on one day, the first inquisition shall be preferred: this was *Pain and Dew's* case, *East.* 21 *Car.* 2. Thirdly, Where there are two inquisitions on one day, the first outlawry shall be preferred. And fourthly, Where there are two outlawries on one day, and both inquisitions on one day, there, the first lease shall be preferred.]

4. *Of the King's and Party's Interest at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.*

Hard. 422.
Carth. 441.

When the outlawry is returned on the *exigi facias* by the sheriff, and recorded in court, execution may be taken out against the party outlawed, either general, to arrest the body, or special, to arrest the body and extend the goods and lands, as also debts and *choses in action* belonging to the party outlawed; and when such inquisition is returned by the sheriff, a transcript of the outlawry and inquisition is transmitted into the Exchequer: and thereupon, if any debt be returned due from any one to the outlawed, on application to the Exchequer, a *scire facias* issues to such person, to shew cause why the king should not have such sum so found due on the inquisition to the outlawed. And the reason of returning the transcript of the record into the Exchequer is, *ad ulterior. execution. pradieto domino reg. per eand. cur. de Scacc. superinde fiend.*: for when the inquisition has returned the outlawed to be possessed of any goods or lands, the property of those goods belongs to the king,

king, since the outlaw, being out of the king's protection, cannot enjoy any thing, and the profits of the land are to be seized into the king's hands; but the lands themselves are not forfeited, unless it be in capital cases: in other cases, the profits are seized whilst the party continues outlawed; and therefore the transcript of this record is sent into the Exchequer, that the court of ordinary revenue may have it in charge. But the court of Exchequer usually grants a *custodiam* to such person as sued out the outlawry.

and not *de jure*, Yelv. 19. [1 P. Wms. 690. S. C. cited in argument. 2 P. Wms. 269. S. P. And the court will not subject the property to the debt of the party, unless he obtain a grant of it under the Exchequer seal, and make the Attorney-General a party. Balch v. Walsall, 1 P. Wms. 445. Rex v. Fowler, Bunb. 38. ——— v. Broomley, 2 P. Wms. 269.]

The king by his prerogative is to have *bona felonum & fugitivorum*; and (b) though the lord of a manor or other private person may claim them, yet that, cannot be by prescription, but must be by way of grant; for every prescription must be immemorial, and the goods of felons and fugitives cannot be forfeited without matter of record, which presupposes the memory of that continuance (c),

shop of Durham, he having a grant of *bona fugiti.* in Durham, should have the goods, vide Lane, 90, 1. 2 Roll Abr. 803. [(c) Although they may not be claimed immediately by prescription, yet may they be had obliquely, or by a mean by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla preditorum, felonum, &c.* Co. Lit. 114. b. Durham a county palatine by prescription. 4 Inst. 216.]

There is a difference said to be between an outlawry on mesne process and after judgment; that, as to the first, the party hath no interest, but that the whole benefit of the forfeiture accrues to the king.

it is held, that there is no difference between outlawries before and after judgment.

If a *capias ad satisfaciendum* issues upon a judgment in an action of debt, and the sheriff returns *non est inventus*, and after, a *capias utlagatum* issues, upon which the party is taken and imprisoned, and he is let to go at large; the party that recovered may have an action of debt for this escape against the sheriff, because of the prejudice to him (d), he being in execution as well for his benefit as for the king's.

the case. [Throgmorton v. Church, 1 P. Wms. 693. S. P. Leighton v. Walwin, 1 Roll. Abr. 810. 35. Cro. Eliz. 706. S. C. by the name of Leighton v. Garnous, 5 Co. 88. S. C. Moor, 566. S. C. Elv. 20. S. C. cited. 5 Mod. 201. S. C. cited.] (d) Although the *capias utlagatum* issue after the first, so that the defendant could not be in execution without prayer, yet case lies; for the plaintiff is prejudiced by the escape; for he ought not to be discharged, till he found sureties to satisfy the plaintiff by the stat. 5th. 3. c. 13. 5 Co. 89.

So, if a *capias utlagatum* issues upon an outlawry upon mesne process, and the defendant is taken and suffered to escape, an action upon the case lies; because the plaintiff is thereby delayed of his debt.

pl 182. S. P. adjudged, [Cooke v. Champness, Fitzg. 265. S. P. Stanton v. James, 1 Lutw. 110. S. P.]

If within the year a *capias ad satisfaciendum* issues on a judgment, and the defendant is thereupon outlawed, and two years after

(a) That the king is to satisfy the party at whose suit the outlawry was taken out; but this, per Popham, Ch. J. is *de gratia*,

46 E. 3. 16. 5 Co. 109. (b) Outlawry in Northumberland for a debt in Durham, whether the king, or

vide Lane, 90, 1. 2 Roll Abr. 803. [(c) Although they may not be claimed immediately by prescription, yet may they be had obliquely, or by a mean by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla preditorum, felonum, &c.* Co. Lit. 114. b. Durham a county palatine by prescription. 4 Inst. 216.]

Co. Lit. 238. b. Cro. Eliz. 707. But in 2 Lev. 30.

Cro. Jac. 619. Moor and Sir George Reynolds, S. P. But by Bridg. 67. it appears to have been an action upon

Cro. Eliz. 658. Boanier v. Stokeley, adjudged. Moor, 641.

1 Lutw. 110. Wolf v. Davidson, 1 Salk. 381.

Mod. 100. after taken upon a *capias utlagatum*, and the sheriff suffers him to escape, debt will lie against him; for the defendant was in execution at the suit of the plaintiff, without prayer, inasmuch as the plaintiff was at the end of his process, and no continuance nor *juris facias* lay after the *capias utlagatum*, which, being sued at the charge of the plaintiff, imported an election of the body.

Cartm. and H. C. Ch. J. facs. he never understood the diversity taken in the case where within the year and a half after. 1 Sid. 380. S. P. adjourned.

Mod. 100. If *A.* hath judgment in debt against *B.* for 50 *l.*, and thereupon he takes out a special *capias utlagatum* against him, and *J. S.* promises, that, in consideration of his staying any further proceeding on that writ, he the said *J. S.* will satisfy him the debt, unless *B.* do it before such a day; an *assumpsit* lies on this promise; for the plaintiff is at the charge of suing out the writ, and hath the carriage of it; and the party shall be in execution at his suit, and the king is to satisfy him out of the goods of the party outlawed although it was objected, that the consideration was against law being in delay of justice, and that the whole benefit accrued to the king.

3 Vent. 300. But it hath been adjudged, that an action on the case will not lie against the sheriff for neglecting to extend or seize the goods and lands of a person outlawed upon a *capias utlagatum*, because it is the king's loss; and though it was urged, the sheriff's extending and seizing would be a means to enforce the defendant to appear to the plaintiff's action; this, the court said, was so remote as not to be considered as a ground to support an action: but, if it had been shewn, that the sheriff might have taken his body, and had neglected to do it, there might have been more reason to support the action.

Mod. 100. When after the extent the lands are leased out, or a *custodian* granted to him at whose suit the outlawry was had, the lessee shall account only according to the extended value; and if they happen to be extended too low, the party hath no remedy but by taking out a *melius inquirend.*, and thereby having them extended at a greater value.

Mod. 100. If, by the inquisition, the lands of the person outlawed are found in the particular occupation of such and such persons, but the value of every particular parcel is not found, but by the lump that in *fact* the lands are of such a value; this is a good finding. Such inquisition ought to be as certain as an indictment or declaration.

Mod. 100. It was found by inquisition upon an outlawry, that the party outlawed was seised in fee *de sex clausis prati & pastura*; and it was objected, that the inquisition was void for uncertainty: *per Hale*, Chief Baron, an inquisition found *de uno messuagio sive tenemento* has been held good; because it is not an office of entitling but of instruction or information, which does not require such precise certainty as an office of entitling does: so, in an inquisition upon an extent upon a statute or judgment, or in dower, such certainties suffice, else all such inquisitions were liable to be quashed, which would

would annul all such proceedings, which would be mischievous; and such inquisitions have not used to be quashed for want of such precise certainty.

A bill was exhibited by the Attorney-General against a person outlawed, to discover his real and personal estate, and what secret and fraudulent gifts and conveyances he had made, because by the outlawry his goods and the profits of his land were forfeited; to which the defendant demurred; *quia nemo tenetur prodere seipsum*, and to discover his estate upon a forfeiture: but the court held, that he ought to answer the bill; because the king is entitled to his estate by course of law, and the outlawry is in the nature of a gift to the king, or a judgment for him; and a common person may have a bill of discovery in the like case to entitle him to take out execution.

Hard. 22.
The Protec-
tor v. Lord
Lumley.

Also, in case of outlawry, it is said to be the course of the Exchequer to prefer an information in nature of trover and conversion against him who hath the goods of a person outlawed.

Mod. 90.

3. Of the Party's Disability to bring any Action.

A person outlawed cannot regularly maintain any action, for by his contumacy he is out of the king's protection, and shall have no privilege or (a) benefit from that law of which he is a violator, and to which he refuses to be amenable.

Lit. § 197.
Co. Lit.
128.

(a) But a
person out-
lawed may

be sued, being to his prejudice. Noy, 1. Sid. 60. *Ulagatus legem terre amittit*. Glanvil, lib. 2. c. 3. *Respondra a teuti, mes nul respondra a lui*. Cro. Jac. 426. cited from Britton and Bracton.

This disability may be taken advantage of by pleading the same in bar or abatement, with this diversity, that it may be pleaded in abatement in all cases, but it cannot be pleaded in bar, unless the ground or (b) cause of the action be forfeited; as, in felony, where it may be pleaded in bar to all actions concerning lands and tenements, as well as goods and chattels, because all are forfeited by the felony.

28 E. 3. 92.
22 Aff. pl.
47. 63.
5 Co. 109.
Co. Lit. 29.
2 Ld Raym.
1056.
(b) If the
demandant
in a *cessavit*

be outlawed in a personal action, this outlawry may be pleaded in bar of the action, because the arrears are due to the king. 2 Inst. 298.

But, though it cannot be pleaded in bar, unless the ground or cause of action be forfeited, nor in actions where the damages are uncertain; yet, it is now held, that in actions on the case, where the debt to avoid the law-wager is turned into damages, there, outlawry may be pleaded in bar; for it was vested in the king by the forfeiture, as a debt certain due to the outlaw; and the turning it into damages, whereby it becomes uncertain, shall not divest the king of what he was once lawfully possessed.

Dyer, 227.
in margin.
3 Leon. 197.
Owen, 22.
Cro. Eliz.
203.
2 Vent. 282.
3 Lev. 29.

It hath also been held, that outlawry may be pleaded in bar after it is pleaded in abatement (c); because the thing is forfeited, and the plaintiff has no right to recover.

Jon. 239.
Lutw. 1604.
[(c) It is
stated in

Lutw. as having been so said in 11 H. 7. pl. 27. But no such dictum is to be met with in the place referred to. The decision in Jon. 239. was, that the defendant may plead outlawry in bar to a *scire facies* by the plaintiff after imparlance.]

5 Mod. 400. after taken upon a *capias utlagatum*, and the sheriff suffers him to escape, debt will lie against him; for the defendant was in execution at the suit of the plaintiff, without prayer, inasmuch as the plaintiff was at the end of his process, and no continuance nor *scire facias* lay after the *capias utlagatum*, which, being sued at the charge of the plaintiff, imported an election of the body. S. C. ad- judged. Comb. 373. S. C. ad- judged. S. C. ad- judged; and Ho't, Ch. J. said, he never understood the diversity taken in the case where within the year and where after. 1 Sid. 380. S. P. adjourned.

Yelv. 19.
Jennings v.
Hatley ad-
judged, by
three Judges
cont. Pop-
ham.

If *A.* hath judgment in debt against *B.* for 50 *l.*, and thereupon he takes out a special *capias utlagatum* against him, and *J. S.* promises, that, in consideration of his staying any further proceeding on that writ, he the said *J. S.* will satisfy him the debt, unless *B.* do it before such a day; an *assumpsit* lies on this promise; for the plaintiff is at the charge of suing out the writ, and hath the carriage of it; and the party shall be in execution at his suit, and the king is to satisfy him out of the goods of the party outlawed although it was objected, that the consideration was against law, being in delay of justice, and that the whole benefit accrued to the king.

3 Vent. 89.
90. Dawson
v. the Sher-
iffs of Lon-
don.

But it hath been adjudged, that an action on the case will not lie against the sheriff for neglecting to extend or seize the goods and lands of a person outlawed upon a *capias utlagatum*, because it is the king's loss; and though it was urged, the sheriff's extending and seizing would be a means to enforce the defendant to appear to the plaintiff's action; this, the court said, was so remote as not to be considered as a ground to support an action: but, if it had been shewn, that the sheriff might have taken his body, and had neglected to do it, there might have been more reason to support the action.

Hard. 106.
Morters v.
Whitefield.

When after the extent the lands are leased out, or a *custodiam* granted to him at whose suit the outlawry was had, the lessee shall account only according to the extended value; and if they happen to be extended too low, the party hath no remedy but by taking out a *melius inquirend.*, and thereby having them extended at a greater value.

Hard. 6, 7.
Crosse's
case; & vide
Hard. 58.
where it is
said, that
such inquisition
ought to be as certain as an indictment or declaration.

If, by the inquisition, the lands of the person outlawed are found in the particular occupation of such and such persons, but the value of every particular parcel is not found, but by the lump that *in toto* the lands are of such a value; this is a good finding.

Hard. 191.
Wilford v.
Greaves.

It was found by inquisition upon an outlawry, that the party outlawed was seised in fee *de sex clausis prati & pasturæ*; and it was objected, that the inquisition was void for uncertainty: *per Hale*, Chief Baron, an inquisition found *de uno messuagio sive tenemento* has been held good; because it is not an office of entitling but of instruction or information, which does not require such precise certainty as an office of entitling does: so, in an inquisition upon an extent upon a statute or judgment, or in dower, such certainties suffice, else all such inquisitions were liable to be quashed, which would

[2 Salk.
469. Bunb.
103.]

would annul all such proceedings; which would be mischievous; and such inquisitions have not used to be quashed for want of such precise certainty.

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The Protec-
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Lit. § 197.
Co. Lit.
128.

(a) But a
person out-
lawed may

be sued, being to his prejudice. Noy, 1. Sid. 60. *Utilitatus legem terre amittit*. Glanvil, lib. 2. c. 3. *Respondere a seipso, nec aut respondere a iure*. Cro. Jac. 426. cited from Bacon and Bracton.

Glanvil, lib. 2.

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28 E. 3. 92.

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2 Ld Raym.

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(b) If the

defendant

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be outlawed in a personal action, this outlawry may be pleaded in bar of the action, because the actions are due to the king. 2 Inst. 298.

Dyer, 227.

in margin.

3 Leon. 197.

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Cro. Eliz.

203.

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3 Lev. 29.

But, though it cannot be pleaded in bar, unless the ground or cause of action be forfeited, nor in actions where the damages are uncertain; yet, it is now held, that in actions on the case, where the debt to avoid the law-wager is turned into damages, there, outlawry may be pleaded in bar; for it was vested in the king by the forfeiture, as a debt certain due to the outlaw; and the turning it into damages, whereby it becomes uncertain, shall not divert the king of what he was once lawfully possessed.

It hath also been held, that outlawry may be pleaded in bar after it is pleaded in abatement (c); because the thing is forfeited, and the plaintiff has no right to recover.

Law. as having been so said in 11 H. 7. pl. 27. But no such decision is to be met with in the place referred to. The decision in Jon. 239. was, that the defendant may plead outlawry in bar to a *joinder* by the plaintiff after imparlance.]

Jon. 239.

Law. 1604.

(c) It is

stated in

Outlawry.

... statute upon the statute of usury; to ... outlawry in the plaintiff at the suit ... it was insisted, that outlawry could not be ... the suit being only by way of discharge, and ... but it was held, that a person outlawed ... in any court, unless it be to reverse his ... and the Chief Justice said, that where the action ... there ought to be ability in the person, and that ... by way of discharge, as by way of perqui-

... error was brought by six to reverse a judgment in ... the defendant in error pleaded outlawry in one of ... the plea was held ill on demurrer; because this ... commission which went in (a) discharge, and in which ... were obliged to join: it was also said in this case ... be very mischievous upon an outlawry in case of ... or *audita querela*, which are only by way of dis- ... this should be any bar.

... the outlawry against one is a good bar against the other, because the ... But for this, *vide* Cro. Eliz. 648. 6 Co. 25. Cro. Jac. 117.

A person is outlawed in debt, and taken upon a *capias* and ... to the *Fleet*; the keeper of the *Fleet* lets him escape ... afterwards the executor of the plaintiff in debt ... in execution again upon a new writ; and upon this ... he brings an *audita querela*: to this, outlawry in the ... in the *audita querela* was pleaded; upon which plea he ... and it was resolved, that outlawry was a good plea in ... in disability of the plaintiff; because that this writ is not ... to reverse the outlawry (as a writ of error is), but is ... upon a wrong, *viz.* upon the escape, and not upon the ... only.

In debt upon a judgment brought in *Trinity* term, the defend- ... compared till *Michaelmas* term, and then pleaded in bar, that ... the plaintiff *die lune prox. post fest. Sancti Martini* was outlawed; ... to which the plaintiff demurred. It was urged, that the outlawry ... was meane between the action brought and the plea pleaded, and ... that all matters in discharge of the action, which happen after the ... action brought, ought to be pleaded *puis darrein continuance*. But ... the court compared this to the common case of a judgment con- ... by an executor after an action brought, which is never ... pleaded *puis darrein continuance*, but as this case is; and in ... these cases, the time of the outlawry, and the time of the judg- ... ment, and when it was, appear in themselves.

In pleading outlawry, it hath been adjudged, that the defend- ... must conclude his plea with a *prout patet per recordum*, and ... not *hoc paratus est verificare*.

If the defendant after imparlance pleads outlawry in bar, and ... the plaintiff replies *nul tiel record*, and the defendant hath a day ... to bring in the record, and fails therein, judgment shall be given ... absolutely against him, and not a *respondeas ouster*.

If ten outlawries on mesne process be pleaded in disability of the plaintiff, this is naught for duplicity; for though there be a difference as to pleading double between pleas in bar and abatement, there is likewise a difference between a plea of an outlawry in disability and other pleas in abatement; and the court held this plea ill for duplicity, because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required.

Carth. 8, 9.
Trevelian v.
Seccomb.
Show. 8b.
S. C.

Outlawry may be pleaded to a bill in equity, as well as to an action at common law; and in this case the defendant need not set down the plea, as he must other pleas and demurrers, in eight days, or they must stand over-ruled; but the plaintiff must set it down, if there be any insufficiency in point of form in pleading; for being *sub pede sigilli* it appears, upon the shewing of it, to be a good plea, and therefore not presumed to be necessary to be argued before the court. If an outlawry be not pleaded, yet it may be shewed at the hearing as a peremptory matter against the plaintiff's demand, if it be personal; because it shews the right of the thing in demand to be in the king. If a plea of outlawry stand allowed, whereby the suit is put *sine die*, and after the outlawry be reversed, the plaintiff must bring his bill of revivor; because that suit being abated, the defendant has no day in court, and therefore must be brought into court by a new process.

This plea must be on oath.
2 Vern. 37.
[But plea of an outlawry with the common averment of the identity of the person need not be on oath.
Id. 198.]

But, if the bill be for relief against an action at law, and an outlawry be pleaded by the defendant in the same action, it will not be allowed (a); because the outlawry is part of the grievance, and it is *exceptio ejusdem rei cujus petitur dissolutio*. Also, as at law, an outlawry in an executor, administrator, or guardian, is no good plea, because they do not claim in their own right; and the real actor being the testator or infant, the outlawry in any third person is no exception against him why he should not share *in judicio*.

(a) That to avoid pleas of outlawry, the plaintiff may make all that have outlawries against him defendants.
2 Vern. 199.
per Hutchins, Lord Commissioner.

4. What further Disabilities Outlawry subjects the Party to.

Persons outlawed are under several other disabilities, besides that of bringing an action; such a one cannot be a juror, because he is not *liber & legalis homo*, as the law requires.

But one outlawed in a personal action may be a witness, though he cannot be a juror.

A person outlawed cannot be an (b) auditor to take accounts.

Co. Lit.
6. b. & vide tit. Juries.
Vide tit. Evidence.

a person outlawed may be a private attorney. Co. Lit. 52. a. — May be executor or administrator, vide tit. Executors and Administrators. — Incapable of executing an office in a corporation. Carth. 159. Show. 288.

Co. Lit. 6.
b. (b) But

One outlawed in a personal action cannot be an approver; because by his outlawry he is out of the law, and his accusation shall not be of such credit as to put any person on his trial.

2 Hawk.
P. C. c. 24.
§ 4.

If a man pledge goods and then is outlawed, he cannot redeem them; because then the absolute property of them is in the king; but if the outlawry be reversed, then the outlawed person is reinstated.

Bull. 29.

instated in his property as if there had been no outlawry, and therefore may redeem.

Co. Lit. 3. b. Persons outlawed in debt, trespass, or other civil action, may be heirs.

Brook, 82. If a husband be outlawed in trespass, or any civil action, the wife shall have dower; for this works no corruption of blood, or forfeiture of lands: so likewise, it seems, if the wife be outlawed or waived in such actions, yet her (a) dower is not forfeited.
Perk. 388.
Co. Lit. 31. a. (a) So, a husband shall be tenant by the curtesy, though he be outlawed in a civil action. 5 Co. 110. Co. Lit. 92. b. 391. a.

Owen, 116. A. being outlawed, the queen granted him a lease for years, rendering rent; he was again outlawed after the grant, but, before any seizure, there was a pardon of all goods and chattels forfeited; Knowles v. Powell. and it was adjudged, that a person outlawed was capable of receiving a lease, and that by the pardon, the term, which was forfeited, revived, and was restored again. Moor, 237. S. C.

It is held, that where clergy is allowable, it shall be as much allowed to one who is outlawed by common law for felony, as to one who is convicted by verdict or confession. Also, a statute taking away the benefit of clergy, from those who shall be found guilty, doth not thereby take it from persons who are outlawed; neither doth the statute of 25 H. 8. c. 1. § 3. which takes away clergy from those who are found guilty after the laws of this realm, extend to persons outlawed (b).
31 Co. 29.
31. a Hawk.
P. C. c. 33.
§ 28. 62.
Fost. 358.
[(b) For this point see Hawk. P. C. ubi supra, 4 Term Rep. 543.]

By the statute of *Westm.* 1 Ed. 1. c. 15. it is enacted, that if a person be attaind by outlawry of any felony, he is not bailable: but it is held, that the court of King's Bench may in their discretion, in some special cases, bail a person upon an outlawry of felony; as, where he pleads, that he is not of the same name with the person that was outlawed, or alleges any other error in the proceedings.
2 Inst. 187.
a Hawk.
P. C. c. 15.
§ 40.

(c) By statute of recu-
sancy the
outlawry of
a recusant
not to be re-
versed for
want of
form.

(E) Of the Regularity of Proceedings on an Outlawry, and (c) for what Errors it may be reversed:
And herein,

1. Where, for want of such Process as is required by Law, the Outlawry may be reversed.

5 Mod. 141.
3 H. 6. 9.
Roll. Abr.
793. Finch
of Law, 351.
355.
Rast. Ent.
188. pl. 18.
Co. Lit. 259.

THE forfeitures and penalties in an outlawry being so severe, great care hath been taken and caution used, that no person should be outlawed without sufficient notice, and great contumacy to the process of the court; and therefore the law requires, that in all civil causes, and in every indictment or appeal for any crime under the degree of capital, there should be three *capias* to the sheriff of the county where the action or prosecution is commenced, before the exigent is awarded; and if any such process is omitted, the outlawry is erroneous.

But (a), after judgment upon a *capias ad satisfaciendum*, an exigent may be awarded, with an *alias* and *pluries*, and thereupon the defendant be outlawed; because he having been already in court before judgment, and having consufance of the debt, ought to pay the debt on the first suing out of the *capius*; otherwise it is a contumacy in not performing the judgment of the court, for which disobedience he is put out of the king's protection.

40 E. 3. 25.
pl. 28.
Finch, 476.
(a) So, after judgment, there need not be any proclamations to the county where he

arrested. Cro. Jac. 577.—If one is outlawed in Middlesex, a *capias utlagat.* may be sued out against him in any other county without a *testatum.* Vent. 33. 2 Hal. Hist. 198.

It is said to be agreed, that one *capias* before the award of the exigent hath alway been sufficient in an indictment or appeal of death, or high treason; but that it seems doubtful whether two *capias* were not required by the common law in all indictments and appeals of any other felony. However, says *Hawkins*, it is

2 Hawk.
P. C. c. 27.
§ 116.

(b) certain, that they are required in all indictments of any other felony by 25 E. 3. c. 14. by which it is enacted, "That if after any man be indicted of felony before the justices in their sessions, to hear and determine, it shall be commanded to the sheriff to attach his body by writ or precept, which is called a *capias*; and if the sheriff return that the body is not found, another shall be incontinently made, returnable at three weeks after, wherein it shall be comprised, that the sheriff shall cause to be seized his chattels, and safely to keep them till the day of the writ or precept returned; and if the sheriff return, that the body is not found, and the indictce cometh not, the exigent shall be awarded, and the chattels shall be forfeit, as the law of the crown ordaineth: but, if he come and yield himself, or be taken by the sheriff or by other minister, before the return of the second *capias*, then, the goods and chattels shall be saved."

(b) But vide
2 Hal. Hist.
P. C. 194-5.

It is said to have been the general opinion, that this statute extends to appeals, as well as to indictments, though it mention only the latter; but that it extends not to any indictment or appeal of death, though it speak of felony in general.

2 Hawk.
P. C. c. 27.
§ 116.

It is left a *quare*, if three *capias* be still necessary in an appeal of rape, as they were at the common law, notwithstanding it be made felony by statute.

2 Hawk.
P. C. c. 27.
§ 115.

[This statute doth not apply to a court of oyer and terminer, and gaol-delivery, but is confined to the sessions of the justices of the peace.]

Rex v. Yandell, 5 Term Rep. 521.

2. Where, for want of Form in such Processes, the Outlawry may be reversed.

If any process required in an outlawry be erroneous, the outlawry for this may be reversed; for a person shall not be subject to any disadvantage in respect of having such process awarded against him, nor shall he be condemned barely for not appearing, where

3 H. 7, 8.
b. 9. a.
Sid. 100.
Dyer, 206.

(e) Where, for want of form in a writ of proclamation, and for improper abbreviations, the outlawry was reversed. Style, 182.—So, where in the exigent it was *utlagat.* for *utlagat.*, the outlawry was reversed. Style, 227. So, where it was *utlagat.* instead of *utlagat.* Lev. 164.—But it is said, that a defect in process in an outlawry may be waived by the defendant's purchasing a pardon, and shewing it to the court; for that supposes that there was an outlawry against him as needed a pardon; which, if it were erroneous, it would not do. 2 Hat. P. C. c. 27. § 111.

Cro. Elis. 592. 3 Hal. Hist. P. C. 199. As, where the *capias* was *esse Edmundo Aaderfon*, without a for this error the outlawry was reversed; for the *capias* and exigent must be in the king's name, and under the judicial seal of the king appointed to that court that issues the process, and with the *teste* of the Chief Justice or Chief Judge of that court's sessions.

But for this Cro. Elis. 467. Every *capias* ought to be returnable the ensuing term, for the mischief that might otherwise befall the prisoner in being kept ways in prison. Dyer, 175. Lev. 143. 2 Salk. 700.

Latch. 11. The *capias utlagatum cari* issue only in term-time, being a judicial writ; yet in pleading an outlawry, the party need not allege that it issued in term-time; for it shall be so intended, unless the contrary appears. Lutw. 333.

Rex v. Perry, 6 Term Rep. 573. [It need not indeed be stated in express terms on a record of judgment of outlawry, that a writ of *capias* issued; for it is sufficient, if it appear, "that the sheriff was commanded to take the defendant."

Ibid. Neither is it necessary in stating every writ to repeat the day of the year when each was issued: it will suffice, if it appear by reference to the preceding parts of the record; as if, after stating that the *capias* was returned on such a day, it proceed, *Whereupon* the exigent was awarded; *whereupon* referring to the day when the *capias* was returned:

Rex v. Vandell, 5 Term Rep. 521. It need not appear on a record of outlawry, that the *capias* and exigent were sealed by the justices of oyer and terminer, &c.] Cro. Jac. 577. If the process be against the feme, and the words are, *quas cuperauit versus eum*, instead of *eam*; this is (b) such an error in which the outlawry may be reversed.

(b) So, an outlawry upon a writ of error, for that in the exigent it was fourteen in figures, and not in words. 2 Keb. 128. So, where the year of the Lord was in figures, and not in words. Style, 334.—where it was *ex insinuatione* for *ex insinuatione*, for want of *i*, the outlawry was held to be erroneous. Cro. Jac. 577.

Style, 334. If the writ be *precipimus vobis* instead of *precipimus vobis*, this is erroneous; for without a command to the sheriff the writ is not good, and here, there is none; the word *precipimus*, being senseless, is of no greater force than if omitted.

3. Where, for Variance in such Processes, the Outlawry may be reversed.

Fitz. Utlagary, 41. If there be a variance between the original and extent or other process, for this the outlawry may be reversed. Bro. Variance, 90. Misnomer, 80. Error, 172.

As, a variance between the original writ and Filazer's rule.

2 Leon. 120.
Cro. Elis.
240.
Elden v.
Barnes.

So, where in error to reverse an outlawry in trespass, in the original the plaintiff was named *Barnes*, and in the exigent *Bernes*; this was held error. So, where in the original it was *Blaba sua*, and the exigent was *Blada*; this was held a plain variance, and the outlawry was reversed.

So, where in the original the party was named *Agnes Gargrave* of *Kingsly* in com. *Ebor.*, and in the exigent she is named *Nuper de Kingsly*; this was held error.

Cro. Jac.
576.

4. Where, for defective Execution and Return, the Outlawry may be reversed: *And herein,*

1. *To whom such Process is to issue and be directed.*

The exigent and several processes, in order to an outlawry, are to be directed to the sheriff of the proper county; and such care hath been taken that there might be no surprise in the affair, that in civil cases there are three several offices concerned in the issuing of such process: the first is the Chancery, out of which the original issues; the second, the filazer, who makes out the *capias*, *plac.*, and *pluries*; and the third, the exigenter, who makes out the exigents; which several process must be legally executed before the party can be said to be outlawed: therefore, if the sheriff returns a *cepi*, if he have not the body at the day, the court will not award an exigent on the suggestion of an escape, unless the sheriff will return one.

2 Hawk.
P. C. c. 27.
§ 117.

If the exigent be directed to the sheriffs of the city of *Lincoln*, and the direction be *Quod capias corpus ejus ita quod habeas corpus ejus*, where (as it was objected) it ought to have been *capiatis & habeatis*; yet this is no error, for they are both but one officer to the court, and though in the end of the writ it was *Ita quod habeatis ibi hoc breve*; this was likewise held to be good, and no way repugnant, being good both ways.

Cro. Jac.
576.

But if, in the direction of process of outlawry to the sheriffs of *London*, it be *precipimus tibi* instead of *vobis*; this is such an error for which the outlawry will be reversed, because that the court will *ex officio* take notice that there are two sheriffs in *London*.

Hedley, 93.
Lit. Rep.
150. S. C.

Judgment of outlawry is given by the coroner at the fifth county-court, upon the party's not appearing to the exigent, (which is a writ, commanding the sheriff to cause the defendant to be demanded from county-court to county-court until he be outlawed, &c.) and such judgment is entered thus, *Ideo, &c. per judicium coronatoris domini regis comitatus predicti. utlagatus est.*

Dyer, 223.
pl. 24.
Bro. Coron.
166.
3 Inst. 232.

If the judgment appear not by the return of the exigent to have been given by the coroner, it is erroneous, except in *London*, where the mayor by custom is coroner, and the judgment is given by the recorder.

Co. Lit. 288.
Dyer, 317.
pl. 6.
8 Co. 126.
Roll. Rep. 266.

Cro. Elis. 648. Palm. 43. Cro. Jac. 358. 521. Roll. Rep. 266.

2 Hal. Hist.
P. C. 224.
[(a) It is
not neces-
sary, that
the names
of the coro-
ners should
be subscrib-
ed to the
judgment
of the out-
lawry: it is
sufficient
if it appear on the record, that the judgment of outlawry was given by them. Rex v. Yandell, 5 Ter.
Rep. 541.]

Noy, 113.
An attach-
ment grant-
ed against
the coroners
of York.
(b) That
a coroner
has to return the outlawry, which must be returned by the sheriff on the *exigi facias*, and such return
recorded in the court above. Dyer, 223. a.

2 Hal. Hist.
P. C. 36.

If there be two coroners in a county, the calling upon the exigent may be by one of them, and likewise one alone may give the judgment of outlawry; but; it seems, the return must be by two in ministerial acts; the name of the coroner must be subscribed (a) to the judgment of outlawry at the *quinto exactus* upon an outlawry of felony; and it must be subscribed also by the name of their office, *A. B. & C: D. coronatores*, unless in London where the mayor is coroner; the sheriff's name and office must also be subscribed to the return of the exigent, e. g. *A. B. armiger vicecomes*.

If, after the *quinto exactus*, the coroners refuse to give judgment of outlawry, the court will grant an attachment against them, and it is said, that the coroners of *Stafford* for such an offence were fined 10 l.; but after the judgment of the outlawry pronounced, they may (b) stay the return of the exigent to be advised if the case requires it.

By the statute of 34 H. 8. c. 14. the clerks of the crown, clerks of assize, and clerks of the peace, are to certify into the King's Bench the names of all persons outlawed, attainted, or convicted, and upon letter from the justices aforesaid, certificates shall be made of such persons outlawed, attain, or convict, to the justice of gaol-delivery.

2. To what Place the Process is to issue; and herein of the *Quinto exactus*, and Proclamations on an Outlawry.

Fin. Lib.
p. 20.
Dyer, 223.

The exigent must be sued to the county where the party actually resides, for there, all actions were originally laid; and because that outlawries were at first only for treason, felony, or very enormous trespasses, the process was to be executed at the town which is the sheriff's criminal court; and this held not only before the sheriff but before the coroners, who were ancient conservators of the peace, being the best men in each county, to preside with the sheriff in his court, and who pronounced the outlawry in the county-court on the party's being *quinto exactus*; and therefore anciently there was no occasion for any process to another county than that in which the party actually resided. But this matter being since altered, and the learning thereof depending on several acts of parliament, it will be necessary to take notice of the statutes themselves.

And first, it is enacted by the 6 H. 6. c. 1. "That before any exigents be awarded against persons indicted in the King's Bench of treason or felony, writs of *capias* shall be directed as well to the sheriff or sheriffs of the county wherein they be indicted, as to the sheriff or sheriffs of the county whereof they be named in the indictments; the same *capias* having the space of six weeks

" at the least, or longer time, by the discretion of the said justices, if the case require it, before the return of the same; which writs so returned, the justices shall proceed in the manner as they had done before the statute; and if any exigent be awarded, or any outlawry pronounced hereafter against any such persons before the return of the said writs, the same exigent so awarded, with the outlawry thereof pronounced, shall be void and holden for none."

And it is farther enacted by 8 H. 6. c. 10. " That upon every indictment or appeal, by the which any subject dwelling in other counties than where such indictment or appeal shall be taken of treason, felony, and trespass, before the justices of the peace, or before any other having power to take such indictments or appeals, or other commissioners or justices in any county, franchise, or liberty of *England*, before any exigent awarded, presently after the first writ of *capias* returned, another writ of *capias* shall be awarded, directed to the sheriff of the county whereof he who is indicted is or was supposed to be conversant, by the same indictment, returnable before the same justices, before whom he is indicted or appealed; at a certain day, containing the space of three months from the date of the said last writ, where the counties be holden from month to month, and where the counties be holden from six weeks to six weeks, the space of four months, until the day of the return of the said writ, by which writ of second *capias* the sheriff shall be commanded to take him which is so indicted or appealed, by his body, if he can be found within his bailiwick; and if he cannot be found within his bailiwick, to make proclamation in two counties before the return of the same writ, that he which is so indicted or appealed shall appear before the said justices, &c. at the day contained in the said writ, to answer, &c. after which writ so served and returned, if he which is so indicted or appealed come not at the day of such writ returned, the exigent shall be awarded; and that every exigent and outlawry otherwise awarded or pronounced shall be holden for none and void."

But it is expressly provided, " That the above recited statute concerning process to be made before the king in his bench stand in force, and that this present statute shall not extend to indictments or appeals taken within the county of *Chester*; and that if any persons shall be indicted or appealed of felony or treason, and at the time of the same felony or treason supposed were conversant within the county whereof the indictment or appeal makes mention, the like process to be made against them as was used before."

And it is farther enacted by 10 H. 6. c. 6. " That such second *capias* as is required by 8 H. 6. c. 10. shall be awarded upon indictments or appeals removed into the King's Bench, or elsewhere, by *certiorari* or otherwise."

And by the 31 Eliz. c. 3. it is enacted, " That in every action personal, wherein any writ of exigent shall be awarded out of any court, one writ of proclamation shall be awarded and made

“ out of the same court having day of *teste* and return, as the said
 “ writ of exigent shall have directed, and delivered of record to
 “ the sheriff of the county where the defendant, at the time of
 “ the exigent so awarded, shall be dwelling; which writ of pro-
 “ clamations shall contain the effect of the same action; and that
 “ the sheriff of the county, unto whom any such writ of pro-
 “ clamations shall be directed, shall make three proclamations in
 “ this form following, and not otherwise; that is to say, one of the
 “ same proclamations in the open county-court, and one other of
 “ the same proclamations to be made at the general quarter
 “ sessions of the peace in those parts where the party defendant
 “ at the time of the exigent awarded, shall be dwelling, and one
 “ other of the same proclamations to be made one month at the
 “ least before the *quinto exactus* by virtue of the said writ of ex-
 “ gent, at or near the most usual door of the church or chapel of
 “ that town or parish where the defendant shall be dwelling at
 “ the time of the exigent so awarded; and if the defendant shall
 “ be dwelling out of any parish, then in such place, as aforesaid
 “ of the parish in the same county, and next adjoining to the
 “ place of the defendant’s dwelling, and upon a *Sunday* immedi-
 “ ately after divine service and sermon, if any sermon there be
 “ and if no sermon there be, then forthwith after divine
 “ service; and that all outlawries had and pronounced, and all
 “ writs of proclamations awarded and returned according to
 “ the form of this statute, shall be utterly void and of no
 “ effect.”

Note: This statute extends the provisions of the 31 El. only to criminal cases before judgment: in those cases after judgment, no proclamations are necessary.

[By statute 4 & 5 W. & M. c. 22. § 4. made perpetual
 7 & 8 W. 3. c. 36. § 4. it is enacted, “ That upon the issuing
 “ any exigent out of any of their majesties’ courts, against a
 “ person or persons for any criminal matter, before judgment
 “ conviction, there shall issue out a writ of proclamation, bearing
 “ the same test and return, to the sheriff or sheriffs of the county
 “ city, or town corporate, where the person or persons in the
 “ record of the said proceedings is or are mentioned to be or of
 “ habit, according to the form of the statute made in the one-
 “ thirtieth year of the reign of the late Queen *Elizabeth*, which
 “ writ of proclamation shall be delivered to the said sheriff or
 “ sheriffs three months before the return of the same.”]

In the construction of these statutes the following opinions have been holden:

That though the words are express, that any outlawry pronounced contrary to the directions of the statute shall be void yet it is not to be taken, as if such outlawries were absolutely void but only voidable by writ of error.

If a defendant be expressly named of the same county where he is indicted or appealed and be also named under an *alias dictus* of another, it hath been adjudged, that there is no need of *alias capias*, with a command for proclamation according to 8 H. 6. c. 10. because that which comes under the *alias dictus* is no writ traversable nor material: Also, if a defendant be named of B. and live at C. there is no need of any *capias* to the sheriff of the county where C. lies; because that it appears, that the defendant

at present conversant at *B.* But if a defendant be named of no certain place at present, but only late of *B.* and late of *C.* and late of *D.* &c. being all of them in counties different from that in which the prosecution is commenced, a *capias* shall go to the sheriff of every one of these counties.

On a writ of error to reverse an outlawry upon the statute of *Eliz. c. 9.* of perjury, the first error assigned was, that the defendant was indicted by the name of *N. L. de parochia de Aldgate*, and not shown in what county *Aldgate* is. 2dly, For that a county-court was held 23 *Feb.* and the next county-court was held 23 *March* following, so as there were not twenty-eight days between these two county-courts, as there ought to be by the law, exclusive and not inclusive. And for the first cause it was reversed; although it was objected to be well enough because *Middlesex* was in the margin, so the parish should be intended to refer thereto; but because an indictment shall not be taken by intendment, and because the county in the margin shall be referred to the place where the offence was committed, and not to the indictment of the party; and by the statute of 8 *H. 6. c. 10.* there ought to be the addition of the place and county where the party indicted inhabits; therefore it was held to be ill, and reversed. For the second cause also, it was held to be erroneous; but *Tanfield* said, that ought to be assigned as an error *in fact*, for it might be leap-year, and then it is good, and that matter issuable.

Cro. Jaci
167.
Leach's case.

If an *exigi facias* be delivered to the sheriff, and there be but two county-courts before the return, and the sheriff return the first and second *exactus*, & *non comparuit*, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may issue a special *exigi facias* with an *allocato comitatu*, if it be prayed after the return, and before any new county-day be past; but if any county-day be past between the last of the former county-days and the return, no *exigi facias* shall issue with an *allocato comitatu*, but an *exigi facias de novo*; for the demand of the party must be at five county-courts successively held one after another without any county-court intervening: so, if after the second *exactus* the offender render himself, and find mainprize, and at the day of the return make default, no *exigi facias* with an *allocato comitatu* shall issue, because three county-days intervened, but a new exigent and a *capias* against the bail.

2 Hal. Hist.
P. C. 201-2.

And therefore it hath been holden, that in *London*, where the holding of the *hustings* is uncertain, no *exigi facias* shall issue with an *allocato hustings*, because the court cannot take notice of the set times of holding it, as they may of the times of holding the county-courts. But it is now agreed, that if an exigent issues in *London*, and they begin *hustings de placito terre* (as they may) they shall proceed along at that *hustings* to the outlawry, without mingling their *hastings de communibus placitis*; but if an *allocato hustings* comes, they shall proceed without omitting any *hustings*.

Palm. 287.
2 Leon. 14.
2 Hal. Hist.
P. C. 202.

[If upon the record of the outlawry, in a criminal case before judgment, it appear from the writ of proclamation and return,

Barrington
v. Regem,
2 Term
Rep. 499.

that the party was outlawed after he had a day given to appear in court, and before the arrival of that day, this will be error. Thus, *George Barrington* was outlawed on the 21st of *February*, and the writ of proclamation required the sheriff to proclaim him, so that he should be before the justices of the peace at the general sessions of the peace to be holden for the county aforesaid next after the first day of *February* next ensuing; and the return by the sheriff to that writ was, that he had proclaimed the said *George Barrington* that he should be before his majesty's justices of the general sessions of the peace last within mentioned. The next sessions of the peace were holden on the 25th of *February*; so that by the terms of the writ, and the proclamation too, the prisoner had a day given him to appear till the 25th of *February*; and if he had appeared on that day, he would have complied with the requisition of the writ, and have saved his default. But he was outlawed before that day came, viz. on the 21st of *February*; and upon that ground the court held the outlawry bad.

Yandell v.
Regem,
5 Term
Rep. 521.

But, where it appeared by the writ of proclamation and the return to it, that the prisoners were required to render themselves to the sheriffs, so that he might have their bodies before the justices, &c. at the return of the writ; it was adjudged to be good.

Ibid.

If it appear upon the record, that the writ of proclamation was delivered to the sheriff three months before the return of it, it is sufficient, though it be not expressly so alleged.

Ibid.

The sheriff need not allege in his return to the writ of proclamation, that "the persons proclaimed did not appear and render themselves;" though he must in his return to the exigent.

Ibid.

A writ of proclamation requiring the sheriff to proclaim the parties *in open court in the sheriff's county* (not saying *county court*;) is good.]

3. *What shall be said a good Execution and Return.*

Before a person is pronounced outlawed he is to be *quinqvies exactus*, for he hath three days for appearance, one for grace, and if he stands in contempt at all these days, at the fifth county-court he is pronounced outlawed by the coroners; and therefore (a) if a person be outlawed the day of the *quinto exactus*, this is error, because he hath all that day to appear.

(a) *Cro. Jac.*
660. Palm.
280. S. C.

Noy, 49.
Hartland
v. Yates.

(b) If upon
an indictment
of murder an
exigent be

But, if an exigent is awarded against *A.* and after he is *quinto exactus*, and before the return of the exigent he dies, yet the outlawry shall stand in its force, and shall not be reversed; for judgment was by the coroners upon the *quinto exactus*, and they may certify the outlawry: but otherwise (b), if *A.* had died before the *quinto exactus*.

awarded, but before the return the party dies, his executors may by writ of error, setting forth the special matter, reverse the proceedings. 5 Co. 111. a. *Eaton's case* cited in *Foxley's case*.—That an executor may reverse an outlawry. 2 Keb. 507.—That an heir or executor may. 2 Hawk. P. C. 461.—But a gaoler or sheriff cannot take any advantage of an error in an outlawry. *Dyer, 67. a.*
3 Keb. 236.

If on an outlawry against two, it be returned, that *exacti non comparuerunt*, without saying *nec aliquis eorum comparuit*, this is erroneous; for peradventure one of them did appear.

Rep. 440. S. C. adjudged.

So, where a *capias*, and thereupon an exigent, was awarded against five, viz. three men and two women, and the return was, *Quod ad quartum comitatum, &c. non comparuerunt*, without saying *nec aliquis comparuit*; this was held to be manifest error; and it being likewise returned *utlagati existunt*, where for the women it ought to have been *waviata*, this likewise was held to be error.

[If one exigent be awarded against the principal and accessary together, it is error only as to the accessary.]

Rex v. Yandell,

5 Term Rep. 521.

The return must shew where the county-court was held, and in what county; and this must be shewn on every *exactus*; and therefore (a) an outlawry was reversed, because the place where the county-court was held was not shewn on the *secund. exactus*; (b) where not shewn on the *tertiq. exactus*.

(a) Style,

451.

(b) Keb.

50.

Cro. Jac.

616.

(c) An out-

lawry in London was reversed upon a writ of error, because the hushings were set out to be held in, but not for the city. Trin. 6 Geo. 2. Martin v. Duckett.

If the sheriff returns, that *ad comitatum meum S. tent. apud C.*, and says not *in com. prad.*, or *in com. S.*, this is erroneous.

11 H. 7.

10. a.

2 Roll.

Abt. 102. 2 Hal. Hist. P. C. 293.

So, if it be *ad comitatum meum tentum apud S. in com. Somersf.*, and say not *ad comitatum meum Somersf.*, or *ad comitatum Somersf.*, without saying *ad comitatum meum Somersfet*, this is erroneous.

2 Roll.

Abt. 802.

Palm. 480.

Latch. 210.

So, an outlawry was reversed, for that the proclamations were returned to be *ad comitat. meum tent. apud*, such a place *in com. prad.*, and not said *pro com.*; for anciently one sheriff had two or three counties, and might hold the court in one county for another.

Vest. 108.

Show. 319.

3 Mod. 89.

2 Keb. 141.

Comb. 19.

2 Show. 60.

68. pl. 52.

ver. 164. [From the authorities referred to in this and the two preceding paragraphs, and several others, which the court of King's Bench was furnished with, it was holden in Wilkes's case, that a technical form of words was requisite in the description of the county-court, at which an outlaw is exacted; and therefore where, in that case, the sheriff stated that "at my county-court," without adding "of Middlesex," and "held at the house known by the sign of the Three Tuns in Brook-street, near Holborn, in the county of Middlesex," without adding the words, "for the county of Middlesex," after the word "held," the outlawry was reversed. Rex v. Wilkes, 4 Burr. 2527.—In a later case, Buller, J. says, I do not know, that it has ever been determined, that in any return made by a sheriff, any technical form of words is necessary: certain requisites must be observed; but if observed in substance, and the return be not in equivocal terms, a great deal of argument is necessary to convince me, that such a return is bad." Barrington v. Regem, 2 Term Rep. 502. The inclination of the opinion of the court in this case of Barrington seems to have been, that a return to a *capias cum proclamatione*, that the prisoner was exacted, "at my county-court, holden at the house known by the name of the Sheriff's Office in Took's Court, Currier-street, in and for the county of Middlesex," was well enough; though objected, that the name of the county was not added after "my county-court," and that the county-court was not stated to have been holden in Took's Court, Currier-street, and in and for the county of Middlesex. However, the clearness of the other objection made to the return in that case, relieved the court from the necessity of giving an opinion upon this.—In Barrington's case let it be observed, the outlawry was before judgment; in Wilkes's case, it was after conviction.]

2 Roll.

Abr. 802.

2 Hal. Hist.

P. C. 203.

[Rex v.

Almon, 5 Term Rep. 202. S. P.]

The sheriff must return the day and year of the king to every *exactus*; and therefore if the day and year of the king be inserted in the 1st, 2^d, 3^d, and 5th *exactus*, but omitted in the 4th, it is erroneous, and shall not be supplied by intendment.

2 Roll.

Abr. 803.

2 Hal. Hist.

P. C. 203.

So, if it be *anno regni domine regina*, without saying *Elizabetha*, or *domine Elizabetha*, without saying *regina*, or *anno regni domini regis Jacobi*, without saying *regni sue Anglia*, for the year of England and Scotland differ: so, if there be less than a month between the first and second *exactus*; in these cases, the outlawry is erroneous.

2 Roll.

Abr. 802.

2 Hal. Hist.

P. C. 203.

So, if the return be *ad husting tent. apud Guildhall civitatis London*, without saying *de communibus placitis*, it is erroneous; because they have two hustings, one *de communibus placitis*, another *de placitis terra*.

2 Roll. Abr.

803. Chap-

man's case.

If an outlawry be returned, that the party was *exact*. at three several times 10 *Jac.*, and that he was *quarto exact*. 25th day of Feb. & *non comparuit*, without mentioning any year, & *quinto exact*. such a day in March 10 *Jac.* although it may be intended, that he was *quarto exact*. in 10 *Jac.*, yet the outlawry shall not be good by intendment; for perhaps the clerk would have made it *quarto exact*. 8 *Jac.*, which would have been clearly bad.

(F) Of the Manner of reversing an Outlawry: And herein of the Difference between Errors in Fact and in Law.

2 Hal. Hist.

P. C. 207.

Outlawries are, regularly, to be reversed by plea by writ of *identitate nominis*, or by writ of error, for any errors, be they errors in fact or in law.

Co-Lit. 259.

2 Hawk.

P. C. c. 50.

§ 6.

As to errors in fact; as that in felony, the party was an infant under the age of fourteen, was in prison or beyond sea; these can, regularly, be only taken advantage of by writ of error. But it is agreed, that by the common law *in favorem vite* an outlawry of treason or felony might be avoided by plea, that the defendant was in prison, or in the king's service beyond sea, &c. at the time of the outlawry pronounced against him; but that no outlawry for any other crime (against a party rightly described) can be avoided by plea of any matter of fact whatsoever.

2 Roll.

Abr. 804.

2 Hal. Hist.

P. C. 208.

As to avoiding an outlawry of felony, because the party was beyond the sea, these differences are laid down by Rolle and Hale, as agreed to by the court, 1st, That if a man, having committed a felony, goes beyond the sea voluntarily, or upon his own occasions, and not in the king's service, before any exigent awarded, though after the indictment, and then an exigent is awarded, and the offender beyond the sea is outlawed for the felony, he may assign it for error. 2^{dly}, But if, after the exigent awarded upon the indictment of felony, he goes beyond the sea voluntarily, or upon his own occasions, and being so beyond sea is outlawed, he shall

shall not avoid it by such being beyond sea; because by the exigent awarded he has notice of the prosecution, and by such a means he may avoid his conviction, by staying till all the witnesses are dead. 3dly, But yet *prima facie* the error in that case is well assigned, by alleging he was *ultra mare tempore promulgationis utlagaria*; and if he were in the realm after the exigent issued, it shall come in by the plea of the king's attorney to shew it. 4thly, But, if he were within the realm at the time of the exigent issued, and went beyond the sea upon the service of the king or kingdom, and then is outlawed, being beyond the sea, this outlawry shall be reversed; if the party allege generally, that he was *ultra mare tempore promulgationis utlagaria*, and the king's attorney reply, that he was in *England tempore emanationis brevis de exigent facias*, it is a good replication for the plaintiff in the writ of error to allege, that he went out after the exigent, and before the outlawry pronounced, upon the king's command or service, and shew it specially, and so confess and avoid the plea.

As to the avoiding an outlawry in treason, on the party's being beyond sea, it is enacted by the 26 H. 8. c. 13. and 5 & 6 E. 6. c. 11. "That all process of outlawry to be had or made within this realm against any offenders in treason, being resistant or inhabiting out of the limits of this realm, or in any of the parts beyond the seas, at the time of the outlawry pronounced against them, shall be as good and effectual in law, to all intents and purposes, as if such offenders had been resident and dwelling within this realm at the time of such process awarded, and outlawry pronounced (a); provided that the party so to be outlawed shall, within one year next after the said outlawry pronounced, yield himself to the Chief Justice of England for the time being, and offer to traverse the indictment or appeal whereon the said outlawry shall be pronounced, as is aforesaid, that then he shall be received to the same traverse; and being thereupon found not guilty by the verdict of twelve men, he shall be clearly acquitted and discharged of the said outlawry," &c.

(a) For this vide Dyer, 287. pl. 48. 2 Jon. 120. 4 Mod. 366.

It is the allowed practice of the court of Common Pleas to suffer a defendant, coming in by *capias utlagatum* the same term on which an exigent is returnable, to avoid the outlawry without writ of error, by shewing, that he purchased a *superfedeas* out of the same court, and delivered it to the sheriff before the *quinto actus*, &c., or by shewing any other matter apparent on record which makes the outlawry erroneous; as, the want of an original, or the omission of process, or want of form in a writ of proclamation, &c., or a return by a person appearing not to be sheriff, or the want of such addition as required by 1 H. 5. c. 5.: yet it is said in many books to be the constant course of the court of King's Bench never to reverse an outlawry on the crown side, either in the same or a different term, for these or other errors of a like nature, without a writ of error.

2 Hawk. P. C. c. 50. and several authorities there cited.

It is agreed, that any outlawry whatsoever may be avoided by a defendant's coming in upon the *capias utlagatum*, and pleading a misnomer either of the name or addition in the writ, &c. as, by shewing,

2 Hawk. P. C. c. 50. § 9.

shewing, that whereas he is called by such a name of baptism or surname, he hath been always known by a different one, and not by that in the writ, &c. Also, it is said in many books, that he may plead, that there is no such town as that whercof he is named; and it seems clearly agreed, that he may plead, that at the time of the writ purchased, and ever since, he hath made his abode at some other town, and not at that in the writ, &c. And it is said, that by such plea the outlawry shall only be avoided as to the person who pleads it, (who shall not be intended to be the person meant,) and shall stand in force against the person of the name and addition in the record. But it is said, that a person of the same name and addition as are mentioned in a record of outlawry cannot avoid it, by averring, that there are two persons of such name and addition, and that the person intended is the elder, and he himself is the younger, but shall be put to his writ *de identitate nominis*; which is said by some to be the only remedy in such case, after an outlawry returned. And it seems, that notwithstanding in civil cases, before an outlawry is returned, one of the same name may come into court, and shew that he is not the person intended; whereupon, if the plaintiff confesses it, the diversity of the names shall be entered on the roll, and a new exigent shall issue, with a fuller description of the person intended; yet this cannot be done upon an indictment without a writ of *identitate nominis*, because it would make the process variant from the indictment, which cannot be altered without the consent of the jurors.

3 Co. 141,
142. Doctor
Drury's case.
Vaugh. 158.
S. C. cited.
(a) For this
vide Co.
Ent. 157.
3 Keb. 291.
Mod. 111.
Hern. Ent.
49. Aff.
Ent. 143.

If *A.* brings an *audita querela* against *B.*, and declares, that whereas *B.* had recovered against *A.* 200 *l.* debt, &c. and thereupon the said *A.* was outlawed, and upon a *capias utlagatum* taken, and in execution at the suit of the said *B.*, and after from the said execution was delivered, and suffered to go at large, &c. and yet *B.* hath taken out execution upon the said judgment, and endeavours, &c., the defendant may plead and shew, that after the said enlargement, and before the purchase of the *audita querela*, the outlawry was set aside and made void; and so conclude *quod (a) non habetur tale recordum*.

2 Vent. 46.
2 Jon. 211.
Comb. 19.
2 Salk. 495.
pl. 3. S. P.
where an
outlawry
was reversed,
on motion,
at the charge
of him who
procured it,
an affidavit,
that the de-
fendant was

If a person procures another to be outlawed clandestinely, who appears openly and in publick, the court will, on motion, oblige such person who procures the outlawry to reverse the same at his own costs. But if it appears, that the party outlawed had lurked backward and forward between two counties, and that the person procuring the outlawry had dealt openly, and had been regular in sending down the proclamations to the sheriff of the county where he sometimes resided; the court will not interpose in this summary manner, but will leave the party to his ordinary remedies by plea or writ of error.

— But in the same page in Salk. it is said, that though such motions are frequently granted in B. R. because it is a great charge to reverse an outlawry there, yet that it is otherwise in C. B., the charge there being but 16 *s.* 8 *d.*

Biscoe v.
Kennedy,
a Wils. 127.

[In debt upon bond entered into by the wife *dum sola*, the husband was abroad and outlawed; and the wife, though she appeared publickly,

publicly, *waived*. On motion to set aside the outlawry against the wife, and to restore her the goods taken on a special *copias utlagatum*, on affidavit, that they were her separate goods, the court held, that the goods must be taken to be her husband's goods in point of law; and that, if she had any equitable right to them, she must resort to a court of equity: but, as she appeared publicly, she had been wrongfully waived; and therefore the rule was made absolute for setting aside the outlawry as to the wife, but discharged as to restoring the goods.

The defendant was taken on a *copias utlagatum*, on a *Sunday*, and therefore he moved to be discharged, the taking being contrary to the 29 *Car. 2*. But, notwithstanding the court held the taking bad, they refused to grant an attachment, and put the defendant to take the remedy given by the statute.

The defendant was waived specially on mesne process, as a single woman, by the name of *Dunster*; and after the exigent, and before the outlawry, she married one *Prisley*; and on being taken by a *copias utlagatum* after the outlawry, on motion, a rule was obtained to shew cause, why the outlawry should not be reversed at her husband's expence, on his entering a common appearance for himself and his wife. But the rule was discharged, the court refusing to interpose in a summary way, as the marriage was after the exigent.]

Osborne v. Carter, Barnes, 319.

White v. Dunster, Barnes, 322.

(G) What the Party must do in order to entitle him to a Reversal: And herein,

Of appearing in Person, or by Attorney, and of giving Bail

Regularly, in all outlawries, as well personal as criminal, the party in order to reverse the same was to appear in person, and could not appear by attorney.

2 Leon. 22. — Where the husband and wife be-

ing outlawed, and the wife refusing to appear, the outlawry could not be reversed. *Cro. Elis. 611.* — One outlawed prayed to appear by attorney, and upon an affidavit made of his sickness, the court *ex sua gratia* allowed him to appear by attorney; but the clerk was commanded to enter it, *quod venit in propria persona*, the law being clear, that upon an outlawry he ought to appear in person. *Cro. Jac. 462.* Having once appeared in person, the residue of the proceedings may be by attorney. *2 Keb. 507.* — Said that there was a difference where the error appeared on the face of the record; that in such case error may be assigned *per attorn.*, without a special rule of court for that purpose. *Carth. 7.*

But now by the 4 & 5 *W. & M. c. 18*, for the more easy and speedy reversing of outlawries in the court of King's Bench, it is enacted, "That, from and after the first day of *Easter* term thence ensuing, no person or persons whatsoever, who is, are, or shall be outlawed in the said court for any cause, matter, or thing whatsoever, (treason and felony only excepted,) shall be compelled to come in person into or appear in person in the said court to reverse such outlawry, but shall or may appear by attorney, and reverse the same without bail in all cases, (except where special bail shall be ordered by the said court)."

And

[(a) That is, to put in bail to a new action, plead within the limited time, put the plaintiff in the same condition, and such like matters. 4 Burr. 2540.]

And it is further enacted by the said statute, "That if any person or persons outlawed, or hereafter to be outlawed, in the said court, (other than for treason or felony,) shall from and after the said first day of *Easter* term be taken and arrested upon any *capias utlagatum* out of the said court, it shall and may be lawful to and for the sheriff or sheriffs, who hath or shall have taken and arrested such person and persons, (in all cases where special bail is not required by the said court,) to take an attorney's engagement under his hand to appear for the said defendant or defendants, and to reverse the said outlawries, and thereupon to discharge the said defendant and defendants from such arrest; and in those cases, where special bail is required by the said court, the said sheriff and sheriffs shall and may take security of the said defendant or defendants by bond, with one or more sufficient surety or sureties, in the penalty of double the sum for which special bail is required, and no more, for his, her, or their appearance by attorney in the said court at the return of the said writ, and to do and perform such things as shall be required by the said court (a); and after such bond taken to discharge the said defendant and defendants from the said arrest."

And it is further enacted by the said statute, "That if any person or persons outlawed as aforesaid, and taken and arrested upon a *capias utlagatum*, shall not be able within the return of the said writ to give security, as aforesaid, in cases where special bail is required, so as he or they is or are committed to gaol for default thereof, that whensoever the said prisoner or prisoners shall find sufficient security to the sheriff or sheriffs, in whose custody he or they shall be, for his or their appearance by attorney in the said court at some return in the term then next following, to reverse the said outlawry or outlawries, and to do and perform such other thing and things as shall be required by the said court, it shall and may be lawful to and for the said sheriff and sheriffs, after such security taken, to discharge and set at liberty the said prisoner and prisoners for the same; any law or usage to the contrary notwithstanding."

2 Salk. 496.

It hath been held, that if the party outlawed comes in by *cepi corpus*, he shall not be admitted to reverse the outlawry without appearing in person, as in such case he was obliged to do at common law; or putting in bail with the sheriff for his appearance upon the return of the *cepi corpus*, and for doing what the court shall order.

2 Hawk. P. C. c. 15. § 40. *Vide* tit. Bail in Criminal Causes, letter (D).

By *Westm. 1. 3 Ed. 1. c. 9.* it is expressly provided, that those who are outlawed, or have abjured the realm, &c. should be excluded the benefit of replevin; yet it hath been always held, that the court of King's Bench may in their discretion, in special cases, bail a person upon an outlawry of felony; as, where he pleads, that he is not of the same name, and therefore not the same person with him that was outlawed, or alleges any other error in the proceedings.

By

By the 31 Eliz. c. 3. § 3. it is enacted, " That before any allowance of any writ of error, or reversing of any outlawry be had by plea, or otherwise, through or by want of any proclamation to be had or made according to the form of this statute, the defendant and defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry *."

* Vide the stat. 4 & 5 W. & M. c. 18. ante.

A., who was a foreign merchant, and never in England, was outlawed at the suit of B., in an action on several promises for goods sold and delivered; and upon a special *capias utlagatum* a ship and other effects belonging to A. were seised, as forfeited upon this outlawry; and it was moved, that this outlawry may be vacated, and restitution awarded, upon affidavits produced and read, that the defendant was never *infra legem*, i. e. that he never was in England, and therefore could not be outlawed, because that was putting him *extra legem*. *Sed per cur.*—This outlawry shall not be vacated upon such affidavits, but the defendant may bring a writ of error, which he was compelled to do, and thereupon to put in bail to the action in which he was outlawed according to the new statute of 4 & 5 W. & M. c. 18. ante; and then the plaintiff consented to the reversal of the outlawry.

Carth. 459.
Ld. Raym.
349.
Matthews
v. Erbo,
Tidd's Pr.
64.

H. was outlawed in two actions, one was for 10 l., the other for 40 s., and upon reversing the outlawry the court took special bail for the first, and an appearance for the other, upon the statute 4 & 5 W. & M. c. 18. and the recognizance was taken pursuant to 31 Eliz. c. 3. § 3.

2 Salk. 496.

[The defendant was outlawed in a personal action, without any affidavit made of the plaintiff's demand; and having brought error, he assigned his being beyond sea at the time of the outlawry, for which the court made no difficulty to reverse it. But then the question was, upon what terms they should do it, the plaintiff insisting upon special bail, and having now made a proper affidavit; and the defendant insisting to file common bail only. The court, upon considering the words of 4 & 5 W. & M. c. 18. § 3. which empowers the outlaw to appear by attorney, (as he did here,) and says, " It shall be reversed without bail in all cases, but where special bail shall be ordered by the court," declared, they were of opinion, they had a discretionary power to require it or not; and that the want of an affidavit before, was no objection; because that is only necessary to warrant an arrest; and here was one in time for the new action that must be brought. And although the 31 Eliz. c. 3. § 3. is the only act that expressly requires bail; it is not to be inferred from thence, that in other cases it is not to be insisted upon; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. And it is now settled, that on reversing an outlawry for any other error in law, besides

Serocold v. Hamson,
2 Str. 1178.
1 Will. 3.
S. C.

Tidd's Pr.
73.

the

the want of proclamations, the bail is *common or special*, in *like* manner as upon the arrest.

1 Ld. Raym.

605.

2 Str. 951.

2 Barnardist.

298. S. C.

Impey, 456.

Where special bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reversal.

The bail may render the defendant, and are not, at all events, answerable for the debt.

Cracraft v.

Gladowe,

3 Burr.

1482.

Defendant being arrested on a *capias utlagatum*, the sheriff took an attorney's engagement, under his hand, to appear for the defendant, and reverse the outlawry, without taking security by bond in double the sum for which bail was required, pursuant to the above statute of 4 & 5 W. & M. On shewing cause why an attachment should not issue against the sheriff for discharging the defendant out of his custody, it was urged, that he neither did, nor could know, that it was a case requiring bail, as the *capias utlagatum* was not marked for bail; and that the 12 G. 1. c. 29. required an affidavit; and that the sum, for which bail is to be taken, is to be marked on the process, &c. For the plaintiff, it was urged, that process of outlawry is not within the statute of 12 G. 1.; that this was by *special original*, and the cause of action is expressed in the original process, in which it appears the plaintiff was entitled to bail. The court were clear, that this was not a case within the 12 G. 1., and thought the sheriff had acted improperly; but, as there was an affidavit of the under-sheriff, that he had acted to the best of his understanding without any ill intention, they enlarged the rule, in order to give the sheriff an opportunity to put in bail. After which the sheriff undertook to pay the debt and costs.

Rex v.

Wilkes,

4 Burr.

2539-40.

The statute of 4 & 5 W. & M. hath been construed not to extend to *criminal* cases; at least, not to misdemeanours after conviction. And even in *civil* cases, the defendant cannot be bailed, where he was not bailable on the process to outlawry; for it was the design of the statute to put him in the same condition, as if he had not been outlawed: and therefore, he is not bailable, when taken upon an outlawry *after* judgment.

Symmons

v. Bing,

2 Salk. 496.

Two persons were outlawed in a joint action against them, and one moved, that on filing common bail, he might have liberty to reverse the outlawry. *Sed per cur.*—The writ of error to reverse the outlawry must be brought in the names of both the parties that are outlawed; and, if one only appears, the other may be summoned and severed, and then the outlawry may be reversed for the benefit of the party appearing.]

2. Of suing out a *Scire Facias*.

Dyer, 34.

pl. 20.

Crb. Eliz.

235. Keb.

It is clearly agreed, that an attainder of felony of a person who had any lands shall never be reversed by writ of error, without a *scire facias* against all the ter-tenants and lords mediate and immediate.

date. But it is (a) settled, that such *scire facias* is not necessary in the case of high treason.

141. pl. 11.
Sid. 316.
3 Keb. 29.

3 Mod. 42. 47. 4 Mod. 366. 2 Hal. Hist. P. C. 209. S. P. and that such writ is to issue returnable at fifteen days; and if any lords do appear, they may plead to the errors; and if the sheriff return there are no lands, &c., then the court proceeds to examine the errors. (a) So ruled, Mich. 12 Anne, the Queen v. Strafford, upon examination of all the precedents. 2 Hawk. P. C. c. 50. § 13. Ca. Law and Eq. 188.

Also it is said, that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the Attorney-General confesses it.

2 Salk. 495.
pl. 5.
Ld. Raym.
154.

[Where the defendant has obtained a charter of pardon, he must sue out a *scire facias*, to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper.]

Trye, 131.
154.

(H) The Effects and Consequences of a Reversal: And herein,

1. Where the Proceedings on the Reversal are in the same Plight as if no Outlawry had been.

It is agreed, that after an outlawry of treason or felony is reversed, the party shall be put to plead to the indictment, for that still remains good, and (b) he may be tried at the King's Bench bar; or the record may be remitted into the country, if it were removed into the King's Bench by *certiorari*, with a command to the justices below to proceed by the statute of 6 H. 6. c. 6.

Cro. Jac.
464. Cro.
Car. 365.
3 Mod. 48.
6 Mod. 115.
(b) 2 Hal.
Hist. P. C.
209.

So, if a man be outlawed by process in an information, and come in and reverse the outlawry, he must plead *instante* to the information.

Salk. 371.
pl. 10.
Rex v. Hill,
5 Mod. 141. S. P.

The law is the same in civil cases; and therefore, if an outlawry in a personal action be reversed, the original remains.

March, 9.

Trespass for taking and detaining his beasts till he made a fine: the action was laid in *Suffex*. The defendant pleads, that the cause of action did not accrue within six years before suing of the writ. The plaintiff replies, that at another time he brought an original in battery in *London*, intending when the defendant had appeared to have declared for this trespass; and that the defendant was outlawed in *London*; and that within such a time after the reversal of the outlawry he declared here. The defendant demurred; and for the defendant it was insisted, that the original being laid in *London*, he could not in this action declare in another county, though the cause of action be transitory. But, upon information by the prothonotaries, that the course of the court is, that although the original be laid in *London* for expediting the outlawry, yet, when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory; and the statute 21 Jac. 1. c. 16. gives to plaintiffs generally a power to commence a new suit within the year after the outlawry reversed; it was ruled, that so he might do in this case to warrant his declaration within the course of the court, and judgment was given for the plaintiff.

3 Lev. 145.
Whitwick
v. Hoven-
den.

2. To what the Party shall be restored on Reversal of the Outlawry.

And. 188.
(a) Shall,
after out-
lawry re-
versed, be
restored to
his law, and
be of ability to sue.

It hath been adjudged, that if the king grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry be (a) reversed, the party may enter on the patentee, and needs neither to sue a petition to the king, nor a *scire facias* against the patentee.

Co. Lit. 288. b.

5 Co. 90.
Hoe's case,
Roll. Abr.
778. S. C.
cited. Cro.
Eliz. 278.
S. P. ad-

If the goods of a person outlawed are sold by the sheriff upon a *capias utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves; because the sheriff was not compellable to sell those goods, but only to keep them to the use of the king.

judged; where a termor being outlawed upon the statute of recusancy, the Lord Treasurer and Barons of the Exchequer sold the term; *vide* 2 Jon. 101. 2 Show. 68. pl. 52. and 3 Keb. 871. that there shall be restitution of the profits actually paid into the Exchequer. *Vide etiam* Bunb. 104. 220.

Moor, 267.
Beverley v.
Cornwall.

If an advowson comes to the king by forfeiture upon an outlawry, and, the church becoming void, the king presents, and then the outlawry is reversed; yet the king shall enjoy that presentment, because the presentment there came to the king as the profit of the advowson.

Moor, 269.
agreed per
curiam.

But, if the church is void at the time of the outlawry, and the presentation is thereby forfeited as a chattel principally and distinct of itself, there, upon the reversal of the outlawry, the party shall be restored to the presentation.

Cro. Eliz.
170. Og-
nal's case,
& 13 Co.
20. 22.

If a termor being outlawed for felony grants over his term, and after the outlawry is reversed, the grantee may have trespass, for the profits taken between the reversal of the outlawry and the assignment; for by the reversal it is as if no outlawry had been, and there is no record of it.

5 Mod. 61.

* *Sed qu.*
If restitu-
tion would
not be made
on petition
to the king?

It is said, that if a man be outlawed in the King's Bench, and the party's goods seized into the king's hands, and then the outlawry be reversed, there can be no restitution; the reason whereof is, for that the court of King's Bench cannot send a writ to the treasurer; and the court of Exchequer have no record before them to issue out a warrant for restitution*.

4 Vern. 312.
Peyton v.
Ayliffe; &
2 Lev. 47.
the case of
Pinfold v.
Northey.

It hath been adjudged in Chancery, that if *A.* being possessed of several houses for a long term of years, mortgages the same, and is outlawed for high treason, upon which those houses are seized into the king's hands, and the same granted for valuable consideration to *J. S.*, who likewise gets an assignment of the mortgage; that yet the representative of *A.* may redeem the mortgage upon reversal of the outlawry; and herein the Lord Keeper said, that the judgment upon the reversal is, that the party shall be restored to all that has not been answered to the king; which in all cases has been understood of the mesne profits answered to the king, and not as to the principal thing itself, though seized into the king's hands; and that it was undoubtedly so as to a freehold or inheritance, and he saw no substantial difference in the case of a leasehold.

Popists and Popish Recusants.

THE laws for restraining the growth of popery, by which papists are subjected to divers penalties, forfeitures, disabilities, and inconveniencies, may be considered in general, as relating to popish (a) recusants, such as refuse to make the declaration against popery, and such as promote, encourage, or profess the popish religion. And these laws, though made for the advancement of religion and the publick good, yet, being considered as penal laws, have, like all other penal laws, been construed strictly.

(a) i. e. Those who refuse to come to church, and being persons professing the popish religion, and convicted of such refusal or recusancy, are termed popish recusants convicted. But the 23 Eliz. c. 1. extends to all recusants; and the courts cannot take notice of the grounds of the recusancy, but must punish them for not coming to church, without examining into the cause why they did not. Skin. 99. pl. 14. per Sanders, Ch. J. but for this, vide tit. Heresy, and Offences against Religion. — And what shall be evidence to prove a person a popish recusant convicted, vide Keb. 7.

For the better understanding of these penalties, &c. the laws herein are ranked under the following heads: Hawk. P.C. c. 12, 13, 14.

(A) The Disabilities, Restraints, Forfeitures, and Inconveniencies which Popish Recusants are subject to: And herein,

1. *Of their Disability to bring any Action.*
 2. *Of bearing any Publick Office or Charge.*
 3. *Of claiming any Part of a Husband's personal Estate.*
 4. *Of claiming an Estate by Curtesy, or by Way of Dower, after a Marriage against Law.*
2. Of the Restraints they are put under. And herein,
1. *From going five Miles from Home.*
 2. *From coming to Court.*
 3. *From keeping Arms.*
 4. *From coming within ten Miles of London.*
3. Of the Forfeitures they are liable to. And herein,
1. *That of two Parts of a Jointure or Dower.*
 2. *That of 20 l. for not receiving the Sacrament yearly after Conformity.*
 3. *That of 10 l. for an unlawful Marriage.*
 4. *That of 100 l. for an Omission of lawful Baptism.*
 5. *That of 20 l. for an unlawful Burial.*

~~Recusants.~~ **Recusants.**

... are subject to: And herein,

... searched for Reliques, whether

... and married, that they may be com-

... or not making a Declaration
... and the Restraints it subjects the

... and herein,

... in Parliament.

... at Place or Court.

... within ten Miles of London.

... Arms.

... in Promoting or Professing the
... Religion: And herein,

... of saying or hearing Mass or other Popish
... .

... or receiving Popish Education.

... or using Popish Books.

... or keeping Schools.

... or withholding a competent Maintenance from a Pro-
... .

... or the Disability of those professing the Popish Religion
... or a Church.

... or their Disability to purchase.

The Disabilities, Restraints, Forfeitures, and
... which Popish Recusants are sub-
... to: And herein,

1. *Of their Disability to bring any Action.*

... § 11. it is enacted, "That every Popish
... shall stand to all intents and purposes dis-
... as a person lawfully excommunicated, and as if such per-
... to be denounced and excommunicated according to
... laws of this realm, until he or she shall conform, &c. and
... every person sued by such person so disabled, may plead
... in disabling of such plaintiff as if he or she were ex-
... by sentence in the ecclesiastical court, except the

"action

"action of such recusant do concern some hereditament or lease,
"which is not to be seised into the king's hands by force of some
"law concerning recusancy."

In the construction of this branch of the statute, it hath been holden,

That the plea of such a conviction, like all other pleas in disability, ought to be pleaded before (a) imparlance, and also conclude with a (b) demand if the plaintiff shall be answered.

P. C. c. 12. § 2. (a) Cannot be pleaded after a general imparlance, but may be pleaded *pais dernier courance*, because being in disability of the person, may accrue after a continuance. Mod. Ca. in Law and Eq. 43. 381. (b) In debt for rent by the plaintiffs as executors of J. S., defendant pleads in abatement by *pet. judicium de brevi*, &c. for that one of the plaintiffs is a popish recusant convicted, and *quasi excom.* by this statute; but it was held, that this, as here, ought not to be pleaded in abatement, because the writ is not abated thereby, but only suspended; and the pleading ought to be *responderi non debent*. 3 Lev. 208.—So, where judgment was demanded generally. Mod. Ca. in Law and Eq. 43. 381.

Noy, 89.
Litch, 176.
Held. 18.
1 Hawk.

That such plea ought also to shew before what justices the conviction was, that the court may know where to send for a certificate thereof, if it be denied; and also that the record itself, or at least a certificate thereof, ought to be immediately produced, according to the general rule of law, as to all dilatory pleas grounded on records.

That, if after such a plea it be certified, that the plaintiff hath conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapse, and be convicted again, the defendant cannot plead the same in disability a second time.

That it must appear, either from the conviction itself, or by proper averments, that the plaintiff is convicted of popish recusancy, because no recusants, except popish ones, are within the said clause. But this is sufficiently set forth, by alleging, that the plaintiff being *papalis recusans* was indicted and convicted *secundum formam statuti*, &c.

It seems to be the better opinion, that this being a penal law, and therefore to be construed strictly, the words *as persons lawfully excommunicate*, &c. mean no more than disabling the party, in the same manner as an excommunicated person, to bring an action, but do not subject the party to the other consequences of an excommunication.

Noy, 89.
Litch, 176.
3 Lev.
333-4

Held. 176.

3 Lev. 11,
12. 332-3.
2 Lutw.
1117.

2 Bull. 155.
Cawley,
216.
Hawk. P.C.
c. 12. § 6.

2. Of bearing any Publick Office or Charge.

By the 3 Jac. 1. c. 5. § 8. it is enacted, "That no recusant convicted shall at any time practise the common law of this realm as a counsellour, clerk, attorney, or solicitor in the same; nor shall practise the civil law as advocate or proctor; nor practise physick, nor use or exercise the trade or art of an apothecary; nor shall be judge, minister, clerk, or steward of or in any court, or keep any court; nor shall be registrar or town-clerk, or other minister or officer in any court; nor shall bear any office or charge as captain, lieutenant, corporal, serjeant, ancient bearer, or other office in camp, troop, band, or company of soldiers;

4. Of claiming an Estate by Curtesy, or by Way of Dowry, after a Marriage against Law.

By the 3 Jac. 1. c. 5. § 13. it is enacted, "That every man, who, being a popish recusant convict, shall be married otherwise than in some open church or chapel, and otherwise than according to the orders of the church of *Egnland*, by a minister lawfully authorized, shall be disabled to have any estate as tenant by the curtesy; and that every woman, being a popish recusant convict, who shall be married in other form than as aforesaid, shall be disabled to hold her dowry, or jointure, or widow's estate."

2. Of the Restraints they are put under: And herein,

1. From going five Miles from Home.

To this purpose it is enacted by 35 Eliz. c. 2. and 3 Jac. 1. c. 5. § 6, 7. "That every popish recusant convict shall repair to his place of dwelling, &c. and not remove above five miles from thence, unless he be urged by process, &c. or have a licence from the privy council, &c. or under the hands and seals of four justices of the peace, with the assent in writing of the lieutenant of the county, or of the bishop, &c. (every licence of which kind by justices of peace must express both the particular cause and the time for which it was given, and ought not to be granted without a previous oath of some reasonable cause,) under pain of forfeiting all his goods and hereditaments, (whether freehold or copyhold,) for his life, or of abjuring the realm, if he be not worth twenty marks a-year, or forty pounds in goods, unless he recant before conviction, and also continue conformable."

In the construction hereof it hath been holden, that the privy council may grant such licence without any such special cause or oath, &c. but that justices of peace cannot. Also it hath been holden, that in pleading a licence of justices of peace, it must be expressly shewn, that it was made under their hands and seals; the cause in particular for which it was granted must be set forth, and the time for which it was limited, and that the party was sworn to the truth of such cause.

It is said, that if the same person be both a justice of peace and a lieutenant, he cannot both join in a licence as justice of peace, and also give his assent as lieutenant, but can only act in one capacity.

It seems, that the miles shall be computed according to the *English* manner, allowing 5280 feet, or 1760 yards, to each mile; and that the same shall be reckoned not by strait lines, as a bird or arrow may fly, but according to the nearest and most usual way.

Hawk. P.C.
c. 12. § 13.

Cro. Jac.
351. Roll.
Rep. 108.
Moor, 836.
Hawk. P.C.
c. 12. § 4.

Cawley,
130. Cro.
Eliz. 222.

2. *From coming to Court.*

By the 3 *Jac.* 1. c. 5. § 2. it is enacted, "That no popish recusant convict shall come into the court or house where the king or his heir apparent shall be, unless he be commanded so to do by the king, upon pain of 100*l.* And it is further enacted by 3 *Car.* 2. *stat.* 2. § 5 & 6. that every popish recusant convict, who shall come advisedly into or remain in the presence of the king or queen, or shall come into the court or house where they or any of them reside, shall be disabled to hold or execute any office or place of trust civil or military, or to sue in law or equity, or to be an executor, &c. or capable of any legacy or deed of gift, and shall forfeit for every offence 500*l.*, unless such person do, within the term next after such his coming or remaining, take the oaths of allegiance and supremacy, and make the declaration against transubstantiation and the invocation of saints, &c. in the court of Chancery."

3. *From keeping Arms.*

By the 3 *Jac.* 1. c. 5. § 27, 28, 29. it is enacted, "That all such armour, gunpowder, and munition of whatsoever kind, as any popish recusant convict shall have in his own house, or elsewhere, or in the possession of any other, at his disposition, shall be taken from him by warrant of four justices of peace at their general or quarter sessions, (except such necessary weapons as shall be allowed him by the said four justices for the defence of his person or house,) and that the said armour, &c. so taken, shall be kept at the costs of such recusants in such place as the said four justices at their said sessions shall appoint; and that if any such recusant, having such armour, &c. or if any other person who shall have any such armour, &c. to the use of such recusant, shall refuse to discover to the said justices, or any of them, what armour he hath, or shall let or hinder the delivery thereof to any of the said justices, or to any other person authorized by their warrant to take the same; that then every person so offending shall forfeit his said armour, &c. and also be imprisoned for three months without bail, by warrant from any justice of peace of such county. And it is further enacted, that notwithstanding the taking away such armour, &c. yet such recusant shall be charged with the maintaining of the same, and with the providing of a horse, &c. in such sort as others of his majesty's subjects."

4. *From coming within ten Miles of London.*

By the 3 *Jac.* 1. c. 5. § 4, 5. it is enacted, "That no popish recusant, &c. shall remain within the compass of ten miles of London, under pain of 100*l.* except such persons as at the time
" of

" of the said act did use some trade, mystery, or manual occupation in *London*, &c. and such as shall have their only dwelling in *London*," &c.

3. Of the Forfeitures they are liable to: And herein,

1. That of two Parts of a Jointure or Dowry.

By the 3 *Jac.* 1. c. 5. § 10. it is enacted, " That every married woman, being a popish recusant convict, (her husband not standing convicted of popish recusancy,) who shall not conform herself and remain conformed, but shall forbear to repair to some church or usual place of common prayer, and there to hear divine service and sermon, if any then be, and receive the sacrament of the Lord's Supper, according to the laws of this realm, within one year next before the death of her said husband, shall forfeit to the king the profits of two parts of her jointure and dower of any hereditaments of her said husband," &c.

2. That of 20 l. for not receiving the Sacrament yearly after Conformity.

By the 3 *Jac.* 1. c. 5. § 1, 2, 3. it is enacted, " That if any popish recusant convict who hath conformed himself to the church, &c. shall not receive the sacrament in his own parish-church, &c. within one year after his conformity, he shall forfeit 20 l. and for the second year 40 l. and for every year after 60 l." &c.

3. That of 100 l. for an unlawful Marriage.

By the 3 *Jac.* 1. c. 5. § 13. it is enacted, " That every popish recusant convict, who shall be married to a woman who is no inheritrix, otherwise than according to the church of *England*, shall forfeit 100 l."

4. That of 100 l. for an Omission of lawful Baptism.

By the 3 *Jac.* 1. c. 5. § 14. it is enacted, " That every popish recusant shall, within one month after the birth of his child, cause the same to be baptized by a lawful minister according to the laws of this realm, in the open church of the same parish where the child shall be born, or in some other church near adjoining, or chapel where baptism is usually administered; or, if by infirmity of the child it cannot be brought to such place, then the same shall within the time aforesaid be baptized by the lawful minister of any of the said parishes or places aforesaid; upon pain that the father of such child, if he be living, by the space of one month next after the birth of such child, or if he be dead within the said month, then the mother of such child shall for every such offence forfeit 100 l." &c.

5. That of 20 l. for an unlawful Burial.

By the 5 Jac. 1. c. 5. § 15. it is enacted, "That if any popish recusant, not being excommunicate, shall be buried in any other place than in the church or church-yard, or not according to the laws of this realm, the executors, &c. of such recusant knowing the same, or the party that causeth him to be so buried, shall forfeit 20 l." &c.

4. Of the Inconveniencies they are subject to: And herein,

1. That their Houses may be searched for Reliques, whether they be Men or Women.

Popish recusants. To this purpose it is enacted by the 3 Jac. 1. c. 5. § 26. "That any two justices of peace, and all mayors, bailiffs, and chief officers of cities and towns corporate in their respective jurisdictions, may search the house and lodgings of every popish recusant convicted for popish books and reliques, and that if any altar, pix, beads, pictures, or such like popish relique, or any popish book be found in the custody of such person, as in the opinion of the said justices, &c. shall be unmeet for him or her to have or use, it shall be defaced or burnt, if it be meet to be burnt; and if it be a crucifix, or other relique of any price, the same shall be defaced at the general quarter sessions in the county where it shall be found, and then restored to the owner."

2. If they be Women, and married, that they may be committed.

Popish recusants. To this purpose it is enacted by the 7 Jac. 1. c. 6. § 28. "That if any married woman, being a popish recusant convicted, shall not within three months after her conviction conform herself, and repair to church and receive the sacrament, &c. she may be committed to prison by one of the privy council, or by the bishop, if she be a baroness; or if under that degree, by justices of peace, whereof one to be of the *quorum*, there to remain till she perform, &c. unless the husband will pay to the king ten pounds a-month for her offence, or else the third part of all his lands, &c. at the choice of the husband," &c.

(B) Of the Offence of not making a Declaration against Popery, and the Restraints it subjects the Parties to: And herein,

1. From sitting in Parliament.

By the 30 Car. 2. stat. 2. c. 1. it is enacted, "That no peer shall vote or make his proxy in the House of Peers, or sit there during any debate; and that no member of the House of Commons

"Commons shall vote or sit there during any debate after the Speaker is chosen, until such peer or member shall take the oaths of allegiance and supremacy, and make a declaration of his belief that there is no transubstantiation in the sacrament of the Lord's Supper, and that the invocation or adoration of the Virgin *Mary*, or any other saint, and the sacrifice of the mass, as they are now used in the church of *Rome*, are superstitious and idolatrous, &c., on pain that every such offender shall be adjudged a popish recusant convict, and disabled to hold or execute any office, &c., or from thenceforth to sit or vote in either house of parliament, to sue in law or equity, or to be guardian, executor, or administrator, or capable of any legacy or deed of gift, and shall forfeit for every offence 500*l*."

2. Holding a Place at Court.

By the 30 *Car. 2. stat. 2. § 9. 12, 13.* it is enacted, "That every person who shall be a sworn servant to the king shall take the said oaths, and subscribe the said declaration in Chancery the next term after he shall be so sworn a servant, &c.; and that if any such person neglecting so to do shall advicedly come into or remain in the presence of the king or queen, or shall come into the court or house where they are, or either of them reside, he shall suffer all the penalties expressed in the foregoing section; unless such person coming into the king's presence, &c. shall first have licence so to do by warrant under the hands and seals of six privy counsellours, by order of the privy council, upon some urgent occasion therein to be expressed; which licence shall not exceed ten days, and shall be first filed, &c. in the petty-bag office for any body to view without fee, &c.; and no person to be licensed for above thirty days in one year."

[The fifth section subjects peers of Great Britain and Ireland, and members of the House of Commons, not conforming as mentioned in the text, and all recusants convict, who shall come unadvisedly into or remain in the king or queen's presence,

to the like penalties. But this clause is repealed as to peers of Great Britain and Ireland by 31 *G. 3. c. 32. § 20.* who shall take the oaths therein appointed.]

3. From living within ten Miles of *London*.

By the 1 *W. & M. c. 9.* it is enacted, "That every justice of peace in *London* and *Westminster*, and within ten miles thereof, shall cause to be arrested and brought before him all reputed papists, (except foreigners, being merchants or menial servants to some ambassadour or publick agent, and except all such as used some trade, mystery, or some manual occupation at the time of the said act, in *London*, &c. and also except all such persons as had their dwelling in *London*, &c. within six months before the thirteenth of *February* 1688, and no dwelling elsewhere, and certified their names to the sessions before the first of *August* 1689,) and that every such justice shall tender the said declaration to every such person; and that every such person refusing the same, and afterwards remaining in *London*, &c.

[Repealed by 31 *G. 3. c. 32. § 19.* as to persons taking the oaths therein mentioned.]

"or

Popish Recusants.

... on being certified to the King's
... at the next term or sessions, as hav
... the said declaration, and neglecting to
... shall suffer as a popish recusant

A. For carrying Arms.

... it is enacted, " That any two justices
... under the said declaration to an
... or suspect, or have informatio
... or suspected to be such; and that no suc
... and not making and subscribing the sai
... before the said justices upon an
... by one authorize
... the said justices, sha
... or above the value of 5
... of any other person
... weapons as shall be allowe
... for the defence of his house or pe
... by warrant under the
... persons in the day-tim
... or his deputy, or tithing
... and horses, and seize the
... the said justices shall deliver ti
... the next quarter sessions in op
... or shall be aiding
... shall be committed
... under the hands and seals of a
... the value; and
... so as ti
... the full value thereof, to l
... and that such refusers
... shall be discharged whenever the

Of the Offence of Promoting or Professing th Popish Religion: And herein,

Of the Offence of saying or saying Mass or other Popi Service.

... it is enacted, " That every pers
... being thereof lawfully convic
... and be committed to prison
... by the space of one year, as
... the said sum of two hundr
... every person who shall willingly hear ma
... of one hundred marks, and suffer a year

Altho it is enacted by the 11 & 12 W. 3. c. 4. "That every person who shall apprehend any popish bishop, priest, or Jesuit, and prosecute him to conviction for saying mass, or exercising any other part of the function of a popish bishop or priest, shall receive 100*l.* of the sheriff; and that every such popish bishop, &c. (except, being a foreigner, he be entered in the secretary's office, and officiate only in the house of a foreign minister,) shall be adjudged to perpetual imprisonment." [Repealed by 18 G. 3. c. 60. as to popish bishops, &c. taking the oath therein appointed before they shall have been apprehended, or any prosecution commenced against them.]

2. Of giving or receiving Popish Education.

To this purpose there are several statutes, and first by the Jac. 1. c. 4. § 6, 7. it is enacted, "That if any person or persons under the king's obedience shall go or send, or cause to be sent, any child, or any other person under their or any of their government, beyond the seas out of the king's obedience, to the intent to enter into, or reside in, or repair to, any college, &c. of any popish order, profession, or calling, to be instructed, persuaded, or strengthened in the popish religion, or in any sort to profess the same; every such person so sending such child, &c. shall forfeit 100*l.*; and every such person so passing or being sent, &c. shall in respect of him or herself only, and not in respect of any of his heirs or posterity, be disabled to inherit, purchase, take, have, or enjoy any profits, hereditaments, chattels, debts, legacies, or sums of money, &c. whatsoever; and that all estates, terms, and other interests whatsoever to be made, suffered, or done, to the use or behoof of any such person, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person, shall be utterly void."

And it is further enacted by 3 Jac. 1. c. 5. § 16. "That if the children of any subject within the realm (the said children not being soldiers, mariners, merchants, or their apprentices, or factors) shall be sent or go beyond sea to prevent their good education in *England*, or for any other cause, without the licence of the king or six of his privy council, (whereof the principal secretary to be one,) under their hands and seals; that then every such child shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of or to any hereditament or chattel, till such child being of the age of eighteen years, or above, take the oath therein mentioned before some justice of peace of the county, liberty, limit, where the parent of such child did and shall inhabit; and that in the mean time the next of kin to such child, who shall be no popish recusant, shall have the said hereditaments, &c. so given, &c. until such child shall conform, &c. and take the said oath, and receive the sacrament; and after such conformity, &c. he who hath received the profits of the said hereditaments shall account for the same, and in reasonable time make payment thereof, and restore the value of

Keb. 263.
"the

" the said goods, &c.; and that whoever shall send such child
 " over seas shall forfeit 100*l.*, which by 11 & 12 *W.* 3. c. 4.
 " § 6. shall be to the sole use and benefit of the person who shall
 " discover the offence."

Also it is enacted by 3 *Car.* 1. c. 2. " That if any person under the obedience of the king shall go, or shall convey or send, or cause to be sent or conveyed, any person out of the king's dominions into any parts beyond the seas, out of the king's obedience, to the intent to enter into or be resident, or trained up in any priory, abbey, nunnery, popish university, college, or school, or house of Jesuits, priests, or in a private popish family, and shall be there by any popish person instructed, persuaded, or strengthened in the popish religion, in any sort to profess the same; or shall convey or send, or cause to be conveyed or sent, any thing towards the maintenance of any person so going or sent, and trained and instructed as is aforesaid, or under the colour of any charity towards the relief of any priory, &c. or religious house whatsoever; every person so sending, &c. any such person or thing, and every person passing or sent, being thereof convicted, &c. shall be disabled to prosecute any suit in law or equity, or to be executor or administrator to any person, or capable of any legacy or deed of gift, or to bear any office within the realm; and shall forfeit all his goods and chattels, and shall forfeit all his hereditaments, offices, and estates of freehold, during his life."

Hob. 73.
 74. *Ley*,
 59. *Tred-*
way's case.

In the construction of the 3 *Jac.* 1. c. 5. it hath been holden, that if *E. T.*, being the king's ward of lands holden of the king by knights-service in chief, die the king's ward, and it be found that *A.* and *B.* are his sisters and heirs, both of full age, and that *A.* in the lifetime of her brother departed this realm contrary to this statute, and is a nun professed; the king may retain *A.*'s moiety in his own hands till she, according to the 1 *Eliz.* c. 1. take the oath of supremacy * required on suing out livery; for the words of the statute 3 *Jac.* 1. c. 5. are, *shall take no benefit by descent, &c.* not that the party should not take by descent; and therefore the estate does not vest absolutely in *B.* the sister and next heir, but her right is to the rents and profits during the non-conformity of her sister, for which in case of common lands she might enter; but in this case the king is interested, and is not obliged to give livery to the heir, till such time as the oath of supremacy be taken.

Hob. 74.
per Hobart.

So, if such an heir, being beyond sea, should bargain and sell his lands to a stranger, the bargain in such case will prevent the next of kin, and the bargainee may take the lands out of the hands of the next of kin, in case he had entered; for the estate never vested absolutely in such next of kin; but in such case the king may refuse to give livery sued out on such bargain in the name of the heir, except the heir himself appears and takes the oath of supremacy in his proper person.

Hill.
 12 Ann.
 in *C. B.*

C. Lord Gerard in the year 1660 settled the estate in question to the use of himself and the heirs male of his body, remainder to the

he heirs male of the body of *Thomas* first Lord *Gerard*, remainder to his own right heirs. *Charles* Lord *Gerard*, upon the death of *Digny* Lord *Gerard* (only son of the said *C.*) without issue male, entered, claiming the estate as heir male of the body of *Thomas* first Lord *Gerard*, by virtue of the said limitation in the settlement; and by virtue of this title enjoyed that estate above twenty years, and during the time of his enjoyment suffered several coveries, and settled the estate upon his marriage in 1689, and died without issue in the year 1707, leaving *Philip* his only brother then surviving, who was heir male of the body of *Thomas* first Lord *Gerard*. Upon the death of Lord *Charles*, the Duchess of *Hamilton* claimed the estate as right heir of *C.* Lord *Gerard*, notwithstanding the estate-tail limited to the heirs male of the body of *Thomas* Lord *Gerard* subsisted in *Philip*, alleging, that Lord *Charles* and his brother *Philip*, being sent abroad and educated in a popish seminary, were made so utterly incapable of taking any estate, that he had the right of entry in her. It was insisted for her, that the 1 *Jac.* 1. c. 4. § 6. had so far disabled Lord *Charles* to take the estate by descent, that the recovery suffered by him was void, and that the same disability being still upon *Philip*, and there being no person in being who could take the estate-tail, the Duchess, as heir at law, must be entitled to take at present, as if the estate were actually spent. But it was resolved, that the words of the act being, that the offender shall be disabled as in respect of himself only, and not in respect of any of his heirs or posterity, inherit, purchase, &c., this qualifies and restrains the disability, so that the act does not extend beyond the person offending, beyond the time of his non-conformity; so that the act hath reserved in the offender an ability to inherit, &c. for the benefit of posterity: and this act having made no application of the prohibition during the disability, and this being a penalty inflicted for a past offence, the king is entitled to the penalty. And to create the offender a total disability would be very inconvenient; for in the case of an inheritance, it would be difficult to know when in what manner the heir should take; it could not be in the person of the ancestor, for no man can be heir of a person living; nor if there be a son under no disability who cannot take, it would be merely by construction to carry the estate over his head for the benefit of a remainder-man, who was not intended to take as long as there was any issue of a prior tenant in tail; and an heir can take himself only through his ancestors, and such as are inheritable; that this is not like the case of a monk, for in times of vacancy he was civilly dead: the 3 *Jac.* 1. c. 5. gives the perannuity the profits in cases of disabilities to the next of kin, that is not a popish recusant; and *R. Ow.* was the next protestant of kin; the 3 *Car.* 1. c. 2. does not repeal the 1 *Jac.* 1. c. 4. but was intended to explain, amend, and enforce it; the 1 *Jac.* 1. c. 4. was intended to show the penalties of that act were to arise; the 3 *Car.* 1. c. 2. has provided, that it shall be upon conviction, and expressly makes a forfeiture for life, and a restitution in case of conformity, which the former act was silent; so that if the former act were

and affirmed in the House of Lords; *Thornby v. Fleetwood*, alias the Duchess of *Hamilton's* case. *Str.* 318. *Comyns*, 207. pl. 124. *Andr.* 104. 10 Mod. 113.

to be put in execution, under the explanation of 3 *Car. 1. c. 2.* there being no conviction in the case, the Duchefs could have no title, but the land on conviction would be forfeited for life, which must be to the king.

3. Of buying or selling Popish Books.

By the 3 *Jac. 1. c. 5. § 25.* it is enacted, " That no person shall bring from beyond the seas, nor shall print, buy, or sell any popish primers, ladies' psalters, manuals, rosaries, popish catechisms, missals, breviaries, portals, legends, and lives of saints, containing superstitious matter, printed or written in any language whatsoever, nor any other superstitious books printed or written in the *English* tongue, on pain of forfeiting forty shillings for every book, &c. and the books to be burnt."

4. Of keeping School.

[Repealed
by 31 G. 3.
c. 32. § 13.
as to per-
sons taking
the oaths
and sub-
scribing the
declaration therein appointed.

By 11 & 12 *W. 3. c. 4. § 3.* it is enacted, " That if any papist, or person making profession of the popish religion, shall be convicted of keeping school, or taking upon themselves the education or government, or boarding of youth, in any place within the realm or the dominions thereunto belonging, they shall be adjudged to perpetual imprisonment."

Roman Catholics, however, are restrained from holding the mastership of any college or school of royal foundation, or of any endowed college or school, and from keeping a school in either of the universities: neither is any catholick school-master to educate in his school the child of any protestant father; nor is any school-master or mistress to keep a school until his or her name shall have been registered at the quarter or general sessions of the peace for the county, division, or place wherein such school shall be situated, by the clerk of the peace. § 14, 15, 16.]

5. Of withholding a competent Maintenance from a Protestant Child.

By the 11 & 12 *W. 3. c. 4.* it is enacted, " That if any popish parent, in order to compel a protestant child to a change of religion, shall refuse to allow such child a sufficient maintenance, suitable to the degree and ability of such parent, and to the age and education of such child, the Lord Chancellour upon complaint may make such order therein as shall be agreeable to the intent of the said act."

6. Of the Disability of those professing the Popish Religion to be present to a Church*.

Precedents
of a title
made under
these sta-

By the 3 *Jac. 1. c. 5. § 18, 19, 20, 21.* popish recusants convicted are disabled to present to a church; and by the 1 *W. & M. c. 26.* this disability is extended to persons refusing to make the declaration

[* This disability from presenting to advowsons is not taken away by any of the acts which have been passed in favour of the Catholics; and it is complained of as a hardship peculiar to them, all other non-conformists, even Jews, having the full enjoyment of the right of presentation. See Mr. Butler's

Declaration against popery, mentioned in 30 *Car. 2. stat. 2.* and by the said statute 1 *W. & M. c. 26. § 4.* it is enacted, " That if the trustee, mortgagee, or grantee of any avoidance, whereof the trust shall be for any popish recusant convict, shall present without giving notice in writing of the avoidance to the university, &c. within three months after the avoidance, he forfeits 500*l.*"

tates.
2 Lutw.
1101. &
vide 3 Ley.
332. Lutw.
1117.

And by the 12 *Ann. c. 14.* this disability is extended to all persons making profession of the popish religion; to which purpose it is enacted, " That every papist or person making profession of the popish religion, &c. and every mortgagee, trustee, or person any ways intrusted by or for such papist, &c. with or without writing, shall be disabled to present to any benefice, school, or hospital, &c., or to grant any avoidance of any benefice, prebend, or ecclesiastical living, and that in all such cases the universities shall present."

Also, by force of the said statute, " The ordinary may tender the declaration against transubstantiation to any reputed papist making a presentation, and upon a refusal to take the same the presentation shall be void: also, the ordinary may examine every presentee upon oath, whether the person who presented him be the true patron, or only a trustee; and the court, wherein a *quare impedit* shall be brought, may in like manner examine the parties, and a bill may be brought in any court of equity to discover such secret trusts, &c., and the answer of such persons, upon any such examination or bill, shall be good evidence against such patron, in respect of such a presentation, but not as to any other purpose."

In the construction of the 3 *Jac. 1. c. 5.* the following points, which are said to be likewise applicable to the 1 *W. & M. c. 26.* and 12 *Ann. c. 14.* have been holden.

Hawk. P.C.
c. 15. § 8.

That where a presentment is *pro hac vice* vested in the university, by reason of the patron's being a popish recusant at the time when the church became void, it shall not be devested again by his conforming himself to the church.

10 Co. 57.
b.

That such a patron is only disabled to present, and that he continues patron as to all other purposes, and therefore that he shall confirm the leases of the incumbent, &c.

Cawley,
230.

note on Co. Lit. 391. a.—It is indeed remarkable, that a provision so essential to the security of the establishment, and to the integrity of the doctrines it maintains, should be confined only to one description of non-conformists. To leave the right of presentation in the hands of men who are inimical to the church, is, in truth, to create an interest in the church against the church. It has the pernicious tendency too of setting the private interests of the individual in opposition to the superior interests of the church; and of tempting the clergy to temporize with the errors of those to whom they look up for preferment. For is it probable, that a bold and honest zeal for the doctrines and discipline of our establishment will recommend to a patron, who dissents from the one, or disapproves of the other? In the presence of such a person; we must expect either a cold friend, or a secret enemy to our church: one, who can be silent, where he ought to object; passive, when he ought to resist; or, one who can subscribe to doctrines he deems erroneous, and can pledge himself to the maintenance of a system it is his wish to subvert. By this means, the effect of those provisions which have been established for securing an orthodox clergy, and which, it is urged, render it unnecessary to lay dissenters under any restriction in this respect, will in a great measure be done away: it is to little purpose to insist upon a profession of conformity, if we allow a temptation to schism; to exact a vow of chastity, if we tolerate seduction.]

Jon. 19, 20.

That such a person, by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years, *bonâ fide*, and for good consideration.

Hob. 125.

Winch. 7,

21.

Moor, 372.

Jon. 20.

That if an advowson or avoidance belonging to such a person come into the king's hands by reason of an outlawry or conviction of recusancy, &c., the king, and not the university, shall present.

On the statute 12 *Ann. c. 14.* it was resolved by my Lord Chancellour *Talbot*, in the case of Mr. *Brett*, who was presented by the university of *Oxford* to a living belonging to Mr. *Fitzberbert* of *Swinerton* in *Staffordshire*, that a bill founded on this statute cannot be for relief, but only for a discovery.

Cottington

v. Fletcher,

2 Atk. 155.

[So, it hath been resolved upon the same statute, that it doth not make the whole trust void, but only the turn upon an avoidance, so that if the party conforms before any avoidance happens, nothing can vest in the universities.]

By the 11 *G. 2. c. 17.*, reciting the 3 *Jac. 1. c. 5.* and 1 *W. & M. c. 26.*, and that whereas for the better discovery of all secret trusts and fraudulent conveyances made by papists, or persons making profession of the popish religion, of their advowsons and right of presentation, nomination, and donation to any benefices or ecclesiastical livings, several provisions were made by the act 12 *Ann. c. 14.* which have been fraudulently evaded by persons obtaining from such papists, without a full and valuable consideration, grants of such advowsons, and right of presentation, nomination, and donation, upon confidence only that such grantees will, at the request of such papists, present to such benefices or ecclesiastical livings clerks nominated by such papists, who have been presented accordingly, contrary to the true intent and meaning of the said act, and to the great hurt of the protestant interest of this kingdom; it is therefore enacted, " That every grant to be made from " and after the 6th day of *May* 1738, of any advowson or right " of presentation, collation, nomination, or donation of or to any " benefice, prebend, or ecclesiastical living, school, hospital, or do- " native, and every grant of any avoidance thereof by any papist, " or person making profession of the popish religion, or any mort- " gagee, trustee, or person any ways intrusted directly or indirec- " ly, mediately or immediately, by or for any such papist, or person " making profession of the popish religion, whether such trust be " declared in writing or not, shall be null and void; unless such " grant shall be made *bonâ fide*, and for a full and valuable consi- " deration, to and for a protestant purchaser, and merely and only " for the benefit of a protestant; and that every such grantee, or " person claiming under any such grant, shall be deemed to be a " trustee for a papist, or person professing the popish religion, as " aforesaid, within the true intent and meaning of the said act; " and that all such grantees, or persons claiming under such grants, " and their presentees, shall be compelled to make such discovery " relating to such grants and presentations made thereupon, and " by such methods as in and by the said act 12 *Ann. c. 14.* are " directed in the case of trustees of papists, or persons professing " the

" the popish religion, and that every devise to be made from and
 " after the said sixth of *May* by any papist, or person professing
 " the popish religion, of any such advowson or right of presenta-
 " tion, collation, nomination, or donation, or any such avoidance,
 " with intent to secure the benefit thereof to the heirs or family of
 " such papist or person professing the popish religion, shall be null
 " and void, and that all such devisees and their presentees shall
 " in like manner, and by such methods, be compelled to discover
 " whether, to the best of their knowledge and belief, such devisees
 " were not made with the said intent."

7. Of their Disability to purchase.

The statutes relating to estates conveyed by or to papists, and the disabilities they are under to take by purchase, &c. are the 11 & 12 *W. 3. c. 4.* 3 *G. 1. c. 18.* and 11 *G. 2. c. 17.*

By the 11 & 12 *W. 3. c. 4.* it is enacted, " That from and after the 29th day of *September*, which shall be in the year of our Lord 1700, if any person educated in the popish religion, or professing the same, shall not, within six months after he or she shall attain the age of eighteen years, take the oaths of allegiance and supremacy, and also subscribe the declaration set down and expressed in an act of parliament made the 30 *Car. 2. stat. 2.* entitled, *An act for the more effectual preserving the king's person and government, by disabling papists from sitting in either house of parliament*, to be by him or her made, repeated, or subscribed in the courts of Chancery or King's Bench, or quarter sessions of the county where such person shall reside; every such person shall, in respect of him or herself only, and not for or in respect of any of his or her heirs or posterity, be disabled or made incapable to inherit or take by descent, devise, or limitation in possession, reversion, or remainder, any lands, tenements, or hereditaments within the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*; and that during the life of such person, or until he or she do take the said oaths, and make, repeat, and subscribe the said declaration in manner as aforesaid, the next of his or her kindred, which shall be a protestant, shall have and enjoy the said lands, tenements, and hereditaments, without being accountable for the profits by him or her received during such enjoyment thereof, as aforesaid; but in case of any wilful waste committed on the said lands, tenements, or hereditaments, by the person so having or enjoying the same, or any other, by his or her licence or authority, the party disabled, his or her executors and administrators, shall and may recover treble damages for the same against the person committing such waste, his or her executors or administrators, by action of debt in any of his Majesty's courts of record at *Westminster*; and that from and after the 10th day of *April* 1700, every papist, or person making profession of the popish religion, shall be disabled and is hereby made incapable to purchase, either in his or her own name, or in the name of

11 & 12
W. 3. c. 4.
 [Repeated
 by 18 *G. 3.*
c. 60. as to
 all papists
 or persons
 professing
 the popish
 religion,
 claiming
 under titles
 not then to-
 fore litigat-
 ed, who
 within six
 months after
 the act
 passed, or
 their com-
 ing of age,
 should take
 the oath
 thereby pre-
 scribed.—
 Upon this
 act a case
 was decided
 in Chancery,
 on the 18th
 December
 1783, under
 the name of
Bunting v.
Williamson.
 In that case,
 a bill had
 been filed,
 claiming an
 estate given
 to a person
 professing
 the popish
 religion, by
 will, alleg-
 ing, the in-
 capacity oc-

called by the act of 11 & 12 W. 3. The testator died many years before, and after his death, a suit had been instituted by another person, who claimed as his heir at law, and

"any other person or persons to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms, or hereditaments, within the kingdom of *England*, dominion of *Wales*, and town of *Berwick-upon-Tweed*; and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after the said 10th day of *April*, to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon any trust or confidence mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void and of none effect, to all intents, constructions, and purposes whatsoever."

that suit was depending at the time when this statute of 18 G. 3. was passed; but was afterwards dismissed for want of prosecution. The plaintiff filed his bill, some time after the act, claiming in right of his wife, as heir at law. The defendants pleaded their title under the testator's will; and that the defendant, who was beneficially interested, having or claiming the estate under that will, had taken the oath prescribed by the act, and concluded with an averment, that the title had not been before litigated by the plaintiff, or any one under whom he claimed. The plaintiffs, on argument of the plea, contended, that the words *not hitherto litigated*, extended to the case then before the court, because the title had been litigated, and was in litigation at the time the act passed. But the Lords Commissioners, Ashurst and Hotham, were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any person, who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation: and the plea was allowed. Co. Lit. last edit. 391. a. note 2.—Note, The oath prescribed by the 18 G. 3. c. 6., and that prescribed by the 31 G. 3. c. 32. are different. As the last act was originally framed, and as it stood, when, having past the Commons, it was brought into the House of Lords, the first clause in it directed, that the oath contained in the act of the 18th year of the reign of his present Majesty should be taken no longer; but that the oath appointed by the bill should, in future, be administered in its stead, and should give the same benefits and advantages, and should operate to the same effects and purposes, as the oath contained in the 18th of his present Majesty. This clause was altered in the House of Lords to the form in which it now stands. It does not express, that the oath contained in it shall entitle the persons taking it to the benefits of the act of the 18th of his present Majesty: it only expresses, that *it shall be lawful for catholicks to take the oath of the 31st of his present Majesty at the places and times, and in manner therein mentioned*. Thus, it is very uncertain, whether persons taking only the oath prescribed by the 31st of his present Majesty will be entitled to the benefit of the act of the 18th of his present Majesty. It seems therefore advisable for every Roman catholick, who wishes to be secure in the enjoyment of his landed property, to take both the declaration and oath prescribed by the act of the 31st, and the oath prescribed by the 18th of his present Majesty. *Ibid.*]

3 G. 1. c. 18. (a) *Viz.* An act passed in the sessions before, entitled, *An act to oblige papists to register their names and real estates.*

By the 3 G. 1. c. 18. reciting, that some doubts have arisen upon the (a) act therein recited, as also upon one other act made and passed in the parliament held in the 11 & 12 W. 3. c. 4. entitled, "*An act for the further preventing the growth of popery*," and upon another act made in the 1 Jac. 1. c. 4. for the due execution of the statutes against Jesuits, seminary priests, recusants, and other acts made against papists and popish recusants touching the sale of the real estates of persons professing the popish religion, or incurring the disabilities and incapacities in the said acts mentioned, it is enacted, "That no sale for a full and valuable consideration of any manors, messuages, lands, tenements, or hereditaments, or of any interest therein by any person or persons, being reputed owner or owners, or in the possession or receipt of the rents or profits thereof, heretofore made, or hereafter to be made, to or for any protestant purchaser and purchasers, and merely and only for the benefit of protestants, shall be avoided or impeached for or by reason or upon pretence of any of the disabilities or incapacities in the said acts or any of them contained, incurred, or supposed to be incurred, by any of the persons making or join-

"ing

ing in such sale, or by any other person or persons, from or through whom the title to such manors, &c. is or shall be derived, or supposed to be derived, unless before such sale the person entitled to take advantage of such disability or incapacity shall have recovered such manors, messuages, lands, tenements, and hereditaments by reason of such disability or incapacity, and have entered such claim in open court at the general sessions of the peace for the county, city, riding, or division wherein such manors, messuages, lands, tenements, or hereditaments lie or arise, and *bonâ fide*, and with due diligence, pursued his remedy in a proper course of justice for the recovery thereof.

“ Provided nevertheless, that whereas it was amongst other things enacted, by the said 11 & 12 W. 3. c. 4. that from and after the tenth day of *April*, which should be in the year 1700, every papist, or person making profession of the popish religion, should be disabled, and was thereby made incapable to purchase, either in his or her own name, or in the name of any other person or persons to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms, or hereditaments, within the kingdom of *England*, dominion of *Wales*, and town of *Berwick-upon-Tweed*; and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after the said 10th day of *April* to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person or persons, should be utterly void and of no effect, to all intents, constructions, and purposes whatsoever: It is hereby declared and enacted, that the said recited part of the said act of parliament shall not be hereby altered or repealed, but the same shall be and remain in full force as if this act had never been made.”

And it is further enacted by the authority aforesaid, “ That from and after the 29th of *September* 1717, no manner of lands, tenements, hereditaments, or any interest therein, or rent or profit thereout, shall pass, alter, or change from any papist, or person professing the popish religion, by any deed or will, except such deed within six months after the date, and such will within six months after the death of the testator, be enrolled in one of the king’s courts of record at *Westminster*, or else within the same county or counties wherein the manors, lands, and tenements lie, by the *custos rotulorum* and two justices of the peace and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one.”

The 11 G. 2. c. 17. reciting that “ Whereas persons professing or educated in the popish religion are by divers acts of parliament subjected to several disabilities and incapacities, which may affect persons conforming from the popish to the protestant religion, and whereas many persons have already conformed to the protestant religion, and are willing to submit to his Ma-

[Repealed absolutely by 31 G. 3. c. 32. § 21.]

"such person and persons shall for ever afterwards be disabled from, and be incapable of, having or enjoying any benefit, privilege, or advantage of this act, and shall from thenceforth be liable to the same disabilities, incapacities, and forfeitures as if he, she, or they had not taken the said oaths and subscribed the declaration as aforesaid.

"Provided always, that nothing in this act contained shall extend to take away or prejudice the right of any person entitled to any remainder or reversion in any such manors, messuages, lands, tenements, or hereditaments, in case such person shall pursue his or her said right by some action or suit, to be commenced within the space of twelve kalendar months next after the precedent estate or estates, on which such remainder or reversion depends and is expectant, shall be determined; or within twelve kalendar months from and after the 29th of *September* 1738, if such precedent estate or estates be already determined by the death or deaths of any person or persons whose deaths have been concealed from or not known to the person entitled to such remainder or reversion, by reason of their having been buried beyond the seas, or in a private and clandestine manner at home, and shall prosecute such action or suit with due diligence."

On the first of these statutes there have been the following cases and resolutions.

John Roper Esq. being seised in fee of several manors, lands, &c. by indentures of lease and release, bearing date respectively the 17th and 18th of *January* 1708, granted and conveyed the same to *William Constable*, *Richard Snow*, and *Daniel Hickman*, and their heirs, in trust to sell the same, and out of the purchase-money and rents till sale to pay a debt of 4000*l.* due to *E.* and *H. W.* by mortgage of the premises, with interest, and after satisfaction thereof, then in trust for payment of the debts mentioned in the schedule annexed to the indenture of release; and the overplus of the money so to be raised, to be paid as the said *John Roper* by any attested writing or by his will should appoint; and for want of such appointment, in trust for the benefit of the said *John Roper* and his heirs. The 5th of *March* 1708, the said *John Roper* made his will, and after reciting the said lease and release, and the power reserved to him over the surplus of the said estate, he bequeathed several pecuniary legacies to his relations, and the residue of all his real and personal estate he gave to *William Constable* and *Thomas Radclyffe*, and to *Robert Hewett* and *Daniel Hickman*, and to their heirs and assigns for ever, and appointed them joint executors: the 1st of *April* 1709, he added a codicil to his will, and thereby gave the further several legacies therein mentioned, and all the remainder, whether in lands or personal estate, he gave to his executors *Mr. Radclyffe* and *Mr. Constable*. The said *John Roper* died soon after; and *Mr. Radclyffe* and *Mr. Constable* brought their bill in Chancery against *Edward Roper* Esq. the heir at law of the said *John Roper*, and also against *Hickman*, *Hewett*, *Snow* and others, to have the trust-estate

Roper v.
Radclyffe,
Hil. 1713.
in Cam.
9 Mod. 182.
S. C. 1 Br.
P. C. 450.
S. C.

(a) But it seems, that where lands are devised to or vested in trustees, to be sold for payment of particular sums to several people, some of whom happen to be papists, that this act does not prevent such papists from taking the particular sums or legacies intended for them; because they cannot insist upon paying off the other incumbrances, and holding the estate, as a person can do to whom the residue of the purchase-money is devised. [A fortiori then it does not prevent a papist, who is a creditor, from receiving his debt out of money arising from the sale of an estate by the appointment of a will. *Foone v. Blount*, Cowp. Rep. 464.]

sold, and for an account of the profits, and after the debts and legacies paid, to have the surplus money arising by sale equally divided between the plaintiffs, according to the said codicil. The said *Edward Roper* by his answer insisted, that as heir at law to the testator he was entitled to all such real estate as was undisposed of by him, and that *Mr. Radclyffe* and *Mr. Constable* were then and at the testator's decease papists, and as such, by 11 & 12 W. 3. c. 4. were incapable of purchasing any manors, lands, profits out of lands, &c. The said *Hewett* and *Hickman* by their answer insisted, that the real estate devised by the said will ought to be considered as the remaining part of the testator's lands, (after a sufficient part sold for payment of debts and legacies,) and not as a personal estate, and that so much only ought to be sold as would be sufficient to pay the debts; and that in case *Mr. Radclyffe* and *Mr. Constable* were incapable of taking them; they as protestants claimed the said real estate, as being the only devisees capable to take the same: they also insisted, that the codicil, with reference to the devise of the remainder of the testator's lands, did not control the devise thereof mentioned in the will; for that if the plaintiffs were incapable to take the lands as purchasers by the devise, they were to be esteemed as persons not *in esse*, and that the codicil as to the lands was void; but if the plaintiffs were capable, yet such devise did not give the remainder of the premises to them but for their lives, and that the reversion in fee belonged to them the said *Hewett* and *Hickman*; and they brought a cross-bill, insisting thereby on the same matters; and the legatees brought a bill for payment of their legacies. The 27th of June 1712, the said causes came on to be heard before the Lord Chancellour *Harcourt*, who desired to have the assistance of the Judges; and a case was made and argued before my Lord Chancellour *Parker*, *Trevor* Chief Justice of C. B., Justice *Powel*, and the Master of the Rolls, and after time taken to consider of the case, my Lord Chancellour, *Trevor* C. J., the Master of the Rolls, and Justice *Powel* were of opinion, that the devise of the surplus of the purchase-money (after debts and legacies paid) to *Mr. Radclyffe* and *Mr. Constable* was good, notwithstanding the said disabling act; the surplus-money being a personal interest in them, and not made void by the words or intention of that statute; and as to *Hewett* and *Hickman*, my Lord Chancellour was of opinion, that the first codicil was a revocation of the will, as to the residue of the real and personal estate. *Mr. Roper* appealed to the House of Lords, and it was there ordered, before the appeal was determined, that the estates should be sold, and all debts and legacies paid; which was accordingly done; but afterwards the Lords reversed the decree, principally for this reason, that (a) if the devise of the residue to the plaintiffs was good, they would in equity be entitled to pay off the antecedent debts and legacies, and when that was done, keep the estate, which would be a means of evading the statutes, and enabling a papist to take an estate contrary to the intention of them. It was also resolved in this case, that a devise is a purchase within the meaning of the act.

The Earl of *Derwentwater* was tenant in tail, with remainder in fee to himself, and intending to marry Sir *John Webb's* daughter, he, by advice of counsel, suffered a common recovery without declaring any uses, it being intended, that he should thereby become tenant in fee, and be enabled to make a proper settlement. Accordingly, by indentures of lease and release, he settled his estate to the use of himself for life; remainder to trustees for preserving contingent uses; remainder in tail successively to the first and other sons of the intended marriage, with remainders over. The marriage took effect, and there was issue a son and a daughter. The said earl was attainted of high treason on account of the *Preston* rebellion, and was executed; and by an act made thereupon, all the forfeiting persons lands were vested in commissioners for the use of the publick; and it was expressly provided, that where the forfeiting person was seised of an estate-tail at the time of the forfeitures, the same should be vested in the commissioners as an absolute fee discharged of all remainders and reversions. The commissioners of forfeitures, on a claim exhibited before them in the name of the said earl's son, determined, that the whole estate was in them on this foundation, that the earl continued tenant in tail notwithstanding the recovery, and, consequently, nothing more than an estate for his own life past by the lease and release. The reason they went upon was, that if by suffering a common recovery he could turn his estate-tail into a fee, then he would gain a new estate by purchase, which they apprehended he, being a papist, was disabled to do by the statute 11 & 12 *W.* 3. c. 4. But the majority of the judges, upon an appeal from the decree of the commissioners, were of a contrary opinion, and held, that this was only a new-modelling of the estate, and not a purchase or acquisition within the act; and that the earl was capable of taking a new fee at least for the benefit of his heirs and posterity, and that he was capable of settling the same by lease and release; and therefore allowed of the son's claim.

Lord Derwentwater's case, upon an appeal to the Lords Delegates from the judgment of the commissioners for forfeited estates. *Hill. 6 O. 1. 9 Mod. 172. S. C.*

It was likewise resolved, by the delegates appointed to hear appeals from the determinations of the commissioners for the estates forfeited in the year 1716, that a papist may be a trustee for a protestant, notwithstanding the statute 11 & 12 *W.* 3. c. 4.

Anne Stephenson had two grandchildren, one the plaintiff *Hill*, the other *Frances* the wife of the defendant *Filkins*, who was educated by her in the popish religion: the grandmother, by her will made in the year 1716, devised the lands in question to trustees, in trust to be sold for the payment of her debts and legacies, and the residue of the money, arising by such sale, she devised to her said grand-daughter, *Frances*, when she should attain her age of twenty-one years, or be married with the consent of the said trustees, and soon after died. The said *Frances*, at the age of fifteen, was married to *Filkins* according to the ceremony and usage of the church of *Rome*, and a week afterward by a minister of the church of *England*: at the age of eighteen she conformed according to the directions of the statute: it was held, that she was within the first clause, and that a devise to a papist under the age of eighteen is

Hill v. Filkins, Trin. 11 G. 1. 2 P. Wms. 9. S. C.

good, if he conforms within six months after he comes to that age; and the age of eighteen was a proper period for them to make their election, whether they would conform or not; and the bill exhibited by the protestant heir was dismissed with costs.

Carrick v. Errington, Trin. 9 G. 1. in Canc. 2 P. Wms. 361. S. C. 9 Mod. 33. S. C. 2 Eq. Abr. 623. pl. 13. 624. fol. 20. 625. pl. 21, 22, 23. S. C.

J. S., a papist, made a settlement of his estate to trustees, to the use of the trustees and their heirs, in trust for *A.* for life; remainder to the said trustees to preserve contingent remainders; remainder to the first and every other son of *A.*, and for default of such issue, then in trust for *B.* and his issue. *A.* was a papist and *B.* a protestant. *B.* exhibited his bill in Chancery, suggesting that *A.* was a papist and had no son, and that therefore the trustees might account to him for the rents and profits; he also made the heir at law defendant; and on hearing this cause before the Lord *Macclesfield*, and afterwards by the Lord *King*, they both held, that though the trust to *A.* was void, he being a papist, yet that notwithstanding, the legal estate was still in the trustees, because they were trustees not only for the papist, but also for *B.* the protestant, and for the sons of *A.*, who were yet unborn; and as they were trustees to preserve contingent remainders for such sons who might be protestants, they thought that the estate should remain in the trustees for that purpose; and they held that the heir at law was entitled to receive the profits during the life of *A.* as a trust undisposed of, but that *B.* the remainder-man could have no right till the death of *A.*, without a son capable of taking. And this decree was affirmed in the House of Lords.

Marwood v. Dorrel, Hil. 8 G. 2. in B. R. Ca. temp. Hardw. 91. S. C.

The case upon a special verdict in ejectment was: *Thomas Dorrel* had one brother and four sisters, and being seised in fee, by will 4 Decemb. 1703, devised the lands in question to trustees, to the use of them and their heirs, in trust for his first and every other son in tail male; and for want of such issue, remainder to his brother *Arthur* for life, remainder to his first and every other son in tail male; and for want of such issue, that then the trustees should stand and be seised for the sole and proper use and benefit of such eldest and first son lawfully begotten, or to be begotten of *John Dorrel*, as shall not be heir at law and inheritor to the said *John Dorrel*, and the heirs of his body; and for default of such issue by him, remainder to the third, fourth, and fifth, and every other son of the said *John Dorrel*, and the heirs of their respective bodies. The trustees, by a clause in the will, were empowered, by the rents and profits of the estate, or by mortgage and sale, to raise so much money as would satisfy the testator's debts: *Thomas* and *Arthur* both died without issue, *John Dorrel* is living, and has seven sons; *George* the defendant is the second son; all the sons of *John* are papists, and educated in the popish religion, except his younger son, who is too young to be said, as yet, to be of any religion: *George Dorrel* was under eighteen years of age when the limitation by the devise fell upon him, but is now above eighteen years, and has not taken the oaths directed by 11 & 12 W. 3. c. 4., and is married, and has now two sons very young, for whom, as well as for his wife, he has made a settlement of these lands; the four sisters of *Thomas Dorrel* are lessors of the plaintiff, as heirs at law; and the question is, Whether

George

George the son of *Arthur*, or the heirs at law, be entitled to the lands? For the plaintiffs, the heirs at law, it was urged, 1st, That *George* is a papist, and that papists who shall refuse, above six months after they arrive at the age of eighteen, to take the oaths of allegiance, &c. are by the said statute expressly disabled from purchasing; and therefore as a devise is a purchase, and so held *Co. Lit.* 18., and by the Lords, in the case of *Roper* and *Radclyffe*, consequently, *George Dorrel* takes nothing by it. 2^{dly}, That the devise was void for uncertainty, being to such eldest and first son of *J. D.* as shall not be heir at law to him; but, as no one can say who will be heir to *J. D.*, so it is impossible to say who will not, for *nemo est heres viventis*; and he who is to be heir is not to take, so that none but a son who will not be heir can take; for both descriptions must coincide. *Hob.* 29. *Hardwicke*, Ch. J. breaking the case said, two objections have been made to the defendant's title; 1st, That the limitation, under which he claims, is void for the uncertainty of the description. 2^{dly}, That supposing the description to be certain enough, yet by 11 & 12 *W.* 3. 4. the defendant is disabled from taking the estate, as being a papist. There seems at present to be a good deal of weight in the first objection, and yet it may possibly be reduced to a certainty, and if so, may be made good. And it seems natural to imagine, that by the words of the will, the testator intended the second son of *John Dorrel* should take, and the rather, as the testator has made the next limitation to the third, fourth, and fifth sons, &c. of the said *John Dorrel*. But, if the second son cannot take, yet, if the third, &c. sons are well described, the daughters of *Thomas* cannot recover; and at present they seem to be certainly described. As to the second objection, I think myself bound by the determination of the House of Lords in the case of *Roper* and *Radclyffe*, that the word *purchase* extends to a devise, and therefore that a papist is incapable of taking an estate by will. But yet, be the defendant's title as it will, the plaintiff must recover on his own strength, and not on the weakness of the defendant's title; and my greatest doubt is this, the devise here is to trustees to the use of them and their heirs, &c. I think this would clearly be a devise to the use of the trustees, though the clause of raising money by rents and profits was omitted; so here is a devise to trustees, in trust not only for the second son of *John Dorrel*, but for all other his sons now living, one of which is not found to be a papist. It hath been said indeed, that this devise being for the benefit of papists, the trust itself is void; but the question is, if the entire trust should not be for the benefit of papists? In the present case, the youngest son of *John Dorrel* may be able to take, for ought appears to the contrary; and therefore I think that this latter part of the trust being lawful, will support the legal estate in the trustees. And here he put the case *supra* of *Carrick v. Errington*, and said, that, according to the resolution in that case, the lands in question cannot be in the heirs at law, but in the trustees; because here is a trust for a son of *John Dorrel*, who was not a papist, as well as for other children yet unborn; so that the plaintiffs have no title

to recover in this action, but have mistaken their remedy; for if they have any, it seems to be by bill in equity against the trustees for an account of the profits. And it is certain, in the above-mentioned case, that the estate could not vest in the remainderman, because he being then in by purchase, it could never be afterwards devised for the benefit of such child as *A.* should happen to have: but, he said, that he did not give this as his absolute opinion, but only to point out the difficulties which stuck with the court: it was adjourned, and no farther proceedings were had therein.

*Peigham v.
Fletcher,
Mich. 1719.*

A mortgage was made to a papist, who assigned to a protestant for a full consideration: an ejectment was brought against the assignee by a subsequent mortgagee, who recovered by reason of the disability of the first mortgagee: all this appeared upon a bill brought in Chancery; and my Lord Chancellor was of opinion, that a mortgage to a papist is void: but in this case the assignment to the protestant, and the trial in ejectment, were both before the 3 G. 1. c. 18. which, were it otherwise, would, it seems, have made an alteration.

*On Lord
Dover's
will.*

In a case which came on before my Lord King in the court of Chancery, it appeared, that my Lord *Dover* was possessed of a long term for years, and made his will, and his lady, who was a papist, executrix thereof. It was resolved by my Lord Chancellor, that, notwithstanding the disabling act 11 G. 12 W. 3. c. 4., the term vested absolutely in her, and that this was not a purchase within that act; and he said, that a papist may be tenant in dower, or by the curtesy; because in all these cases it is by operation of law, and not by any act of the party, that the estate comes to him.

*Malcom v.
Bringlee,
Pasch.
1718, in
C. B.*

It hath been adjudged, that a papist may devise to a protestant; in which case it was agreed, that where an ancestor dies seised of an estate of inheritance, it descends upon and vests in his heir, (though a papist) for the benefit of his heirs, and that the next protestant a-kin has only a right to the perception of the profits during the nonconformity of the heir.

*Smith v.
Read, Trin.
12 G. 2.
1 Atk. 326.
S. C.*

Upon the marriage of Mr. *Paine* with one Mrs. *Gage*, lands in the county of *Surrey* were settled and conveyed to the use of the husband and wife for their lives, and the life of the survivor of them; then to the use of the first and every other son in tail, remainder to the right heirs of the husband: the marriage took effect, but Mr. *Paine* the husband died in the lifetime of Mrs. *Paine*, without leaving issue, having first devised all his lands to his wife and her heirs. In 1730, Mrs. *Paine*, the wife, devised all her real estate to the defendant, subject to a few legacies mentioned in her will, but lived and died a papist; but that being difficult to prove at law, the plaintiff Mr. *Smith* who had married *Eliz. Paine*, heir at law to Mr. *Paine*, he and his wife filed their bill against the defendant to set aside the marriage-settlement and will of Mr. *Paine* the husband, under which Mrs. *Paine* claimed; and, in particular, prayed, that the defendant might discover whether Mrs. *Paine* the wife, under whose will he claimed, was a papist or not?

not? To which the defendant pleaded the statute of 11 & 12 W. 3. c. 4. Upon arguing this plea, it was insisted upon for the defendant, that it was a standing rule in this court, that no person was bound to discover what might subject him to the penalty of an act of parliament; that the statute of 11 & 12 W. 3. c. 4. was a penal law, and the party, who would take advantage of such law, would never be assisted in a court of equity, which never assists a forfeiture; he, who would claim any thing forfeited, must make out the forfeiture himself; for no person shall be obliged to discover a fact that would be a forfeiture of his own estate. If a copyholder commits waste, it is a forfeiture of his estate to the lord of the manor; but, if the lord of the manor comes into this court for a discovery, whether the copyholder has been guilty of waste or not, the copyholder is not bound to answer; for no law in the world obliges a man to accuse himself: if an estate is given to a woman *durante viduitate*, she is not bound to discover whether she is married or not; because the discovery of that fact might be the loss of her estate. That disabilities and forfeitures were of the same nature; that a total incapacity or disability to hold at all (which is the case of papists) was certainly as much a penalty, as a forfeiture of an estate which the party before was capable of holding; that as Mrs. Paine would not have been obliged in her lifetime to discover whether she was a papist or not, the defendant, who claims under her, ought not to be obliged to discover it. On the other hand, it was insisted by the counsel for the plaintiff, that it was not their business to examine, whether the acts of parliament made against papists were hard laws or not; they were laws, and that was sufficient for their purpose: that this was not the case of a forfeiture, but it was to discover a fact, which, if true, the estate was never in Mrs. Paine, because the act of parliament makes all papists absolutely incapable of being purchasers; if she was a papist, the estate never vested in her; and as she was not capable of holding it, she could not give it away to the defendant, therefore could never forfeit the estate; for no person can be said to forfeit an estate he never had. An alien is incapable of holding lands at common law, yet he is obliged to discover whether he is an alien or not; and his discovery of that fact, whether he is so or not, can never be a forfeiture of his estate, because he never had a right to it: so, in case of a bastard who is *nullius filius*, and incapable of claiming lands by descent, he shall discover whether he is so or not, for the same reason: so, a person claiming under a bankrupt, whose goods are vested in the assignees of the commission of bankruptcy for the benefit of creditors, must discover whether the person, under whom he claims, was a bankrupt or not at the time of the conveyance: That all these cases depend upon the same reason, and were no forfeitures, because the estates were never in them; so, if Mrs. Paine was a papist, she was incapable of having the estate herself, and could not give it away; and therefore the defendant could never forfeit it, because the estate was never in him. But my Lord Hardwicke was of opinion, that the defendant was not obliged to discover whether Mrs. Paine was a papist or not;

[(a) So, in *Harrison v. Southcote*, the same plea was allowed to a bill brought against a purchaser to discover, whether the person, under whom he derived title, were a papist. 1 Atk. 528. 2 Ves. 389. S. C.]

not; that there is no rule better established in this court, than that a man shall not be obliged to answer to what may subject him to the penalty of an act of parliament. No person can doubt whether this act is not a penal law, and whether the clauses relating to papists are not disabilities or incapacities, imposed by way of penalty upon all persons exercising that religion. It is objected, that this is not the case of a forfeiture, because the estate was never vested, and therefore can never be devested; yet it all falls under the same reason; and an incapacity or disability to hold at all by act of parliament, is certainly as much a penalty, as the forfeiture of an estate by a person who had a right to enjoy it before the forfeiture. That if a bill is brought against the person for a discovery whether he is a papist or not, he is not bound to discover; and where is the difference between him and the person claiming under him? Here is a disability imposed by parliament, by way of penalty, upon a particular set of men upon the account of their religion, the discovery of that fact subjects them to a penalty; and this is not like the case of an alien or bastard, who are incapable by the general laws of the land to inherit: besides, what sways with me much, is the great inconvenience that would follow, should this plea be disallowed; we should have nothing in this court but bills of discovery, whether such and such persons were papists or not, and nobody knows what confusion would follow; therefore the plea must be allowed (a).

[All the statutes of recusancy are now repealed by the 31 G. 3. c. 32. in favour of persons taking the oaths thereby required. Nor is any catholic to be summoned to take the oath of supremacy prescribed by 1 W. & M. § 1. c. 8. and 1 G. 1. § 2. c. 13. or the declaration against transubstantiation required by 25 Car. 2. The act dispenseth persons acting as a counsellour at law, barrister, attorney, clerk, or notary, from taking the oaths of supremacy, or declaration against transubstantiation. It also tolerates under due regulations the publick exercise of the popish religion, provides against disturbing the congregation, and misusing the officiating minister, and exempts the ministers from serving upon juries, and from ward and parochial offices. The regulations, under which the publick exercise of the religion is tolerated, are, that no congregation for religious worship shall be had in any place, with the doors locked, barred, or bolted, during any time of such meeting together; and that no congregation or assembly for religious worship shall be permitted, until the place of such meeting shall be recorded at the sessions.]

As to the double land-tax, that being imposed by the annual land-tax act, a repeal of it could not be effected by any prospective act. It is repealed, by omitting from the subsequent annual land-tax acts, the clause imposing it.]

Pardon.

- (A) By whom to be granted.
- (B) In what Cases, and for what Offences it may be granted.
- (C) Where a Pardon is grantable of common Right.
- (D) Of the Validity of a Pardon : And herein, by what Words Treason, Murder, Felony, and other Offences may be pardoned : and herein, of Pardons by Implication, and where the King shall be said to be deceived in his Grant thereof.
- (E) Whether a Pardon may be conditional.
- (F) Who may take Advantage of a Pardon, and to whom it shall be said to extend.
- (G) In what Manner a Pardon is to be taken Advantage of : And herein,
 - 1. In what Manner a general Pardon by Parliament is to be taken Advantage of.
 - 2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.
- (H) The Effects and Consequences of a Pardon, and to what the Party shall be restored.

(A) By whom to be granted.

THE power of pardoning offences is inseparably incident to the crown ; and this high prerogative the king is intrusted with upon a special confidence, that he will spare those only whose case, could it be foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case. Show. 284.

But, it seems, that anciently the right of pardoning offences within certain districts was claimed by the Lords of Marches and others, Co. Lit. 114.
3 Inst. 233.

... party, but a
... future, and
... like the
... against tref-

... court
... *pro rei*
... or laying
... which the
... party,
... the award, but
... if it be sub-
... costs taxed
... But *quere*
... for they
... inquests only

... non-
... it is said,
... against the
... a payment
... on the con-

... court, any
... property in
... contracts and
... in a suit
... for a mai-
... or *pro falsis*
... discharged by a

... and then the de-
... for or against
... the first
... not avoided by
... whether they were well
... properly given on
... be pardoned,
... precedent to the
... his appeal, and
... of such desertion, it
... because the pardon,
... made the appeal to be

... "No pardon under the great
... by the Commons in
...
... the impeachment is solemnly heard and determined,
... that the king's royal grace is farther restrained
... or

or abridged; for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time relieved by the crown, and at length received the benefit of the king's pardon.]

(C) Where a Pardon is grantable of common Right.

BY the statute of *Gloucester, c. 9.* it is enacted, "That if it be ^{2 Inst. 318.} found by the country, that a person tried for the death of a man did it in his defence, or by misfortune, then, by the report of the justices to the king, the king shall take him to his grace, if it please him."

But, it seems to be settled at this day agreeably to the ancient ^{2 Hawk. P. C. c. 37. § 2.} common law, in affirmance whereof this statute was made, that in such a case, or where one indicted of *homicide se defendendo* confesses the indictment, if the party cause the record to come into Chancery, the Chancellor will of course make him a pardon without speaking to the king, and that by such pardon the forfeiture of goods may be saved; for these words, *if it shall please the king*, shall be taken as spoken only by way of reverence to him, and not intended to make such a pardon discretionary. But, if the party be found to have fled, it is made a *quere*, if the pardon save the forfeiture for the flight; for that is not grounded on the homicide, but on the contempt of the law.

If an approver convict all the appellees, whether by battle or verdict, the king *ex merito justitie* ought to pardon him as to his appeal, and also give him his wages from the time of the appeal to the time of the conviction. ^{3 Inst. 729; 2 Hal. Hist. P. C. c. 233.}

By the *4 & 5 W. & M. c. 8.* it is enacted, "That if any person or persons out of prison shall commit any robbery, and afterwards discover two or more who then had or afterwards shall commit any robbery, so as two or more of them shall be convicted, any such discoverer shall be entitled to a pardon for all robberies committed before the discovery, which also shall bar an appeal."

And by the *6 & 7 W. & M. c. 17.* it is enacted, "That if any person or persons out of prison shall be guilty of clipping, coining, counterfeiting, washing, filing, or otherwise diminishing the coin of this realm, and afterwards discover two or more who then had or afterwards shall commit any of the said crimes, so as two or more of them shall be convicted, any such discoverer shall be entitled to a pardon for all his crimes committed before the discovery."

By the *10 & 11 W. 3. c. 23.* (which excludes clergy from those who shall in any shop, ware-house, coach-house or stable, privately steal any goods, &c., of the value of 5 s., though such shop, &c., be not broken open, and though no person be therein, or shall hire, or command any person to commit such offence,) if any person or persons shall commit any burglary, house-breaking,

" breaking, or felony, in stealing of any horse or horses, or any money, wares, or goods from whom clergy is by that act taken away, and being out of prison shall discover two or more, who then had or after shall commit any such felony, and shall be convicted thereof, or cause to be discovered and apprehended two or more, who shall be convicted as aforesaid, every such discoverer shall be entitled to a pardon for the felonies aforesaid committed before such discovery," &c.

By the 5 *Ann. c. 31.* it is enacted, " That every person who shall be guilty of burglary, or of the felonious breaking and entering a house in the day-time, and after shall discover two who shall have committed such felony, so as they be convicted, &c., shall have 40*l.* and a pardon of all felonies, except murder," &c.

[It is enacted by 8 *Geo. 1. c. 18. § 7.* " That if any runner of foreign goods shall within two months after his offence, and before his conviction, discover two or more of his accomplices therein to the commissioners of the customs or excise in *England* or *Scotland*, so as they or two of them at least be convicted of such offence (as described in the act), the offender or offenders so discovering shall receive the sum of 40*l.* for every such offender so discovered and convicted, so as the value of the goods recovered by such discovery shall exceed 50*l.*; and such person so discovering shall be clearly acquitted and discharged of such his or her offence." And the like is enacted by 9 *Geo. 2. c. 35.*

Cowp. 333. Persons to whom the king has, by special proclamation in the *Gazette*, or otherwise, promised a pardon, are also entitled to it of legal right.]

(D) Of the Validity of a Pardon: And herein, by what Words Treason, Murder, Felony, and other Offences may be pardoned: And herein, of Pardons by Implication, and where the King shall be said to be deceived in his Grant thereof.

Yelv. 43.
47. *Cro.*
Jac. 18.
34. 548.
2 *Roll. Abr.*
178. *Dyer,*
352. pl. 26.
Raym. 13.
Sid. 41. 3 *Inst. 238.*
2 *Hawk.*
P. C. c. 37.
§ 8.

IT is laid down as a general rule, that wherever it appears by the recital of the pardon, that the king was misinformed, or not rightly apprised both of the heinousness of the crime, and also, how far the party stands convicted upon record, the pardon is void, upon a presumption, that it was gained from the king by imposition.

And upon this ground it seems agreed, that if a man attainted of felony get a pardon, which doth not mention the attainder, the pardon will be ineffectual. Also, it hath been holden, that the pardon of a person convicted by verdict of felony is void, unless it recite the indictment and conviction. Also, it hath been questioned, if the pardon of a person barely indicted of felony be good,

good, without mentioning the indictment: but, it hath been adjudged, that such a defect is salved by the words *five indictatus five non*.

It hath been holden, that anciently a pardon of all felonies included all treasons as well as felonies; and it seems to be taken for granted in many books, that such a general pardon is even at this day pleadable to any felony, except murder, rape, and piracy; and that the only reason why it may not also be pleaded to murder and rape is, because 13 R. 2. *stat. 2. c. 1.* and 16 R. 2. *c. 6.* require an exprefs mention of them; and that the only reason why it is not pleadable to piracy is, because it is a felony by the civil law only.

2 Hawk.
P. C. c. 37.
§ 9.
Hal. Hist.
P. C. 466.
2 Hale's
Hist. P. C.
45.

By the 27 E. 3. *c. 2.* it is enacted, "That in every pardon of felony granted at any man's suggestion, the suggestion and the name of him that makes it shall be comprised; and if it be found untrue, the charter shall be disallowed; and the justices, before whom the charter shall be alleged, shall inquire of the same suggestion, and, if they find it untrue, shall disallow the charter."

No pardon of felony shall be carried beyond the exprefs purport of it; and therefore if the king, reciting an attainder of robbery, pardon the execution, he thereby neither pardons the felony itself, nor any other consequence of it besides the execution.

6 Co. 13.
2 Hawk.
P. C. c. 37.
§ 12.

It is enacted by 2 E. 3. *c. 2.* That charters of pardon of man-slaughters shall not be granted but where the king may do it by his oath, that is to say, where a man slayeth another in his own defence, or by misfortune; neither is there any precedent in the register of the pardon of any other homicide, but such as is done either in self-defence or by misadventure, or by infants or madmen; and from hence some have disputed the king's power of pardoning any other homicide. But this is contrary not only to the general tenor of the books, but also to the plain purport of 13 R. 2. *stat. 2. c. 1.* which, reciting that murders, treasons, and rapes, had been frequently committed, because pardons had been easily granted in such cases, enacteth, "That no pardon shall be allowed for murder, or for the death of a man slain by await, assault, or malice prepenfed, treason, or rape of a woman, unless the same murder, &c. be specified in the same charter; and if the charter of the death of a man be alleged before any justices, in which it is not specified that the party was murdered or slain by await, assault, or malice prepenfed, the same justices shall inquire by a good inquest of the *visne* where the dead was slain, if he was murdered or slain by await, &c. and if they find that he was murdered or slain by await, &c. the charter shall be disallowed."

2 Hawk.
P. C. c. 37.
§ 14. and
several au-
thorities
there cited.

It hath been formerly often adjudged, that murder might be pardoned under the general description of a felonious killing, with a clause of *non obstante*; but by W. & M. *sess. 2. c. 2.* it is declared, That no dispensation by non obstante of or to any statute shall be allowed.

Sid. 366.
Show. 283
Keling, 24.
3 Mud. 37.

2 Keb. 363. But pardons of manslaughter remain as they were at common
 415. law; and therefore the pardon of the felonious killing of *J. S.*
 Keling, 24. may be pleaded to an indictment of manslaughter in killing him:
 2 Jon. 56. but where such a pardon is pleaded to a coroner's inquest of man-
 slaughter, the court may refuse to allow it, till the fact be found
 manslaughter by a jury directed by a higher court.

Dyer, 50. If a general act expressly pardon petit treasons, and except
 pl. 4. 235. murders, it cannot be avoided by indicting a person guilty of petit
 pl. 19. treason for murder only, omitting the word *proditorie*; for the less
 6 Co. 13. offence being included in the greater is pardoned by the pardon of
 it; and therefore such an exception of murder is to be intended
 of such murder only as is specially so called, and doth not amount
 to petit treason.

Lev. 8. 120. Neither doth the exception of murder in a general act of par-
 Sid. 150. don of all felonies extend to a *felu de se*; for though his offence be
 Keb. 66. in strictness murder, yet in common speech, according to which
 548. statutes are commonly expounded, it is generally understood as a
 distinct offence, the word *murder* seeming *primâ facie* to import the
 murder of another.

Plow. 407. It is said, that a general act of pardon of all felonies, misde-
 Cole's case. meannours, and other things done before such a day, pardons a ho-
 Hal. Hist. micide from a wound before the day, whereof the party died not
 P. C. 426. till after; because the stroke being pardoned, the effects of it are
 Dyer, 59. consequently pardoned *.
 pl. 65.

* If the fe-
 lony has its commencement before the pardon takes place, but not its completion, the pardon shall ope-
 rate in favour of the prisoner, as it would have done had the felony been complete before the pardon.
 This is the true sense of the doctrine in Cole's case. Nicholas's case, 1748, Foist. 64.—But, if a
 man gives a stroke, or poison, (which, till death ensues upon it, is only a misdemeanour) and a pardon
 is granted to all misdemeanours, &c. but not of murder or poisoning, and afterwards the party dies, the
 felony is not pardoned. *Id.*

Lev. 106. It is said, that a pardon of all misprisions, trespasses, offences,
 Sid. 211. and contempts, will pardon a contempt in making a false return,
 2 Mod. 52. and a striking in *Westminster-hall*, and barratry, and even a *præmu-
 nire*. Also, it is laid down in general, that it will pardon any
 crime which is not capital.

2 Hal. Hist. If *A.* be indicted of piracy, and refusing to plead have judg-
 P. C. 252. ment of *peine fort & dure*, and by the general pardon piracies are
 cited from excepted, but the judgment of *peine fort & dure* is pardoned
 Dyer, 308. by the general words of all contempts; *quare* whether he may
 a. be arraigned for any other piracy; but, by the better opinion,
 he may be arraigned of any other piracy committed before that
 award.

(E) Whether a Pardon may be conditional.

Co. Lit. 274. b. IT seems agreed, that the king may extend his mercy on what
 2 Hawk. terms he pleases, and, consequently, may annex to his pardon
 P. C. c. 37. any condition that he thinks fit, whether precedent or subse-
 § 45. quent, on the performance whereof the validity of the pardon
 will depend.

Also,

Also, it hath been held, that in every pardon for a capital offence, where the party was obliged to give security, there is a condition in law annexed to such pardon, so that if he forfeits such recognizance, his pardon becomes void, and he may be taken and executed on the first judgment *.

behaviour for seven years. 5 W. & M. c. 13. which *vide post*.

Moor, pl. 662.
* Persons pardoned of felony may be bound to their good

(F) Who may take Advantage of a Pardon, and to whom it shall be said to extend.

NOtwithstanding all felonies are several, yet the felony of one man may be so far dependant on that of another, that the pardon of the one will necessarily enure to the benefit of the other; as, where the principal is allowed his pardon before his conviction, in which case the accessory may by a necessary consequence take benefit of it; because he cannot be arraigned till the principal is convicted.

Cro. Elis. 39, 31.
Dyer, 34. pl. 22.
2 Hawk. P. C. c. 37. § 22.

Where a man is bound to the king as surety for another's debt, it is clear, that the discharge of the principal is a discharge of the surety; but where a man is bound to the king for another's performance of a future act, the discharging of the other from such future act will not discharge the surety. But *quare* if both had been bound, and the subject no way interested in the matter.

2 Hawk. P. C. c. 37. § 23.

The pardon of *A.*, *B.*, and *C.* of all felonies by them done, without adding or any of them, is void; for it supposes them jointly guilty, and extends to none but joint felonies, whereas all felony is several in each offender, and cannot be joint.

Dyer, 34. pl. 21.
2 Hawk. P. C. c. 37. § 24.

(G) In what Manner a Pardon is to be taken Advantage of: And herein,

1. In what Manner a general Pardon by Parliament is to be taken Advantage of.

HEREIN we must first observe a difference between a pardon by parliament and that under the great seal; that as to pardon by (a) parliament, the same cannot be waived, because no one by his admittance can give the court a power to punish him, where it judicially appears there is no law to do it; but a man may waive a pardon under the great seal, by pleading other matter, without taking any notice of it.

2 Hawk. P. C. c. 37. § 58, 59.
(a) That a coronation pardon cannot be taken advantage of, unless it

be taken out and pleaded under the great seal.

Keb. 707.

If the body of a general act of pardon either except divers persons by name, or except all who come under a general description, as, all who adhered to *J. S.*, the court is not bound (neither ought it, as some say,) to give any one the advantage of it, unless he plead it, and shew, in the first case, that he is not one of the persons excepted, and in the other, that he is not included in such description;

2 Hawk. P. C. c. 37. § 60. and several authorities there cited

description; neither will it be safe for him, if he be of the same name with one of those excepted by name, to aver, that he is not one of the persons excepted by name, without adding, that he is a different person from such other of the same name. But, if the body of the statute except one person only, or, if it be general as to all, and afterwards some be excepted in the provisoes, it may be pleaded, as some say, without any averment that he who pleads it is not one of the persons excepted, &c. and the exceptions ought to be shewn on the other side.

Noy, 100. Also, where a general act of pardon excepts certain kinds of crimes, there is no need to aver, that the crime whereof a person is indicted is not one of such excepted crimes, but the court ought judicially to take notice, whether it be excepted or not.

Cro. Eliz. 125. Also, where such a statute excepts only one particular person, it hath been said, that there is no need of an averment that a person indicted is not such person, but that the court is to take notice whether he be or not.

2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.

Cro. Eliz. 153. The party, as hath been observed, must insist on the benefit of this kind of pardon; and therefore it hath been held to be error, to allow a man the benefit of a pardon under the great seal, unless he plead it.

a Hawk. P. C. c. 37. § 65. He who pleads such a pardon ought to produce it (a) *sub pede figilli*; because it is presumed to be in his custody, and the property of it belongs to him. Yet, if a man pleads such pardon without producing it, it seems, that the court may indulge him a farther day to put in a better plea.

(a) That it is sufficient to plead and shew the exemplification of the pardon, &c. because such exemplification is expressly within the 13 Eliz. c. 6. 5 Co. 53. Carth. 138. cited.

3 Inst. 240. If there be a variance between the pardon and record of conviction, &c. yet, if there be no repugnancy to intend that the same person is meant in both, it may be supplied by a proper averment; as, if he be called *J. S.* gentleman in the one, and *J. S.* yeoman in the other; or *B.* the father in the one, and *B.* the son of *W.* in the other; or, if the stroke which caused the death of *J. S.* &c. be supposed to have been given on the second of *August* in the one, and on the third in the other: also, if such variant pardon be pleaded without such averment, the court may give the party a farther day to perfect his plea.

a Hawk. P. C. c. 37. § 67. It seems, that such pardon cannot be pleaded after the general issue, unless it be of a date subsequent to the pleading of it; because the making defence, without taking any notice of the pardon, seems to amount to a waiver of it. And *quere* if a pardon can be pleaded at the same time with the general issue.

a Hawk. P. C. c. 37. § 13. The party is not bound to lay the stress of his case on any particular clause of the pardon, but may take advantage of the whole.

After

After an amerciament in the King's Bench is estreated into the Exchequer, and the party hath insisted on a pardon there, and been denied any benefit of it, he may be brought by *habeas corpus cum causa* to the King's Bench, because the record remains there, and plead his pardon; and if it be adjudged sufficient, have a *superfedeas* to the barons.

While the statute 10 E. 3. c. 2. stood in force, no pardon of (a) felony could be allowed, without a writ of allowance, testifying, that the party had found sureties according to that statute. But this is now repealed by 5 & 6 W. 3. c. 13. which provides, "That the justices, before whom a pardon of felony shall be pleaded, may in discretion remand or commit the party to prison till he shall enter into a recognizance, with two sufficient sureties, for the good behaviour for any time not exceeding seven years; provided that, if such person be an infant or feme covert, it shall be sufficient to find two sureties, who shall enter into a recognizance for his or her being of the good behaviour as aforesaid *.

instance since this statute (as it is said) of the court's requiring recognizance for the good behaviour of a person pardoned for murder. *Rex v. Chetwynd*, 2 Stra. 1203.

2 Hawk.
P. C. c. 37.
§ 69.

Plow. 502.
Sid. 41.
Raym. 13.
Carth. 123.
(a) But there never was any necessity for such writ upon a pardon of treason.
Cro. Eliz.
814.
Noy, 31.
* There has not been any

The judges may insist on the usual fee of gloves to themselves and officers, before they allow a pardon.

2 Jon. 56.
Sid. 452.
Keilw. 25.

Where a prisoner hath a pardon to plead, and any difficulty arise thereon, the court will of course assign him counsel †.

3 Inst. 29.
† On a pardon for a

misdeameour, the defendant shall not be put to the bar, nor plead it on his knees. *Rex v. Hales*, 2 Stra. 816.—Defendant in an information for maihem shall have the benefit of an act of grace, though he did not insist on it at his trial; but shall pay prosecutor's full costs. *Rex v. Haines*, 1 Will. 214.—[The mode of taking advantage of a pardon upon the circuits and at the Old Bailey is, to procure the King's sign manual or privy seal, signifying his Majesty's intention to afford a pardon to the prisoner either absolutely or conditionally as the case may be, and directing the justices of the gaol delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon that shall come out. This mandate the justices obey; taking security, if the pardon is conditional, for the performance of the stipulations on which it is granted, and afterwards issuing their warrant to the gaoler for his discharge. 1 Bl. Rep. 479. 2 Bl. Rep. 797.]

(H) The Effects and Consequences of a Pardon, and to what the Party shall be restored.

IT seems agreed, that a pardon of treason or felony, even after an attainder, so far clears the party from the infamy and all other consequences thereof, that he may have an action against any who shall afterwards call him traitor or felon; for the pardon makes him as it were a new man.

Hob. 67.
81. Moor.
863. Roll.
Abr. 87.
Raym. 23.

Also, a pardon restores a man to his credit, so as to enable him to be a witness: but yet his credit must be left to the jury.

2 Hal. Hist.
278. & v. de tit. Evidence.

And it hath been admitted, that the king's pardon of the burning of the hand on a conviction of manslaughter hath the same effect, as to this purpose, as the burning would have had, which is agreed to restore the party to his credit.

2 Hawk.
P. C. c. 37.
§ 49.

But, it hath been adjudged, that a pardon is of no manner of force, as to this purpose, till it have passed the great seal.

2 Hawk.
P. C. c. 37.
§ 50.

It

Hob. 67.

12

It is said, that the pardon of a felony will not make an arrest for it by one who did not know of the pardon unlawful; because such arrests, being for the publick good, are to be favoured, and therefore shall not be actionable by reason of such a pardon, as scandalous words shall be, because they deserve no favour.

If a man be convicted or deprived, or otherwise punished for an offence during a session of parliament, and at the same session an act pass which pardons the offence, it seems agreed, that the conviction or deprivation, &c. are *ipso facto* avoided; because the act having effect from the first day of the session (a), it now appears, that the offence was pardoned at the time of the conviction, &c. and it hath been adjudged, that where an act of parliament extends to pardons such and such crimes from a certain day before the session, it necessarily avoids all convictions and deprivations, and even attainments and attainments, &c. for such crimes, whether such convictions &c. were before or after the session; because it is a rule of the House of Commons that such crimes shall not be punished which cannot take effect, if such conviction &c. be pardoned a term.

It is also agreed, that the king shall divest any interest vested in him by a charter, without words of restitution, and shall restore it from the king. Yet, a pardon prior to a charter shall not restore all forfeitures of lands or goods.

It is also agreed, that the release of all judgments and arrears due to the king by a general pardon extends to debts due to the king by charter or forfeiture; and that it doth not restore them to the king, but extinguishes them, but extinguishes them in the king's hands.

It is also agreed, that notwithstanding the king's pardon to a clerk coming into church contrary to the purport of 31 *Eliz.*

It is also agreed, that a clerk coming into his office by a corrupt bargain contrary to the purport of 5 & 6 *E. 6. c. 16.*, may save such clerk from any criminal prosecution in respect of the corrupt bargain, but it shall not enable the clerk to hold the church, nor to retain the office, because they are absolutely disabled by statute.

A pardon of blood, in its true nature and extent, can only be granted by parliament, and therefore if a man attainted be pardoned by act of parliament, he is totally restored and inheritable to all relations; but, if he be pardoned by charter, he may thenceforth enjoy his lands, but cannot inherit his former relations; for one's charter cannot alter or take away the right of others, or restore the relation that was lost.

If a man be attainted, and after pardoned by charter, the children of such man shall not inherit; but if they fail, the children born after such pardon may inherit him; for the pardon makes him capable of new relations as well as of new purchases, and the old legal benefits and relations are lost.

Reliefs granted by parliament are of two kinds; one a restitution of lands, which only removes the corruption thereof, but restores not to the party attainted, or his heirs, the manors or honours lost.

lost by the attainder, unless it specially extend to it; the other is a general restitution, not only in blood, but to the lands, &c. of the party attaint.

A restitution in blood may be special and qualified; but, Hal. Hist. P. C. 352. generally, a restitution in blood is construed liberally and extensively.

A. hath issue *B.* a son, and is attaint of treason and dies; *B.* 3 Inst. 233. Hal. Hist. P. C. 352. purchaseth lands in fee-simple; *B.* by parliament is restored only in blood, and enabled as well as heir to *A.* as to all other collateral and lineal ancestors, provided it shall not restore *B.* to any of the lands of *A.* forfeited by the attainder: *B.* dies without issue: it was ruled, that the lands of *B.* shall descend to the sisters of *A.*, as aunts and collateral heirs of *B.* *1st*, Because the corruption of blood by the attainder is removed by the restitution. *2^{dly}*, Although the words of the act of restitution be to restore *B.* only as heir to *A.*, &c. yet this doth not only remove the corruption, and restore him and his lineal heirs in blood, but also his collateral heirs, and removes that impediment which would have hindered the descent to them.

Pauper.

- (A) Of the Right to sue *in formâ Pauperis*, and the Manner of Admittance.
- (B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to sue *in formâ Pauperis*.
- (C) In what Cases to be so admitted.
- (D) In what Cases to be dispaupered, and to pay Costs.

- (A) Of the Right to sue *in formâ Pauperis*, and the Manner of Admittance.

By the 11 *Hen. 7. c. 12.* it is enacted in the words following,
 "Prayen the Commons in this present parliament assembled,
 "that where the king our sovereign lord, of his most gracious disposition, willesh and intendeth indifferent justice to be had and
 "ministered according to his common laws to all his true subjects,

" as well to the poor as rich, which poor subjects be not of ability
 " ne power to sue according to the laws of this land, for the
 " redress of injuries and wrongs to them daily done, as well con-
 " cerning their persons and their inheritance as other causes; for
 " remedy whereof, in the behalf of the poor persons of this land
 " not able to sue for their remedy after the course of the com-
 " mon law, be it ordained and enacted, that every poor person
 " or persons, which have or hereafter shall have cause of action
 " or actions against any person or persons within this realm, shall
 " have, by the discretion of the chancellor of this realm for the
 " time being, writ or writs original and writs of *subpena*, accord-
 " ing to the nature of their causes, therefore nothing paying to
 " your highness for the seals of the same, nor to any person for
 " the writing of the same writs to be hereafter sued; and that the
 " said chancellor for the time being shall assign such of the
 " clerks, which shall do and use the making and writing of the
 " same writs, to write the same ready to be sealed; and also
 " learned counsel and attorneys for the same, without any reward
 " taking therefore; and after the said writ or writs be returned, if
 " it be before the king in his bench, the justices there shall assign
 " to the same poor person or persons' counsel learned, by their
 " discretions, which shall give their counsel, nothing taking for
 " the same; and likewise the justices shall appoint attorney and
 " attorneys for the same poor person or persons, and all other
 " officers requisite and necessary to be had for the speed of the
 " said suits to be had and made, which shall do their duties with-
 " out any reward for their counsels, help, and business in the same;
 " and the same law and order shall be observed and kept of all
 " such suits to be made afore the king's Justice of his Common
 " Place and Barons of his Exchequer, and all other Justices in the
 " court of record where any such suit shall be."

Lil. Reg.

633.

[(a) The same is necessary to entitle prosecutors to prosecute in *forma pauperis*. 3 Burr. 1208. (b) This affidavit must be made by the party himself, not by a third person. *Wilkinson v. Belfier*, 2 Br. Ch. Rep. 272.]

Before a person is admitted to sue in *forma pauperis*, he must have a counsel's hand to his petition, certifying the judge to whom the petition is directed, that he conceives the petitioner hath good cause of action (a): he must also annex an affidavit (b) to his petition, that he is not worth 5*l.* all his debts paid, except wearing apparel and his right to the matter in question.

2 Salk. 507.
pl. 2.

On a motion to dispauper a person who was plaintiff in an action because he had a living of 40*l.* *per annum*; *Turton* and *Gould*, Justices, were against it, because he swore he was in debt more than it was worth; but *Holt*, C. J. differed from them; for his being indebted, or his estate being mortgaged, is no reason; it is enough that he has a considerable estate in possession.

Lil. Reg.
633.

A person admitted to sue in *forma pauperis* can only sue in that cause for which he is admitted; so that if any other cause arises, he must sue *de novo* to be admitted, & *sic toties quoties*.

[The admission in one court is not binding on the officers of another court; and therefore if an issue out of Chancery where the plaintiff

Gibson v. McCarty,
Camp.
311.

plaintiff had been admitted in *formâ pauperis*, comes to be tried in *X. B.*, he must be admitted there also.

The admission to sue in *formâ pauperis* may be either at the commencement of the suit, or afterwards *pendente lite*.

3 Wm. 24.

Say. Costs.

90.

Andr. 306.

A person suing in *formâ pauperis* is not entitled to the issue-money.]

Codron v.

Hayman,

5 Term Rep. 509.

(B) Whether a Defendant may be allowed to defend, as well as a Defendant to sue in *formâ Pauperis*.

It seems that, after the statutes which introduced costs, neither plaintiffs nor defendants could sue or defend in *formâ pauperis*; for that would be a means of depriving the other party of the costs given him by statute; and as the above-mentioned statute 11 H. 7. c. 12. enables persons only to sue as paupers; and as the statute 23 H. 8. c. 15. hereafter set forth, excepts only plaintiffs who are paupers from paying costs, it seems, that a defendant cannot be admitted in a civil action to defend as a pauper. But it hath been (a) adjudged, that a person may be admitted to defend an indictment in *formâ pauperis* for a misdemeanour, such as a conspiracy, keeping a disorderly house, &c., for in such proceedings there being no costs, the judges have a discretionary power of admitting or refusing them by the common law.

(a) Pasch.

9 G. 2.

King v.

Wright.

2 Stra. 1042.

Also by the 2 Geo. 2. c. 28. § 8. it is enacted, "That in case any person, arrested and imprisoned by virtue of any writ of *capias* or information relating to the customs, shall make affidavit before the judge or judges of such court where such action or information shall be brought, or before any other person commissioned by such court to take affidavits, that he is not worth over and above his wearing apparel, the sum of 5*l.* (which affidavit the said judge or judges of such court, and such person so commissioned, is and are hereby authorised and required to take), and such person shall thereupon petition such court to be admitted to defend himself against such action or information in *formâ pauperis*, that then the judges of such court shall according to their discretions admit such person to defend himself against such action or information in the same manner, and with the same privileges, as the judges of such court are by law directed and authorised to admit poor subjects to commence actions for the recovery of their right; and for that end and purpose it shall be lawful for the judges of such courts to assign counsel learned in the law, and to appoint an attorney and clerk of such court to advise and carry on any legal defence that such person can make against such action or information; which said counsel, attorney and clerk so assigned and appointed, is and are hereby required to give his and their advice and assistance to such person, and to do their duties, without fee or reward."

[A de-

Rex v.
Pearson,
2 Burr.
1039.

[A defendant upon an attachment for a contempt will not be admitted to defend *in formâ pauperis*.]

Rex v.
Morgan,
2 Str. 1214.

A person convicted of perjury, and outlawed for forgery, was admitted, no cause being shewn to the contrary, to plead the king's pardon *in formâ pauperis*.]

(C) In what Cases to be so admitted.

Lit. Reg.
633. per
Wild.

IT is said, that none ought to be admitted to sue *in formâ pauperis* in an action on the case for words.

Mod. 268.

per North.

* Sed qu.

If this is not
discretionary

Also it is said, that a person who sues *in formâ pauperis* ought not to have a new trial granted him; because having had once the benefit of the king's justice he ought to acquiesce in it*.

in the court, and more especially if the plaintiff will consent to pay the costs?

Mod. 268.
per North.

And it is said, that paupers ought not to be admitted to remove causes out of inferior courts, but ought to satisfy themselves with the jurisdiction within which their actions properly lie.

(D) In what Cases to be dispaupered, and to pay Costs.

Ord. Cur.
94.

BY the orders of the courts, if the party admitted to sue *in formâ pauperis* give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall from thenceforth be dispaupered, and not be afterwards admitted again in that suit to prosecute *in formâ pauperis*.

Ord. Cur.
95.

Also, if it shall be made appear to the court, that any person prosecuting *in formâ pauperis* hath sold or contracted for the benefit of the suit, or any part thereof, while the same depends, such cause shall be from thenceforth totally dismissed the court.

2 Salk. 506.
pl. 1.

It is said, that if a pauper gives notice of trial, and does not proceed, he shall be dispaupered.

(a) Though
lands de-
scend to
him after
cause tried,

In the statute 23 H. 8. c. 15. there is a provision, "That whoever sues *in formâ pauperis* shall (a) not pay costs, but shall suffer such other punishment as the judge of the court shall think fit."

yet he shall not pay costs. Mod. Rep. in Law and Eq. 344.

2 Salk. 506.
pl. 1.

Style, 386.

(b) Rut

though the usual course in such cases is to tax the costs, and, if not paid, to whip the plaintiff; yet, upon consideration of the circumstances of the case, it is in the discretion of the court to spare both. Sid. 261. And per Holt, C. J. on motion to whip a pauper who had been nonsuited, there is no officer for that purpose, nor did he ever know it done. 2 Salk. 506. pl. 1. [In Solomon v. Agnel, Fortesc. 320. it was holden, that a pauper, though dispaupered should not pay costs; and if taken in execution for costs, he should be discharged on motion.]

A. brought a bill *in formâ pauperis*, to which the defendant put in a plea and demurrer, which were both over-ruled; and it was insisted upon, that he should have no costs, being at none: but my Lord *Somers*, after long debate and inquiry of all the ancient counsel and clerks, who agreed that he should have costs, ordered him his costs (a) like other suitors; for though he is at no costs, or but small costs, yet the counsel and clerks do not give their labour to the defendant, but to the pauper.

Abr. Eq. 125.
(a) But *vide* Preced.
Chan. 219.
where a pauper having a decree to recover with costs, it was held on mo-

tion *per curiam* to be unreasonable, that any one should have more costs than he was out of pocket; and thereupon ordered the plaintiff and his solicitor to make oath before the Master, and what they swore they had paid, or were to pay, was to be allowed, but no farther. — Costs cannot be given against a pauper lessor of the plaintiff, for not going on to trial; if vexatious, he may be dispaupered. *Nokes v. Watts*, Fort. 319. 3 Will. 24. S. C. 1 Str. 420. S. C. *contr.* [Unless the pauper's conduct appears to have been vexatious, the court will not stay the proceedings in a second action, until the costs are paid of a nonsuit in a prior one for the same cause. *Winter v. Slow*, 2 Str. 878. *Brittain v. Greenville*, Id. 1121. 3 Will. 24., but where the costs of a former nonsuit in trespass were not paid, the court, though no circumstances of vexation were stated, staid the proceedings, notwithstanding the plaintiff was a prisoner at the time of bringing the second action, and sued *in formâ pauperis*. *Weston v. Withers*, 2 Term Rep. 511.] — If a pauper is nonsuited, brings a second action, and recovers, the costs of the first shall not be deducted out of the recovery in the second. *Butler v. Innerys*, 2 Stra. 891. — If pauper gives several notices, and does not go on to trial, the court will not restrain him from going on to trial till he has paid costs of former notices, but they will make an order to dispauper him *nisi*. *Taylor v. Lowe*, 2 Str. 983. [A person suing in equity *in formâ pauperis* shall not amend his bill by leaving out some of the defendants, *Wilkinson v. Belsiter*, 2 Br. Ch. Rep. 272., or dismiss it as against some of them without payment of costs, *Pearson v. Belsiter*, 3 Br. Ch. Rep. 87.; nor it seems, will a party be protected by an order to sue *in formâ pauperis* from the costs of proceedings previous to the order. *Moidl*. 103.]

Perjury.

PERJURY by the common law seemeth to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not.

Hawk. P. C. c. 69.

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear, that if the person, incited to take such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain, that he is liable to be punished, not only by fine, but also by infamous corporal punishment.

Roll. Abr. 41. 57.
Yelv. 72.
Cro. Jac. 158.
2 Keb. 399.
3 Mod. 122.
Hawk. P. C. c. 69. § 10.

For the better understanding the nature of perjury, we shall consider,

(A) What

(A) What it is by the Common Law, and how restrained and punished.

(B) How restrained and punished by Statute.

[(C) How charged and assigned.]

(A) What it is by the Common Law, and how restrained and punished.

3 Mod. 350. 1st, [T is necessary, to constitute the offence perjury, that the false oath be taken wilfully, viz. with some degree of deliberation, and not merely owing to surprise or inadvertency, or a mistake of a true state of the question.

Hawk. P.C.
c. 69. § 3.
and several
authorities
there cited.

2^{dly}, The oath must be taken either in a judicial proceeding, or in some other publick proceeding of the like nature, wherein the king's honour or interest are concerned; as, before commissioners appointed by the king to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the king's patents. But it is not material, whether the court, in which a false oath is taken, be a court of record or not, or, whether it be a court of common law or a court of equity, or civil law, &c., or, whether the oath be taken in the face of the court, or out of it before persons authorized to examine a matter depending in it; as, before the sheriff on a writ of inquiry, &c., or, whether it be taken in relation to the merits of a cause, or in a collateral matter; as, where one, who offers himself to be bail for another, swears that his substance is greater than it is, &c. But neither a false oath in a mere private matter, as, in making a bargain, &c. nor the breach of a promissory oath, whether publick or private, are punishable as perjury.

Hawk. P.C.
c. 69. § 4.

3^{dly}, The oath ought to be taken before persons lawfully authorized to administer it; for if it be taken before persons acting merely in a private capacity, or before persons pretending to a legal authority of administering such oath, but having in truth no such authority, it is not punishable as perjury. Yet, a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the king, is perjury, if taken before such time as the commissioners had notice of such demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void.

Hawk. P.C.
c. 69. § 5.

4^{thly}, The oath ought to be taken by a person sworn to depose the truth; and therefore a false verdict comes not under the notion of a perjury, because the jurors swear not to depose the truth, but only to judge truly of the depositions of others. But a man may be as well perjured by an oath in his own cause, as in an

answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c. as by an oath taken by him as witness in another cause.

3dly, It is not material, whether the thing sworn be in itself true or false, where the person who swears it in truth knows nothing of it. Hawk. P.C. c. 39. § 6.

6thly, The oath must be taken absolutely and directly; and therefore if a man only swears as he thinks, remembers, or believes, he cannot be guilty of perjury. Hawk. P.C. c. 39. § 7.

7thly, The thing sworn ought to be some way material; for if it be wholly foreign from the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as, where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, no way relating to what is material, and is guilty of a falsity as to such facts. But it seems a reasonable opinion (a), that a witness may be guilty of perjury in respect to a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as, if in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears, that he knew them by such a mark, which he knew to be the defendant's, where in truth the defendant never used any such mark. Hawk. P.C. c. 39. § 8. [(a) It is not necessary that it appear to what degree the point in which the man is perjured was material to the issue; for if it is but circumstantially material, it will be sufficient. 1 Ld. Raym. 258. Still less is it necessary that the evidence be material for the

plaintiff to recover upon; for an evidence may be very material, and yet it may not be full enough to prove directly the point in question. 2 Ld. Raym. 889.]

8thly, It does not seem material, whether the false oath were credited or not, or whether the party, in whose prejudice it was taken, were in the event any ways damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of publick justice. Hawk. P.C. c. 39. § 9.

(B) How restrained and punished by Statute.

BY the 5 *Eliz. c. 9.* it is enacted, " That whoever shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury in any matter or cause whatsoever depending in suit or variance by any writ, action, bill, complaint, or information in anywise concerning any lands, tenements, or hereditaments, or goods, chattels, debts, or damages in any of the queen's courts of Chancery, *Whitehall*, or elsewhere, within any of the queen's dominions of *England* or *Wales*, or the Marches

" of

[The judgment for the pillory need not specify the time when it is to be executed. Rex v. Atkinson, Dom. Proc. July 1, 1785.]

“ of the same, where any person or persons shall have authority;
 “ by virtue of the queen’s commission, patent, or writ, to hold
 “ plea of land, or to examine, hear, or determine any title of
 “ lands, or any matter or witnesses concerning the title, right, or
 “ interest of any lands or tenements, or hereditaments, or in any
 “ of the king’s courts of record, or in any leet, view of frank-
 “ pledge, or law, ancient demesne court, hundred court, court
 “ baron, or in the court or courts of the flannary in the counties
 “ of *Devon* or *Cornwall*; or shall unlawfully and corruptly pro-
 “ cure or suborn any witness or witnesses, who shall be sworn to
 “ testify in *perpetuam rei memoriam*, shall for such offence, being
 “ thereof lawfully convicted or attainted, forfeit the sum of 40*l.*
 “ And if any such offender, so being convicted or attainted, shall
 “ not have any goods or chattels, lands or tenements, to the value
 “ of 40*l.*, that then every such person shall suffer imprisonment
 “ by the space of one half year, without bail or mainprize, and
 “ stand upon the pillory the space of one whole hour in some
 “ market town next adjoining to the place where the offence was
 “ committed, in open market there, or in the market town itself
 “ where the offence was committed.”

And § 5. it is further enacted, “ That no person, being so
 “ convicted or attainted, shall from thenceforth be received as a
 “ witness in any court of record in any of the king’s dominions of
 “ *England*, *Wales*, or the marches of the same, till such judg-
 “ ment against him shall be reversed by attain, or otherwise, and
 “ that upon every such reversal the party grieved shall recover
 “ damages against the party who did procure the said judgment
 “ so reversed to be first given.”

And § 6. it is farther enacted, “ That if any person or persons
 “ shall either by the subornation, unlawful procurement, sinister
 “ persuasion, or means of any other, or by their own act, consent,
 “ or agreement, wilfully and corruptly commit any manner of wil-
 “ ful perjury by his or their deposition in any of the courts before
 “ mentioned, or being examined in *perpetuam rei memoriam*, that
 “ then every such offender being duly convicted or attainted shall
 “ forfeit 20*l.* and have imprisonment by the space of six months,
 “ without bail or mainprize, and the oath of such offender shall
 “ not from thenceforth be received in any court of record in
 “ *England* or *Wales*, until such judgment shall be reversed, &c.
 “ on which reversal the party grieved shall recover damages in the
 “ manner before mentioned.”

And § 7. it is farther enacted, “ That if such offender shall not
 “ have goods or chattels to the value of 20*l.* that then such per-
 “ son shall be set on the pillory in some market-place within the
 “ shire, city, or borough where the offence shall be committed, by
 “ the sheriff or his ministers, if it shall fortune to be without any
 “ city or town corporate; and if it happen to be within any such
 “ city or town corporate, then by the head officer of such city,
 “ &c. where he shall have both ears nailed.”

And § 8 & 9. it is farther enacted, “ That one moiety of the
 “ said forfeitures shall be to the king, and the other moiety to
 “ such

"such person as shall be grieved, hindered, or molested by reason
"of any of the offences before mentioned, that will sue for the
"same, &c. and that as well the judge and judges of every such
"of the said courts where any such suit shall be, and whereupon
"any such perjury shall be committed, as also the justices of assize
"and gaol-delivery, and justices of peace at their quarter sessions
"both within the liberties and without, may inquire of, hear, and
"determine all offences against the said act."

But it is provided § 11. "That the said act shall no way extend
"to any spiritual or ecclesiastical court, but that every such
"offender, as shall offend in term as aforesaid, shall be punished
"by such usual and ordinary laws as are used in the said courts."

Provided also § 13. "That the said statute shall not restrain the
"authority of any judge having (a) absolute power to punish per-
"jury before the making thereof, but that every such judge may
"proceed in the punishment of all offences punishable before the
"making of the said statute, in such wise as they might have done
"and used to do to all purposes, so that they set not on the
"offender less punishment than is contained in the said act."

(a) And
there the
court of
King's
Bench, &c.
proceeding
upon an in-
dictment or
information
of perjury,

or subornation of perjury at common law, may not only set a discretionary fine on the offender, but
also condemn him to the pillory, without making any inquiry concerning the value of his lands or goods.
Hank. P. C. c. 69. § 16.

In the construction of this statute the following opinions have
been holden :

That every indictment or action on this statute must exactly
pursue the words of it ; and therefore if it allege, that the defend-
ant deposed such a matter *falso & deceptive*, or *falso & corrupte*, or
falso & voluntarie, without saying *voluntarie & corrupte*, it is not
good, though it conclude, that *sic voluntarium & corruptum commisit*
perjurium contra formam statuti, &c. Also, it is (b) said to be
necessary expressly to shew, that the defendant was sworn ; and
that it is not sufficient to say, that *tactò per se sacro Evangelio*
deposuit.

Cro. Ellis.
147.
Held 12.
Savil, 43.
2 Leon. 211.
3 Leon. 230.
Show. 190.
Holt, 534.
pl. 1. Skin.
403. pl. 39.
(b) Cro.
Ellis. 105.
3 Bullst. 147.

But there is no need to shew, whether the party took the false
oath through the subornation of another, or of his own act, though
the words of the statute are, *If persons by subornation, &c., or their*
own act, &c., shall commit wilful perjury, for there being no medium
between the branches of this distinction, they seem to be put in
ex abundanti, and to express no more than the law would have
implied, and therefore operate nothing.

It hath been adjudged, that a man cannot be guilty of perjury
within this statute, in any case wherein he may not possibly be
guilty of subornation of perjury within it ; for it is reasonable to
give the whole statute the same construction ; neither can it be
well intended, that the makers of the statute meant to extend
its (c) purview farther as to perjury, which they seem to esteem
the less crime, than to subornation of perjury, which they seem to
esteem the greater ; and therefore since the clause concerning
subornation of perjury, mentioning only matters depending by

5 Co. 99.
Cro. Jac.
120.
3 Inst. 164.
2 Leon. 201.
Yelv. 120.
Cro. Ellis.
148.
2 Roll. Abt.
77.
(c) See ob-
serv. on
stat. 71.

writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c., extends not to perjury on an indictment or criminal information; the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction. Also, since the clause concerning subornation of perjury relates only to perjury by witnesses, that concerning perjury shall extend only to the like perjury; and therefore not to perjury in an answer in Chancery; or in swearing the peace against a man; or in a presentment by a homager in a court-baron; or in a wager of law; or in swearing before commissioners of inquiry of the king's title to lands; and, by the opinions of some, a false affidavit against a man in a court of justice is not within the statute. But if such affidavit be by a third person, and relate to a cause depending in suit before the court, and either of the parties in variance be grieved, hindered, or molested, in respect of such cause, by reason of the perjury, it may strongly be argued that it is within the purview of the statute. Also, it seems the better opinion, that a false oath before the sheriff on a writ of inquiry of damages is within the statute.

Hawk. P.C.
c. 69. § 22.
and several
authorities
there cited.

It hath been collected from the clause which gives an action to the party grieved, that no false oath is within the statute, which doth not give some person a just cause of complaint; and therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no just cause of complaint to the other party, who would take advantage of another's want of evidence to prove the truth. Also, upon the same ground, no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it; and therefore, in every prosecution on the statute, you must set forth the record wherein you suppose the perjury to have been committed, and must prove at the trial, that there is such a record, either by actually producing it, or an attested copy; and in the pleadings you must not only set forth the point wherein the false oath was taken, but must also shew how it conduced to the proof or disproof of the matter in question; and if an action on the statute be brought by more than one, you must shew how the perjury was prejudicial to each of the plaintiffs. But, it seems, that a perjury, which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury that goes directly to the point in issue; and a perjury, in a cause wherein an erroneous judgment is given, is a good ground of a prosecution upon the statute till the judgment be reversed.

2 Hal. Hist.
P.C. 191-2.

If perjury be committed, that is within this statute, but concludes not *contra formam statuti*; yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute.

By the 2 G. 2. c. 25. § 2. the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, it is enacted, "That, besides the punishment already to be inflicted by law for so great crimes, it shall and may be law-

ful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper; and therefore judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported, as aforesaid, such person being lawfully convicted shall suffer death as a felon without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended."

[By 12 G. 1. c. 29. § 4. "If any person who shall be convicted of wilful and corrupt perjury, or subornation of perjury, shall act or practise as an attorney or solicitor, or agent in any suit or action, in any court of law or equity in *England*, the judge or judges of the court where such suit or action shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way in open court, and if it shall appear, to the satisfaction of such judge or judges, that the party hath offended contrary to this act, such judge or judges shall cause such offender to be transported for seven years."

By 8 G. 1. c. 6. "If any person, making such affirmation or declaration as is appointed by this act, shall be lawfully convicted of wilful, false, and corrupt affirming and declaring any matter or thing, which, if sworn in the common or usual form, would have amounted to wilful and corrupt perjury; every person so offending shall incur such and the same pains, penalties, and forfeitures as are inflicted or enacted by the laws against persons convicted of wilful and corrupt perjury."

By 31 G. 2. c. 10. § 24. "Whoever shall willingly and knowingly take a false oath, or procure any person to take a false oath, to obtain the probate of any will or wills, or to obtain letters of administration in order to obtain the payment of any wages, pay, or other allowances of money, or prize-money, due, or that were supposed to be due, to any officer, seaman, or other person entitled, or supposed to be entitled, to any wages, pay, or other allowances of money, or prize-money, for service due on board of any ship or vessel of his Majesty, &c. or the executor, administrator, wife, relation, or creditor of any such officer or seaman, or other person who has really served, or was supposed to have served, on board any ship or vessel of his Ma-

"jesty, &c. shall be deemed guilty of felony, and suffer death without benefit of clergy."

And by 28 G. 2. c. 13. § 14. for the relief of insolvent debtors, "if any sheriff or other officer perjure himself in taking the oaths directed by the act, he shall forfeit 500 l. And if the offence be committed by a prisoner or other person enabled and intending to take the benefit of the act, it is felony without benefit of clergy."

The better to prevent great offenders from escaping punishment by reason of the expence attending prosecutions, it is enacted by 23 G. 2. c. 11. § 3. "That it shall be lawful for any of his Majesty's justices of assize, or *nisi prius*, or general gaol-delivery, or any of the great sessions of *Wales*, or of the counties palatine, and they are hereby authorized (sitting the court, or within twenty-four hours after) to direct any person, examined as a witness upon any trial before him or them, to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution; and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall, and are hereby required to do their duty without any fee, gratuity, or reward for the same." Such prosecution is also exempt from tax or duty and fees of court, and the clerk of the assize is ordered to give the prosecutor a certificate of the same, being directed, with the names of the counsel assigned; which certificate is to be deemed sufficient proof of such prosecution having been directed, but no such direction or certificate is to be given in evidence upon the trial of the person against whom the prosecution is directed.]

[(C) How charged and assigned.

(a) Before the passing of this act, this averment seems not to have been made. Dougl. 156. (b) *Rex v. Dowlin*, 5 Term Rep. 317. If, however, the prosecutor undertakes to set out in the indictment

BY 23 G. 2. c. 11. "In every information or indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, (averring (a) such court, or person or persons, to have a competent authority to administer the same,) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid; and without setting forth the commission (b) or authority of the court, or person or persons before whom the perjury was assigned."

more of the proceedings than he need under this act, he must set them forth correctly. *Ibid.*

And by § 2. "In every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient

"cient to set forth the substance of the offence charged upon the
"defendant, without setting forth the bill, answer, information,
"indictment, declaration, or any part of any record or proceed-
"ing either in law or equity, and without setting forth the com-
"mission or authority of the court, or person or persons before
"whom the perjury was committed, or was agreed or promised
"to be committed."

The fact in the affidavit in which the defendant was charged to have perjured himself, was, that he never did, at any time during his transactions with the commissioners of the victualling-office, charge more than the usual sum of sixpence *per* quarter, beyond the price he actually paid for any malt or grain purchased by him for the said commissioners as their corn-factor: the assignment in the indictment to falsify this alleged that the defendant did charge more than sixpence *per* quarter *for and in respect of* such malt and grain so purchased. It was objected, that the words *in respect of* may include lightersage, freight, and many collateral and incidental expences attending the corn and grain jointly with the charge for the corn or grain, and bearing that sense, the defendant was not guilty of perjury. This objection however was over-ruled.

Rex v. Atkinson,
Dom. Proc.
July 1, 1785.

A complaint having been made *ore tenus* by a solicitor, before the Chancellour, in the court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stating that, "*at and upon the hearing of the said complaint,*" the defendant deposed, &c. it was holden a sufficient averment, that the complaint was heard.

Rex v. Aylett, 1 Term Rep. 70.
Dom. Proc.
July 6, 1786.

It is sufficient, if the assignments of perjury falsify the meaning attributed by the verdict to the matter sworn.

Ibid.

Where it was stated, that *at such a court J. K. was in due form of law tried upon a certain indictment then and there depending against him for murder, and that at and upon the said trial it then and there became and was made a material question*—Whether, &c. it was adjudged, that these were sufficient averments, that the perjury was committed on the trial of *J. K.* for the murder, and that the question on which the perjury was assigned was material on that trial. For it is not necessary to set forth so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned: it is sufficient to allege generally, that that question became a material question.

Rex v. Dowling,
5 Term Rep.
318.

In perjury in an answer in Chancery, it is not necessary to prove the identity of the person who swore the oath: it is enough if the hand-writing be proved, and that the jurat was subscribed by the Master as being sworn before him.

Rex v. Morris,
2 Burr. 1189.

In general, the court will oblige the defendant to plead or demur to even a defective indictment; and they are very cautious in granting a *certiorari* to remove it (a). And Lord *Thurlow* refused permission to amend the answer in Chancery, where an indictment for perjury had only been threatened, though the party, having no interest, could not be supposed to make the false oath intentionally. For it is the province of the grand jury to judge of the intention (b).]

2 Hawk.
P. C. c. 25.
§ 146.
(a) *Id.* c. 27.
§ 28.
(b) Earl Verney v. Macnamara,
1 Br. Ch. Rep. 419.

THE

...the ... For if these ... authority, ... merchant ship, ... and ... and ... in the Ad- ... As for ... were found on ... the govern- ... of peace ... trade, and ... many princes ... manner, as I ... in discovery, ... privileges of ... in this ...

... of ... on ... a general ... of ... of ... by pirates ... here,

... can ... be an ex- ... be re- ... by his ... merchants, &c., ... at the ... privy or

... the judges in the reign of Richard ... must prove his

his own sovereign and the sovereign of the captor to have been in mutual amity, and also his own sovereign to have been in amity with our king, at the time of the capture. For in our municipal law books it is generally and indiscriminately asserted, that piracy cannot be committed by the subjects of states at enmity.

The goods of pirates, not taken from others, belong, after seizure, to the crown or its grantee; and those of which others have been despoiled will be forfeited in the same manner, if the owners come not within a reasonable time to vindicate their property. And until they do so, the king may seize them, and if they *bona peritura*, he may sell them, and upon proof, restore the value. But by stat. 22 & 23 Car. 2. c. 11. § 11. if the company belonging to any *English* merchant ship take any ship, which first assaulted them, the officers and mariners shall receive such share of the condemned ship and goods as is usually practised in private men of war. 3 Bulst. 148.
12 Co. 73.

About the time of the treaty of *Nimeguen*, the captain of a French merchant ship, having put into a port in *Ireland*, was accused by his crew of robberies on the seas, and fled. His ship and goods were confiscated, as having belonged to pirates. The French ambassador presented memorials, requiring the cause to be demanded to the natural judge, as was pretended, in *France*. But the king and his council finally adjudged, that he was sufficiently founded in point of jurisdiction to confiscate the ship and goods, and to try capitally the person himself, had he been in hold, the matter of *renvoy* being a thing quite refused among princes; and as every man by the usage of our *European* nations is justifiable in the place where the crime is committed, so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they are taken.] 2 Sir L.
Jenk. 714.

Piracies and depredations at sea are capital offences, by the civil law. Piracy is said to have been punishable at common law, before the 25 E. 3. stat. 5. c. 2. as petit treason, if committed by a subject, and, as felony, if committed by a foreigner. But, it seems agreed, that after that statute, by which all treason is confined to the particulars therein set down, it was cognizable only by the civil law. Staunf.
P. C. 10.
3 Inst. 112.
2 Ffal. Hist.
P. C. 369.
370.
Hawk. P. C.
c. 37. § 2.

But this proving very inconvenient, because by that law no offender shall have judgment of death without his own confession, or direct proof by eye-witnesses, it was enacted by 28 H. 8. c. 15. "That all felonies and robberies, &c. upon the sea, or in any haven, river, creek, or place where the admiral or admirals have or pretend to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm as shall be limited by the king's commission or commissions to be directed for the same, in like form and condition as if any such offence or offences had been committed or done in or upon the land; and such commissions shall be had under the king's great seal, directed to the admiral or admirals, or to his or their lieutenant deputy and deputies, " and

“ and to three or four such other substantial persons as shall be
 “ named or appointed by the Lord Chancellor of *England* for the
 “ time being, from time to time and as oft as need shall require,
 “ to hear and determine such offences after the common course
 “ of the laws of this land used for felonies, and robberies, &c.,
 “ done and committed upon the land within this realm.”

And it is farther enacted by the said statute, “ That if any
 “ person or persons happen to be indicted for any such offence
 “ done or hereafter to be done upon the seas, or in any other
 “ place above limited, that then such order, process, judgment,
 “ and execution shall be used, had, done, and made to and against
 “ every such person and persons, so being indicted, as against
 “ felons, &c. for any felony, &c. upon the land, by the laws of
 “ the land is accustomed.”

And it is farther enacted by the said statute, “ That such as
 “ shall be convicted of any such offence by verdict, confession, or
 “ process by authority of any such commission, shall have and
 “ suffer such pains of death, losses of lands, goods, and chattels, as
 “ if they had been attainted and convicted of such offence done
 “ upon the land, and also that they shall be excluded from the
 “ benefit of the clergy.”

In the construction of this act the following opinions have been
 holden :

3 Inst. 172.
 2 Hal. Hist.
 P. C. 370.

That it does not alter the nature of the offence, so as to make
 that, which was before a felony only by the civil law, now become
 felony by the common law; for the offence must still be alleged
 as done upon the sea, and is no way cognizable by the common
 law, but only by virtue of this statute; which, by ordaining that
 in some respects it shall have the like trial and punishment as are
 used for felony at common law, shall not be carried so far as to
 make it also agree with it in other particulars which are not men-
 tioned; and from hence (a) it follows that this offence remains as
 before, of a special nature, and that it shall not be included in a
 general pardon of all felonies.

(a) Moor,
 75.
 3 Inst. 172.
 Co. Lit.
 391.
 2 Hal. Hist.
 P. C. 370.
 3 Inst. 172.
 Hawk. P. C.
 c. 37. § 7.

From the same ground also it follows, that no persons shall in
 respect of this statute be construed to be or punished as accessories
 to piracy before or after, as they might have been, if it had been
 made a felony by the statute, whereby all those would incidentally
 have been made accessories in the like cases in which they would
 have been accessories to a felony at common law; and from hence
 it follows, that accessories to piracy, being neither expressly named
 in the statute, nor by construction included in it, remain as they
 were before, and were triable by the civil law, if their offence
 were committed on the sea; but if on the land, by no law, until
 11 & 12 W. 3. c. 7. for 2 & 3 Ed. 6. c. 24. which provides
 against accessories in one county to a felony in another, extends
 not to accessories to an offence committed in no county, but on the
 sea: but, by the said statute of 11 & 12 W. 3. c. 7. they are
 triable in like manner as the principals are by the statute of
 28 H. 8. c. 15.

From

From the same ground also it follows, that an attainder for this offence corrupts not the blood, inasmuch as the statute only says, that the offender shall suffer such pains of death, &c. as if he were attainted of a felony at common law, but says not that the blood shall be corrupted.

3 Inst. 112.
Hawk. P. C.
c. 37. § 8.

Yet it has been resolved, that an offender standing mute on an arraignment, by force of this statute, shall have judgment of *paine* *mort & dure*; for the words of the statute are, *That a commission shall be directed, &c. to hear and determine such offences after the common course of the laws of the land.*

3 Inst. 114.
Dyer, 241.
pl. 49. 308.
pl. 73.

It has been holden, that the indictment for this offence must allege the fact to be done on the sea, and must have both the words *maritime* and *piraticæ*; and that no offence is punishable by virtue of this act as piracy, which would not have been felony if done on the land, and, consequently, that the taking of an enemy's ship by an enemy is not within the statute.

3 Inst. 112.
Roll. Rep.
175.
Hawk. P. C.
c. 37. § 10.

It is agreed, that this statute extends not to offences done in creeks or ports within the body of a county, because they are and always were cognizable by the common law.

Moor, 756.
Roll. Rep.
175.
Hawk. P. C. c. 37. § 11.

By the 11 & 12 W. 3. c. 7. it is enacted, "That all piracies, felonies, and robberies committed in or upon the sea, or in any place where the admiral has jurisdiction, may be tried and determined at sea, or upon the land in any of his Majesty's islands or plantations, &c. to be appointed by the king's commission under the great seal, or the seal of the Admiralty, directed to any of the admirals, &c., and such persons and officers by name or for the time being, as his Majesty shall think fit, who shall have power jointly or severally, by warrant under hand and seal of any of them, to commit any person against whom information of any such offences shall be given upon oath, and to call a court of Admiralty, which shall consist of seven persons at the least, and shall proceed in the trial of the said offenders according to such directions as are set forth at large in the said statute."

11 & 12 W. 3.
c. 7. Made
perpetual by
6 Geo.
c. 19. § 3.

And it is farther enacted by the said statute, § 8. "That if any of his Majesty's natural-born subjects or denizens of this kingdom shall commit any piracy or robbery, or any act of hostility, against other his Majesty's subjects upon the sea, under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender and offenders, and every of them, shall be deemed, adjudged, and taken to be pirates, felons, and robbers, and they and every of them, being duly convicted thereof according to this act, or the aforesaid act of 28 H. 8. c. 15., shall have and suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to have and suffer."

And it is farther enacted by the said statute, "That if any commander or master of any ship, or any seaman or mariner, shall in any place, where the admiral hath jurisdiction, betray
" his

“ his trust and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandize, or yield them up voluntarily to any pirate, or bring any seducing message from any pirate, enemy, or rebel, or consult, combine, or confederate with, or attempt or endeavour to corrupt, any commander, master, officer, or mariner, to yield up or run away with any ship, goods, or merchandize, or turn pirate, or go over with pirates, or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or that shall confine his master, or make, or endeavour to make, a revolt in his ship, shall be adjudged to be a pirate, felon, and robber; and being convicted thereof, according to the directions of this act, shall have and suffer pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to have and suffer.

And it is farther enacted by the said statute, “ That all and every person and persons whatsoever, who shall either on the land or upon the seas wittingly and knowingly set forth any pirate, or aid and assist, or maintain, procure, command, counsel, or advise any person or persons whatsoever to do or commit any piracies or robberies upon the seas, and such person and persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons whatsoever so as aforesaid setting forth any pirate, or aiding or assisting, maintaining, procuring, commanding, counselling, or advising the same, either on the land or upon the sea, shall be adjudged to be accessory to such piracy and robbery done and committed. *And farther*, that after any piracy or robbery is or shall be committed by any pirate or robber whatsoever, every person or persons, who, knowing that such pirate or robber has done or committed such piracy and robbery, shall, upon the land or upon the sea, receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods or chattels which have been by any such pirate or robber piratically and feloniously taken, shall be by this statute likewise adjudged to be accessory to such piracy and robbery, and that all such accessories to such piracies and robberies shall be inquired of, heard, and determined, and adjudged according to the common course of the law, according to the said statute of 28 H. 8. c. 15. as the principals of such piracies and robberies may be, and no otherwise; and being thereupon attainted shall suffer pains of death, loss of lands, goods and chattels, and in like manner as the principals of such piracies, robberies, and felonies ought to suffer according to the said statute of 28 H. 8. c. 15. which is declared to be in full force; any thing in this act to the contrary notwithstanding.”

4 G. 1.
c. 11.

And by 4 G. 1. c. 11. “ All persons, who shall commit any offence for which they ought to be adjudged pirates, felons, or
“ robbers,

“robbers, by 11 & 12 W. 3. c. 7., may be tried and judged for every such offence, according to the form of 28 H. 8. c. 15., and shall be excluded from their clergy.”

By the 8 G. 1. c. 24. for the more effectual suppressing of piracy, it is declared and enacted, “That if any commander or master of any ship or vessel, or any other person or persons, shall anywise trade with any pirate by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas with any ammunition, provision, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall anywise consult, combine, confederate, or correspond with any pirate, felon, or robber on the seas, knowing them to be guilty of any such piracy, felony, or robbery; such offender and offenders, and every of them, shall in each and every of the said cases be deemed, adjudged, and taken to be guilty of piracy, felony, and robbery, and he and they shall and may be inquired of, tried, heard, and adjudged of and for all or any of the matters aforesaid, according to the statute made 28 H. 8. c. 15. for pirates, and the statute made 11 & 12 W. 3. c. 7., and he and they, being convicted of all or any of the matters aforesaid, shall suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to suffer; and in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and, though they do not seize and carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandizes belonging to such ship or vessel, the person and persons, who shall be guilty thereof, shall in all respects be deemed and punished as pirates as aforesaid.”

And § 2. it is farther enacted, “That every ship or vessel, which shall be fitted out with a design to trade with, or supply or correspond with any pirate, and all and every goods and merchandizes put on board the same for any intent or purpose to trade with any pirate, felon, or robber on the seas, shall be *ipso facto* forfeited; one moiety thereof to the use of the king’s Majesty, his heirs and successors, the other moiety to the person or persons who shall first make discovery, and give information of such intent or design; and such person or persons, who shall first make such discovery, shall and may sue for and recover the said ship or vessel, and all and every the goods and merchandizes on board the same, in the High Court of Admiralty.”

And § 3. “Whereas there are some defects in laws for bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such

“ piracy

8 G. 1.
c. 24.
Made perpetual by
2 G. 2.
c. 28. § 7.

“ piracy and robbery is not or cannot be apprehended and brought
 “ to justice; be it therefore enacted, That all and every per-
 “ son and persons whatsoever, who by the said statute made
 “ 11 & 21 H. 3. c. 7. are declared to be accessory or accessories
 “ to any piracy or robbery therein mentioned, are hereby declared
 “ and shall be deemed and taken to be principal pirates, felons,
 “ and robbers, and shall and may be inquired of, heard, deter-
 “ mined, and adjudged in the same manner as persons guilty of
 “ piracy and robbery may and ought to be inquired of, tried,
 “ heard, determined, and adjudged by the said statute 11 & 12 W. 3.
 “ c. 7.; and being thereupon attainted and convicted shall suffer
 “ such pains of death, loss of lands, goods, and chattels, and in
 “ the manner, as pirates and robbers ought by the said act to
 “ suffer.”

And § 4. it is farther enacted, “ That all and every offender or
 “ offenders convicted of piracy, felony, or robbery, by virtue of
 “ this act, shall not be admitted to have the benefit of clergy, but
 “ be utterly excluded of and from the same.”

And § 5. “ To the end that a farther encouragement may be
 “ given to all seamen and mariners to fight and defend their ships
 “ from pirates, it is farther enacted, “ That in case any seaman
 “ or mariner on board any merchant ship or vessel, or any other
 “ ship or vessel, shall be maimed in fight against any pirate, every
 “ such seaman and mariner, upon due proof of his being maimed
 “ by such fight, shall not only have and receive the rewards ap-
 “ pointed by 23 Car. 2. c. 11. but shall also be admitted into and
 “ provided for in *Greenwich* Hospital, preferably to any other sea-
 “ man, who is disabled from service or getting a livelihood merely
 “ by his age.”

And by § 6. “ If any commander, master, or other officers, or
 “ any seaman or mariner of any merchant ship or vessel, which
 “ carries guns and arms, shall not, when they are attacked by any
 “ pirate, or by any ship or vessel on which such pirate is on board,
 “ fight and endeavour to defend themselves and their said ship and
 “ vessel from being taken by the said pirate, or shall utter any words
 “ to discourage the other mariners from defending the said ship, and
 “ by reason thereof the said ship or vessel shall fall into the hands
 “ of such pirate, then, and in every such case, every such com-
 “ mander or other officer, and every seaman and mariner, who
 “ shall not fight and endeavour to defend and save the said ship
 “ or vessel, or who shall utter any such words as aforesaid, shall
 “ lose and forfeit all and every part of the wages due to him and
 “ them respectively by the owner and owners of the said ship or
 “ vessel, and shall not be permitted to sue for or recover the same,
 “ or any part thereof, in any court either of law or equity, and
 “ as a farther punishment shall suffer six months’ imprison-
 “ ment.”

And § 7. “ For prevention of seamen or mariners from desert-
 “ ing merchant ships or vessels abroad in the plantations, or in

any other parts beyond the seas, which is the chief occasion of their turning pirates, and of great detriment to trade and navigation, and is chiefly occasioned by the owner or owners of ships or vessels paying wages to the seamen or mariners when abroad, it is enacted, That no master or owner of any merchant ship or vessel shall pay or advance, or cause to be paid or advanced, to any seaman or mariner, during the time he shall be in parts beyond the seas, any money or effects on account of wages, exceeding one moiety of the wages which shall be due at the time of such payment, until such ship or vessel shall return to *Great Britain* or *Ireland*, or to the plantations, or to some other of his Majesty's dominions whereto they belong, and from whence they were first fitted out; and if any such master or owner of such merchant ship or vessel shall pay or advance, or cause to be paid or advanced, any wages to any seaman or mariner above the said moiety, such master or owner shall forfeit and pay double the money he shall so pay and advance, to be recovered in the High Court of Admiralty by any person who shall first discover and inform of the same."

[By 18 G. 2. c. 30. "All persons, being natural-born subjects or denizens of his Majesty, who during any wars have committed any hostilities upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, against his Majesty's subjects, by virtue or under any colour of any commission from any his Majesty's enemies upon the sea, or any the places where the admiral hath jurisdiction as aforesaid, may be tried as pirates, felons, and robbers in the said court of Admiralty, on ship board, or upon the land, in the same manner as persons guilty of piracy, felony, and robbery are directed to be tried; and on conviction shall suffer as any other pirates, &c. ought by virtue of 11 & 12 W. 3. c. 7. or any other act: Provided that any person who shall be tried and acquitted, or convicted, according to this act, for any of the said crimes, shall not be liable to be prosecuted for the same crime or fact, as high treason. But this act shall not prevent any persons who shall not be tried according to it, from being tried for high treason by 28 H. 8. c. 5."

And by 32 G. 2. c. 25. § 12. "In case any commander of any private ship of war duly commissioned according to the directions of this act, or the 29 G. 2. c. 34. shall agree with the commander or other person of or belonging to any neutral or other ship or ships, vessel or vessels, except those of his Majesty's declared enemies, for the ransom of any such neutral or other ship, &c. or the respective cargo or cargoes thereof, or any part thereof, after the same shall have been taken as prize, and shall, in pursuance of any such agreement or agreements, actually quit, set at liberty, or discharge any such prize or prizes, instead of bringing the same into some port or ports belonging to his Majesty's dominions, every such offender shall be deemed guilty of piracy,

By 22 G. 3. c. 25. all contracts for ransoming any private vessel, &c. captured by the king's enemies, are void, and the offender liable to a penalty of 500*l*.

" piracy, felony, and robbery, and on conviction (in the manner
 " the act describes) shall suffer such pains of death, &c. as pirates,
 " felons, and robbers upon the seas ought to suffer according to
 " the laws now in being. But the commander of any private ship
 " of war, upon the capture of any neutral vessel, which by any
 " law or treaty shall be liable only to the forfeiture of such con-
 " traband goods as shall be on board thereof, may receive such
 " goods in case the commander is willing to deliver them, and
 " thereupon quit, set at liberty, or discharge such neutral ship or
 " vessel."

By 30 G. 2. c. 25. § 20. and 33 G. 3. c. 66. § 70. a session of oyer and terminer, and gaol-delivery, for the trial of offences committed on the high seas, shall be holden twice at the least in every year at the Sessions-house in the *Old Bailey*, or at such other place as the Lords of the Admiralty shall appoint. And the commissioners named in the commissions of oyer and terminer for the trial of such offences, as also any justices of the peace, may take informations touching offences committed upon the seas, and cause the parties to be apprehended and committed: They may also oblige any persons they think necessary to enter into recognizances to appear, prosecute, and give evidence at the sessions, and upon their refusal to do so, may commit them; which recognizances and informations are to be transmitted to the registrar of the court of Admiralty.]

[Pischary.]

Bloont's
 Law Dict.
 verb. Pif-
 chary.

A PISCHARY is said to be a right or liberty of fishing in the soil of another.

But a man may have *liberam piscariam* in his own soil. Skin. 678.

a Salk. 637.

Our law books make mention of three sorts of fishery, *libera*, *separalis*, *communis*.

Seymour
 v. Lord
 Courtenay,
 5 Burr.
 2814.

In order to constitute a *several* fishery, it is necessary, that the party claiming it should so far have the right of fishing independently on all others, as that no person should have a *co-extensive* right with him in the subject claimed; for where any person has such co-extensive right, there, it is only a *free* fishery. But a partial, independent right in another, or a limited liberty, is not inconsistent with a right to a *several* fishery.

Whether

Whether ownership of the soil is essential to a *several fishery* is a point upon which there hath been a great diversity of opinion, and which is not yet finally settled. 5 Burr. 2814. Dougl. 56. That it is necessarily included in a *several fishery*, see 2 Bl. Com. 39. 2 Salk. 637. Dav. 35. b. 17 E. 4. 6. 11 E. 4. 4. 10 H. 7. 24. 26. 28. Plo. Com. 154. That it is not, Co. Lit. 4. b. 112. a. Bract. 108. b. Br. tit. Tenures, pl. 75. Fitzh. Sci. Fa. 100. Godb. 117. 20 Vin. Abr. 201. The latter seemeth to be the better opinion, for the utmost that can be deduced from the cases cited in support of the former is, that a *several fishery* shall be presumed to include the soil, until the contrary is proved. see Co. Lit. 112. a. note 7. last edition.

A free fishery is considered by Sir Wm. Blackstone as an exclusive right of fishing in a publick river, and is referred by him to the head of franchises. But this doctrine is, at least, questionable, our law books (a) extending this kind of fishery to *all* streams indiscriminately, whether *private* or *publick*. The same learned writer do saith, that a *free fishery* imports an exclusive right, and so differeth from *common of piscary*; that in a *free fishery*, a man hath a property in the fish before they are caught; in a *common of piscary* not till afterwards. But this doctrine, though supported by some (b) authorities, is impugned by others. Lord Coke (c) considers *common of fishery* and *free fishery* as the same thing. For, he saith, that a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam piscariae*, or *liberam piscariam*, the owner of the soil shall fish there. And Eyre, J. saith, (d) that the word *libera*, *ex vi termini*, implied *common*. And that a man cannot declare in trespass for taking his fish in a *free fishery* was expressly holden in two cases (e), and the judgment for that reason reversed. The right to the property of the fish in a free fishery, till caught, was negatived by the court incidentally in a still earlier case (f). Lord Mansfield, in the case of *Seymour v. Lord Courtenay*, saith, that where any person hath a *co-extensive* right with another it is a *free fishery* (g). 2 Bl. Com. 39. (a) F. N. B. 88. G. Fitzh. Abr. Aff. 422. 4 E. 4. 28. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b. Cro. Car. 554. 1 Vent. 122. Skin. 677. Carth. 285. (b) Reg. 95. b. 43 E. 3. 24. 2 Salk. 637. Carth. 285. (c) Co. Lit. 112. a. (d) 2 Salk. 637. Carth. 285. (e) Upton v. Dawkins, 3 Mod. 97. Comb. 11. S. C. Peake v. Turner, cited in Carth. 286. in marg. (f) Child v. Greenhill, Cro. Car. 554. (g) 5 Burr. 2816.

If a man justifies for using a piscary, he ought to shew whether it be common, free, or several. So, whether it be appurtenant to a manor or messuage, &c. for it is an interest, and not a mere liberty or easement. Hardr. 407.

A fishery, without more, is a tenement within the statute 9 & 10 W. 3. c. 11. so as to entitle a person renting it to a settlement, for the court will intend that the soil passed with it. It is indeed doubtful, whether it is material for this purpose, that the soil should pass. Rex v. Old Alresford, 1 Term Rep. 358. In this case, one learned judge is reported to lay it down broadly, that a fishery is a *tenement*; that trespass will lie for an injury to it; and it may be recovered in ejectment.

In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; and it generally extends *ad filum medium aque*. But in navigable rivers, the proprietors of the land on each side have it not; the fishery is common, it is, *prima jure*, Carter v. Muscot, 4 Burr. 2162. Lord Fitzwater's case, 1 Mod.

105. Dev.
55. Mayor,
&c. of Ox-
ford v.
Richardson,
4 Term
Rep. 439.

facie, in the king, and is publick. But the crown may grant a several fishery in a navigable river, where the sea flows and re-flows, or in an arm of the sea; and on the other hand, there may be a free fishery, or a co-extensive right of fishing with the owners of the soil, in a river not navigable. In the one case, the presumption is in favour of the appropriate right, in the other case, the presumption lies the contrary way. In these, as in all other cases of presumption, the presumption will stand, till the contrary is proved.

By the statute of 5 Geo. 3. c. 14. persons convicted of stealing, taking, or destroying any fish in any river, or stream, pond, pool, or other water, in any park or paddock, or in any garden, orchard, or yard, adjoining or belonging to any dwelling-house, or aiding or assisting therein, or receiving or buying the fish knowing them to be stolen or taken, shall be transported for seven years. The prosecution, however, must be within six months after the offence committed; and any offender convicting an accomplice is entitled to a pardon.

By § 3. every person convicted of taking or destroying, or attempting to take or destroy any fish in any river or stream, &c., not being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling-house, but shall be in any other inclosed ground which shall be private property, shall forfeit the sum of five pounds to the owner of such river or stream, &c. But this clause, it is expressly provided, § 5. shall not extend to any person who shall have a just right or claim to take, kill, or carry away any such fish.

Kinnerley
v. Orpe,
Doug. 517.

It is obvious, therefore, that a person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to a penalty under this act.]

Pleas and Pleadings.

PLEADING in general signifies the allegations of parties to suits when they are put into a proper and legal form; which are distinguished, in respect to the parties who plead them, by the names of bars, replications, rejoinders, surrejoinders, rebutters, surrebutters, &c. And though the matter in the declaration or count does not properly come under the name of pleading, yet, being often comprehended in the extended sense of the word, we have considered it under this head.

Pleading in strictness is no more than setting forth that fact which in law shews the justness of the demand made by the plaintiff, or the discharge and defence made by the defendant. And herein, no greater certainty is required, than is sufficient to bring on a trial without inveigling judge or jury. It seems, that, originally, pleadings were so formed, and were very plain and concise; but in progress of time pleaders, yea, and judges, became too curious in them, so that the art and dexterity of pleading, which in its (a) use, nature, and design was only to render the fact plain and intelligible, and, to bring the matter to judgment with convenient certainty, began to degenerate from its primitive simplicity and true use, and end in a piece of nicety and curiosity; which, how it hath improved therein in later times, the length of the pleadings, the many unnecessary repetitions, and the many miscarriages of causes upon small and trivial objections, do but too sufficiently testify.

Anciently fines were imposed *pro stulte loquio*, or *stulte dicto*, which were mulcts laid on pleaders by the courts for barbarous and disorderly pleading. 2 Inst. 123.

Pleas were anciently (b) *ore tenus*, and afterwards minuted down by the prothonotaries, and entered of record in the *Latin* tongue, that being a dead language, and least subject to variation, to remain as monuments and precedents of the law: that the pleadings should be in *Latin* is expressly enacted by the 36 E. 3. c. 15. which statute was made to abolish a law introduced by William the Conqueror, which ordained, that the pleadings in the courts of justice should be in *French*.

But now by 4 G. 2. c. 26. it is enacted, "That all writs, process, pleadings, rules, indictments, records, and all proceedings in any courts of justice within *England*, and in the court of Exchequer in *Scotland*, shall be in the *English* tongue, and be written in such common hand as acts of parliament are usually engrossed in, the lines and words to be written at least as close as the said acts usually are, and not abbreviated; and all persons

(a) Recommended by Littleton as the most honourable, laudable, and profitable thing in the laws of England. Lit. § 534. and by Lord Coke, Co. Lit. 17. a. 168. 303. 2 Co. Tooker's case, and Hob. 162. 292. 295. — And it seems, that

20 Co. 132. (b) And being so is the reason that a plea, whilst in paper, may be amended. Vide title Amendment.

"offending against this act shall forfeit 50 l. to any person who will sue for the same."

[See a similar reservation in the above act of 36 E. 3.]

But by 6 G. 2. c. 14. it is provided, "That the above penalty shall not be extended to the expressing the names of writs, or technical words in the same language, as hath been used, nor to abbreviations used in the *English* language."

In pleading, there are several general rules laid down in our books; as,

Co. Lit. 303.
Plow. 65.
81. Cro.
Jac. 362.

That good matter must be pleaded in right form, apt time, and due order, but that that, which is but inducement or conveyance to the substance, need not be so certainly alleged, as that which is the gift of the plea.

Co. Lit. 303.
7 Co. 40.
Dyer, 16.

That that which is apparent to the court, and appears from a necessary implication in the record, need not be averred.

Co. Lit. 303.
Hob. 234.
Litch. 186.

That every man's plea shall be taken most strongly against himself, as every body is presumed to make the most of his own case.

2 Mod. 5.

That what the parties have agreed in pleading shall be admitted, though the jury find otherwise.

Vaugh. 48.
60. per Ld.
Vaughan.

That when a man will recover a thing from another, it is not enough for him to destroy such person's title, but he must prove his own a better, according to the rule, *melior est conditio possidentis*.

Co. Lit. 285.
303.

That every man shall plead such pleas as are pertinent and proper for him, according to the quality of his case, estate, or interest.

Hob. 164.
per Ld. Hobart.

That the law requires in every plea two things, the one, that it be in matter sufficient, the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is cause of demurrer.

Dyer, 66.
Godb. 253.
Leon. 78.

That every plea in bar, being a confession and avoidance of the plaintiff's action, must be substantive and certain, with an avoidance of the plaintiff's demands, which he may traverse, and thereon go to issue; because the declaration of the plaintiff stands confessed, as far as it is not avoided by the defendant.

2 Co. 25. a.
RCo. 20. b.
Co. Lit. 303.
(a) Dupli-
city in the
declaration
cured by
pleading

That if a count, avowry, which is in nature of a count, replication, &c. want (a) form, or (b) omit circumstance of time, place, &c. they may be made good by the plea of the adverse party; but, if they want substance, they cannot be made good: so, in such cases, the bar may be made good by the (c) replication, and the replication by the rejoinder, &c.

over. 2 Vent. 227.
3 Lev. 195.
—And that if a man pleads over, he shall never take advantage of any slip committed in the plead-
ing of the other side, which he could not take advantage of upon a general demurrer. 2 Salk. 519.
pl. 18. Per Holt, Ch. J.

(b) A suit depending must shew in what court, but cured by pleading over. 3 Lev. 11. In debt for rent, if no place be assigned where the lease was made, the defendant in his plea confessing the lease makes the declaration good. Hob. 82. (c) Fault in the plea cured by the replication. Carth. 66.

Co. Lit. 303.
Vide postea.

That all pleas must be alleged directly, and not by way of rehearsal; nor is it sufficient, that what ought to be expressly pleaded may be deduced by argument from what is pleaded.

That

That in matters triable by our law, all things issuable ought to be specially alleged in order to have a convenient trial; but in matters spiritual the law is otherwise; because there is no peril in the trial; and therefore, if certain enough to ground a certificate, it is sufficient.

3 Leon 300.
Laid down
as a rule by
Lord Ander-
son, cited in
Show. P. C.
94.

(a) Sentences in the spiritual courts may be alleged summarily; as, that a divorce was betwixt such parties for such a cause, and before such a judge; but the judge must be named, that the court may write to him; that this is sufficient, it being to no purpose to allege them particularly, because the forms of these courts are different from those of the common law; and our judges presume that they are observed by the judges of those courts. Co. Lit. 303.

That surplusage does not vitiate, unless it be contrariant to the matter pleaded before. *Vide postea.*

That where one is authorised to do a thing by common law, statute, custom, grant, or commission, he ought to shew, that he hath pursued the substance of it accordingly. Co. Lit. 303.

That general estates in fee-simple may be generally alleged; as, that J. S. was seised in fee; but the commencement of particular estates must be shewn, because they could not originally commence without a conveyance, which must be shewn, unless they be alleged by way of inducement only. Co. Lit. 121. a. 303. But for this, and the pleading a *Que Estate*, *vide Bro.*

Ut. Que Estate. 18 Ed. 4. 10. Dyer, 238. b. Cro. Eliz. 22. Cro. Car. 190. 428. Cro. Jac. 673. Yelr. 76. Lev. 190. Sid. 277. 2 Keb. 87. 96. Skin 303. pl. 7. 2 Mod. 53. Raym. 389. 2 Salk. 562. Carth. 9. 208. 431. 444.

That pleas ought to conclude properly, those to the writ to conclude to the writ, those in bar to the action; estoppels must rely on the estoppel. Co. Lit. 303.

But for the better understanding of these matters, we must more particularly consider,

(A) The several Parts, and the Order of Pleading.

(B) The Declaration: And herein,

1. The Nature thereof; and therein, of adding several Counts in the same Declaration.
2. Who may join or be joined in the same Declaration.
3. What Matters may be joined in the same Declaration.
4. Of the Declaration's agreeing with the Writ.
5. Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Gift of the Action: And herein,

1. Where by the Declaration it must appear that the Plaintiff hath a Right.
2. Where the Plaintiff must shew that he hath performed what was requisite on his Part.
3. Where general Allegations in the Declaration are sufficient; and therein, of Misrecitals and Omissions.

Pleas and Pleadings.

4. Where the Averments must be positive and express in the Declaration.
5. Of the Certainty required in the Description of the Thing declared for.
6. Of the Declaration's being good in Part, and void in Part.

(C) Of Imparance : And herein,

1. Of the Nature thereof, and the several Kinds.
2. What the Defendant must do before any Imparance.
3. What he is to plead after a general Imparance.
4. What may be pleaded after a special Imparance.
5. In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparance.

(D) Of making Defence : And herein, of the Difference between full and half Defence.

(E) The several Kinds of Pleas : And herein,

1. Of Pleas to the Jurisdiction : And therein,
 1. To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction and a Claim of Confiance.
 2. The Manner and Time of pleading to the Jurisdiction.

(F) Of Pleas in Abatement.

(G) Of Pleas in Bar and in Chief: And herein,

1. Of the General Issue, and how formed.
2. Immaterial and informal Issues, and where aided.
3. Of special Pleas ; and therein, of Pleas amounting, to the General Issue, and of Matters which may be pleaded or given in Evidence.
4. Of sham Pleas, and the Consequence of false Pleading.

(H) Traverse : And herein,

1. The Nature thereof.
2. In what Cases a Traverse is permitted.
3. In what Cases a Traverse is necessary.
4. Whether there may be a Traverse upon a Traverse.
5. To what Point the Traverse shall be taken ; and therein, what Matters are traversable, and of the Manner of taking thereof.

(I) Pleas

(I) Pleas in Bar, their Sufficiency and Certainty :
And herein,

1. That the Plea must be proper, and adapted to the Action.
2. That the Plea must be good in Substance ; and therein, of Matter of Inducement, and that which is the Gilt of the Defence.
3. Of general Pleading to avoid Prolixity ; and therein, of affirmative and negative Pleas.
4. Of Surplusage and Repugnancy in Pleading.
5. That the Pleading ought to be direct and not argumentative.
6. Negative Pregnant.
7. What Things must be pleaded according to their Operation in Law.
8. Of Colour in Pleading.
9. Of pleading Non-tenure and Disclaiming.
10. Pleading *Hors de son fee*.
11. Estoppels in Pleading.
12. Pleading with a *Profert*, and demanding Oyer : And herein,
 1. In what Cases there must be a *Profert* or *Monstrans de fait*.
 2. Of demanding Oyer.
13. Pleading a Recovery in a former Action.

(K) Duplicity in Pleading : And herein,

1. The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.
2. What shall be said Duplicity in Pleading.
3. Of pleading double by Leave of the Court.

(L) Departure in Pleading.

(M) Repleader : And herein,

1. Of the Nature of a Repleader, and Manner of awarding it.
2. A Repleader in what Cases to be awarded.
3. Repleader at what Time to be awarded.

(N) Demurrer : And herein,

1. The Definition and Nature of a Demurrer.
2. The Manner and Form of demurring ; and therein, of joining in Demurrer, and waiving thereof.

3. What Facts are admitted by a Demurrer.
4. How far a Judgment on a Demurrer is peremptory.
5. Of the Difference between a general and special Demurrer.
6. What Things are good on a general Demurrer, that would be otherwise on a special one.
7. Demurrer to Evidence.

(O) Plea at what Time to be put in, and the Ceremony requisite therein.

(P) Continuance and Discontinuance in Pleading.

(Q) Pleas *Puis darrien continuance*.

(A) Of the several Parts, and the Order of Pleading.

Doct. pl.
84. Co.
Lit. 17. 2.
Plow. 84.
*Vide the
next title.*

THE first thing in pleading is the plaintiff's count or declaration, in which he sets forth the causes of his complaint particularly, and thereby explains his writ; and this he must do in such a manner, as to make it appear to the court there is sufficient foundation for his bringing the action; and a' essentials, or whatever is of the substance of the action, must be alleged, that the court may be enabled to give judgment for him in case a verdict should be found in his favour.

The next thing is the defendant's plea or bar: Pleas are variously distinguished; the more general division of them is that of being dilatory or peremptory; or they are, 1st, Pleas in abatement; 2^{dly}, Such as suspend the action; or, 3^{dly}, Such as bar the plaintiff for ever. And as the plaintiff's declaration must set forth all essentials necessary to maintain it; so the defendant's bar must be substantially good and certain, with an avoidance of the plaintiff's demands, which the plaintiff may traverse, and thereon go to issue.

The replication is the plaintiff's answer to the defendant's plea, which fortifies and supports his declaration; the rejoinder is the defendant's answer thereto; so, of surrejoinders, rebutters, surrebutters, &c. in which the material thing is, that they pursue what hath been at first alleged and insisted upon, otherwise it will be a departure in pleading; as, if a matter be pleaded at common law, this cannot be maintained by a custom; as, in covenant on an indenture of apprenticeship to serve seven years, the breach assigned was, that he did not serve, &c. the defendant pleaded infancy; the plaintiff replied the custom of London, and adjudged a departure. So, an action at common law cannot be made good in the replication by an act of parliament. But, if one pleads a statute, and the other says it is repealed, he may reply, that it is revived by another, for this fortifies the first matter.

*Vide under
the division
Departure in
Pleading.*

In debt upon a bond, conditioned to save a parish harmless concerning a bastard child which the obligor was forced to father, he pleads *non damnificatus*; they reply, that the child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l.*: Defendant rejoins, that he was ready to pay the money and save the parish harmless; upon this they demurred, and had judgment, because the rejoinder is a departure; for the defendant ought to have taken issue on the child's being ready to starve; for if the plaintiffs had once cause of expence about the child, and were thereupon actually damnified, the defendant's being ready to pay the money will not save the condition of the bond.

When the plaintiff replies, surrejoins, &c. and it thereby appears, that he has no cause of action, he shall never have judgment, though the bar or rejoinder be insufficient, nor can any admittance of the adverse party make it good, for the court ought to judge on the whole record; as, in debt on a bond for performance of covenants, the defendant pleads performance generally, where some of the covenants are in the negative, whereby his plea is insufficient; if the plaintiff reply, and shew a breach, which of his own shewing is no breach, judgment shall be given against him; for on the whole record it appears he has no cause of action.

But, if the bar be insufficient in substance, or amount to a confession of the point of the action, and the plaintiff in his replication shew no matter against himself but matter explanatory, or perhaps not material, the declaration being good, the plaintiff shall have judgment for the insufficiency of the bar, without any regard to the replication; as, if the defendant plead a grant by letters patent in bar which are not sufficient, and the plaintiff in his replication shew another clause in the said letters patent, which is not material, the defendant demur, the plaintiff shall have judgment.

If the plaintiff make a title in his replication, but do not plead as he ought, especially in point of trial, the rejoinder admitting this, and tendering issue upon another matter, makes it good.

The order of pleading is, 1. To the jurisdiction of the court. 2. To the person of the plaintiff, and next of the defendant. 3. To the count or declaration. 4. To the writ. 5. To the action of the writ. 6. To the action itself in bar thereof.

This has been settled as the most natural order of pleading, because by this order each subsequent plea admits the former; as, where the defendant pleads to the person of the plaintiff, he admits the jurisdiction of the court; for it would be nugatory to plead any thing in that court that has no jurisdiction in the case: when he pleads to the count, he allows that the plaintiff is able to come into that court to emplead him, and that he may there be properly empleaded: but in pleading to the count he does not admit the writ to be good, yet if the count be vitious, the writ is consequently destroyed; for though the writ in itself may be good, yet it is ill pursued: but, in pleading to the writ, he ad-

Parish.
22 Car. 2.
in B. R.
2 Sand. 80.
Sid. 444.
Mod. 43.
2 Keb. 612.
619. S. C.
Richards
v. Hodges.

8 Co. 133.
b.

8 Co. 133.
b. 9 Co.
110. Hob.
14. 199.
Lev. 31.
3 Lev. 244.

Lev. 195.

Co. Lit. 303.

Co. Lit. 303.
Hob. 71, 72.
Litch, 178.
5 Mod. 146.

mits the count to be sufficient in form, if the writ be good; since it is not to any purpose to object to the form of such writ, if the form of the count be thereupon insufficient: but, if the count be in substance variant, the defendant may shew it at any time in arrest of judgment; because the court has no authority to proceed in a matter of substance different from the original writ.

If a man pleads to the action of the writ he allows both the form of the count and of the writ; for he admits, that if the form of the writ and count were adapted to the plaintiff's case, that such form is good and sufficient; since to object to the action not agreeing with the plaintiff's case does admit, that, if it be ruled by the court that it does, the plaintiff has before the court a count in form sufficient.

If the defendant pleads in bar to the action, he admits the form of the writ and count, for he answers to the right in demand, and puts that right in issue, and thereby admits, that there is a sufficient form to put it in issue, and therefore though a man pleads *non est promissus modo & forma*, yet the *modo & forma* does not traverse the form of the writ or count, but the substance of the promise; which is the true reason why another promise may be given in evidence different in time and place from that mentioned in the declaration, though not different in substance.

(B) The Declaration : And herein,

1. The Nature thereof; and therein of adding several counts in the same Declaration.

THE (a) declaration is an explanation of the plaintiff's writ, in which he expresses at large his complaint, setting forth the nature and quality of his case more fully than in the writ; and as it is the foundation of his suit, the law requires that it contain certainty and (b) truth, that the defendant may be able to make a proper answer thereto, and the court be enabled to give a right judgment thereon.

Doct. pl. 35. — and is the same with what the civilians call a bill. (a) Must establish a title in the plaintiff, as well as destroy the defendant's; (b) Must be true in fact, and not in law. Vaugh. 58. 60.

The plaintiff having set forth the causes of complaint particularly, the conclusion of his declaration is, *et inde producit scilicet*, which was proffering to the court the testimony of the witnesses or followers; for according to *Fleta*, the (c) ancient law was, *quod iudex non tenetur ponatur ad legem nec ad juramentum per simplicem personam sine testibus fidelibus ad hoc ductis*, &c.

But this method in declarations is now disused. Doct. pl. 85. And it is the practice of annexing affidavits to bills in Chancery, unless, perhaps, in a few very particular cases, required by statute.

An *audita querela* and a *scire facias* are in the nature of a declaration, for they set forth at large the cause of the plaintiff's action as a declaration doth. Lil. Reg. 411.
7 Co. 25.

The gift, and every thing that is of the essence of the plaintiff's action, must be set forth in the declaration; and herein we may lay it down as a general rule, that that seems properly to be the essence of the action without which the court could have no sufficient grounds to give judgment; and this is to be determined in every action according to its nature. Doct. pl. 85.

If the declaration be not a sufficient foundation to give judgment, this may be moved in (a) arrest of judgment after verdict, because judgment cannot be given when it appears, that, though the fact be found for the plaintiff, yet he has not sufficient cause of action. (a) But mistakes in the declaration cannot be taken advantage of on a plain abatement.

ment, but the defendant must demur. Salk. 212. — But if the declaration varies from the writ, the defendant may plead in abatement; for he has abated his own writ by prosecuting it in a different manner. Cro. Eliz. 722. Cro. Jac. 654. Jon. 304.

The declaration may be general or special; as, in debt upon an obligation, the plaintiff may declare on the penalty generally, or may set forth the condition at his election. Doct. pl. 84.

If there are three in execution jointly at the suit of A. and all escape, in debt for the escape, the plaintiff may declare for the escape of all, and it will not be double, though the escape of any of them will be (b) sufficient to entitle him to the action. Keilw. 68.
(b) If one declares for an escape in a cause of action to

40s., and proves 30s., this is sufficient; per Hale. But in the book there is a *querre de boc*, being special. 2 Lev. 85.

If in an *indebitatus assumpsit* the plaintiff declares for 100 l. received to the plaintiff's use, and also upon an *in simul computasset* for another 100 l. the same day, and the defendant pleads that the said several sums of 100 l. are for one and the same cause of action, and likewise that the sum demanded is satisfied; this on demurrer will be good; for though it is frequent to lay a declaration for a debt several ways in an *assumpsit*, and it is not a good plea to say that the several sums are but only for the sum first mentioned, and so go on no further; yet when the defendant pleads over, that the very sum demanded is satisfied, it is a good plea; and if the two several hundred pounds were two distinct sums, the plaintiff might have replied so, and taken issue thereupon *.

In an action for money won at play there were two counts, one setting forth a special agreement to play at such a game, and mutual promises of payment, which was right; the other was, that in consideration that the plaintiff won such a sum of the defendant at play, he promised to pay it, which was adjudged ill, in that an *indebitatus* will not lie for money won at play. It was likewise held, that any thing in the first count which was right could not (c) help any defect in the second; for though they both were put in one declaration, yet they were as distinct as if they had been in two several actions †.

Raym. 449.
Sheldon v. Clipham.
* If the money was actually paid, *non assumpsit* would have been the proper plea; for, having fulfilled the promise, it is as if it had never existed.

6 Mod. 128.
Smith v. Abery, adjudged.
2 Ld. Raym. 1034.
3 Salk. 14.
pl. 1. 175.
pl. 1.
Holt, 329.
pl. 4.
(c) That a judgment cannot be

averred as to one count, and affirmed as to another. Salk. 24. & vide 7 Mod. 148. 2 Ld. Raym. 841.
— † This

—† This was a case after verdict, for on a demurrer to the whole declaration, the court might have given judgment for plaintiff on one count, and for defendant on the other.

Salk., 213.
Pl. 3.

West v.
Troles.

The plaintiff declared, that whereas the defendant 6 *Maii* 1695, for 120 weeks diet then past, had promised to pay him 7 *s. per week*, and that the plaintiff *postea*, *ff.* 6 *Maii* 1695, having found the defendant diet 120 weeks then past, the defendant promised to pay the worth, and that it was worth 7 *s. per week*; upon *non assumpsit*, and verdict *pro querente*, it was moved in arrest of judgment, that the weeks in the *quantum meruit* are not said to be *alia* than those laid in the special promise, so that the defendant is twice charged with the same thing; *sed non allocatur*; for they do not appear necessarily to be the same, and without necessity the court will not intend them so.

Bill. Reg.
408.

The plaintiff after plea pleaded, or after the end of the second term, shall not add a new count to his declaration (as an *indebitatus assumpsit*, or the like) under pretence of amending his declaration.

2. Who may join or be joined in the same Declaration.

See upon this division, tit. "Actions in general (C)," Vol. I. p. 51.

3. What Matters may be joined in the same Declaration.

Brown v.
Dixon,
1 Term
Rep. 276.

[The old opinions upon this subject may be found in the first volume of this work, under title "Actions in general (C)." It would be unnecessary to introduce them again here, especially as the rule is now settled, that any causes of action, which can be comprised in counts, that admit of the same general plea, and are followed by the same judgment, may be joined in the same declaration.]

Carth. 113.
Drake v.
Cooper,
adjudged.

In trespass *quare vi & armis* the defendants entered his close, containing 100 acres, &c. (in which a fair time out of mind had been kept on *Michaelmas* day) & *adtunc & ibidem fregerunt & divulser.* divers booths, &c., *ibidem erect.* by the plaintiff for exposing wares and merchandizes to sale there, brought by persons thither resorting, *nec non eo quod* (these defendants) *adtunc & ibidem impediaverunt & disturba-verunt* the plaintiff in erecting other new booths, &c. for the sale of merchandize; by reason whereof the plaintiff lost all the profits of piccage and stallage. Upon not guilty pleaded, the plaintiff had a verdict, and on a motion in arrest of judgment it was objected to the declaration, that the latter part thereof, *viz.* the disturbance in building new booths, sounds altogether in case and not in trespass, and is therefore incompatible with the first part of the declaration, which is trespass *vi & armis*, and that these several matters require several judgments; the first a *capiatur*, but the last a *miserecordia* only, and therefore could not be joined in one declaration. *Sed per cur.* The disturbance, &c., is laid only in consequence of the first trespass, &c., and it is of the same effect as a *per quod* in a declaration, which is often used

in actions of trespass *vi & armis*, to let in the consequential damages, &c., and one plea goes to the whole; for if the defendant had pleaded a licence from the plaintiff to enter the close, that would have been a good justification of the trespass.

4. Of the Declaration's agreeing with the Writ.

The count or declaration is an exposition of the plaintiff's writ, and must regularly agree therewith; and herein the general rule is, that every thing that comes within the compass of the writ may be comprehended within the declaration, but the declaration cannot be extended beyond the writ; for original writs, issuing out of *Chancery*, are the grounds and foundations of the proceedings of the courts into which they are returnable; and such proceedings must be conformable to the authority given them; whatever therefore may be comprised in the writ, however multifarious, may be comprised in one declaration; but whatever cannot be contained in one writ, cannot be comprehended in the declaration.

Doct. pl.
84. Lil.
Reg. 412.

The writ may be general, according to law, but the declaration special; as, where a statute gives an action, but does not prescribe any form of the writ, the writ framed by the common law will serve, and the special matter may be set forth in the declaration.

Doct. pl.
84.

So, if lands are given to a woman *quandiu sola fuerit*, or to a man *quandiu se bene gesserit*, in waste, the writ shall be general *quod tenet pro termino vite*, and the count special.

Doct. pl.
85.

[Upon general process (a), the plaintiff may declare *qui tam*, or as executor or administrator, &c. But this rule will not hold *converso*; for where the process was to answer the plaintiff *qui tam*, &c. (b), and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and set aside the proceedings. And the like was done, where the process was to answer the plaintiffs (c) as assignees of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on process sued out in a special character. And as such variance between the original writ and declaration may be taken advantage of by plea in abatement, so, where the action is by bill, the court will interfere upon motions (d).]

(a) Weavers' Company v. Forrest, B. R. 2 Str. 1232.
Lloyd v. Williams, C. B. 2 Bl. Rep. 722.
3 Will. 142.
(b) Canning v. Davis, B. R. 4 Burr. 2417.
Canning v. Davis, C. B.

Barnes, 494. (c) Meggs v. Ford, E. 25 G. 3. Imp. Pr. K. B. 172. (d) Turing v. Jones, 5 Term Rep. 402.—It appears, however, to have been the opinion of Yates, J. in the case of Canning v. Davis, 4 Burr. 2417. that though the plaintiff style himself *executor*, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt, for the demand is still the same.

If a man bring an original in trespass against one, and declare against him with a *simul cum*, he abates his own writ; but the defendant cannot take advantage of it without demanding *oyer*. If the writ be against two, the plaintiff may declare against one of them with a *simul cum* *.

Comb. 260.
per Holt, C. J.
* But now, on trial, the court will expect some evidence of an attempt to serve with process, to take off his evidence,

If lands be demised for term of half a year or a quarter of a year, &c., and the lessee squanders waste, the lessor shall have a writ

Lit. § 67.
Co. Lit. 54. b.

of waste against him, and the writ shall say, *quod tenet ad terminum annorum*, but the declaration must be special, according to the case.

Co. Lit.
344. a.

So, if a clerk that is donative be disturbed in a *quare impedit* by the patron, for this disturbance to his church donative the writ shall say, *quod permittat eum presentare ad ecclesiam, &c.*, and the declaration shall be special.

Cases L. and
Eq. 210.

(a) If a declaration be-

Where the (a) title is of one sort of action, there, the declaration can never change it to another; but it may make a fatal variance between the writ and the declaration.

gins *Queritur in placito transgressionis pro eo quod, &c.* yet may it be a declaration in case, notwithstanding the recital of the bill be in *placito transgressionis*, for that will serve indifferently for trespass or case. Cro. Car. 325. Tyffin v. Wingfield.—But for this vide Hob. 180. Allen, 84. Cro. Car. 254. 2 Roll. Rep. 49. Vent. 19.

5. Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Gift of the Action: And herein,

1. Where by the Declaration it must appear that the Plaintiff hath a Right.

Hob. 199.
Palm. 524.
(b) Diversity
where such
matter is
disclosed by
the defend-

It is a general rule in pleading, that the declaration must shew a title in the plaintiff; and that it is regularly true, that if the (b) plaintiff will himself discover to the court any thing, whereby it may appear that he had no cause of action (c) when he commenced it, his writ shall abate.

ant. Cro. Eliz. 111. Leon. 87. 2 Leon. 20. (c) Where the *teste* of original was before the day of payment, in the condition of the bond, upon which action was brought; and this, though after verdict, was adjudged error. Cro. Eliz. 325. Moor, 598. Buckley v. Williamson, & vide Cro. Eliz. 565.

—So in case for scandalous words, the day was alleged before the words spoken. Roll. Abr. 792. § —† The day is not material, if laid before suing out writ, if in C. P. or by original in B. R. or before the first day of the term, whereof the declaration is, if by bill.—So, in *assumpsit*, where it appeared by the declaration, that the action was brought before the cause. Cro. Jac. 574-5.—In

ejectment, by the declaration it appears, that the defendant was ejected after the lease made: it is sufficient, though no certain day is alleged in which he was ejected, for the day is not material, being before the action brought. Cro. Jac. 311.—In ejectment, the plaintiff declared, upon a lease made

12 Jun. habend. a dicto duodecimo die Jun., *virtute cuius* he entered, and that *postea scilicet eod. 120 die Jun.* the defendant ejected him; and because the plaintiff by his own shewing entered as a disseisor, and the defendant ejected him before he had title, after a verdict and judgment for the plaintiff in *Ireland*, upon a writ of error here it was reversed. 3 Mod. 198. Evans v. Croker, & vide Comb. 83.

Like Point ||.—|| But the words subsequent to *postea* might have been rejected as surplusage. Adams v. Goose, Cro. Jac. 96. Bull. N. P. 106.—Where the declaration being of the term generally shall refer to the first day.—That some day must be alleged before the action brought. 5 Mod. 287.

And note; if the cause of action arises on some day within the term of which the declaration is delivered, the declaration must be of some day in the term after the cause of action accrued. [And in such case, if the suit is by bill, there must be a special memorandum of the day subsequent to the cause of action. However, where the cause of action was stated to have accrued on the first day of term, the court, on demurrer, held, that the declaration might be entitled of the term generally; for

the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered before the sitting of the court; so that the cause of action might well have accrued before the actual delivery of the declaration. Pugh v. Robinson, 1 Term Rep. 116.—The declaration by bill should, regularly, be entitled of the day on which the writ is returnable; for the bill, of which it is

a copy, cannot be filed till bail is put in, which cannot be till the return of the writ. Southouse v. Allen, Ca. temp. Hardw. 141. But *quod* as to the time of putting in bail, and see Tidd's Pr. 187.—Where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term, when the last bail was put in. Stork v. Herbert, 2 Will. 242. But in a later case it hath been holden, that a declaration though filed and delivered, cannot be entitled, of a subsequent term to that in which the writ is returnable. Smith v. Muller, 3 Term Rep. 624.—Where a declaration

is improperly entitled, the plaintiff may have it corrected on an affidavit of the fact. Symonds v. Parmenter,

Parnester, 1 Will. 78. It may be set right too at the instance of the defendant, if necessary for his defence. *Southouse v. Allen, Ca. temp. Hardw. 141. Smith v. Key, 1 Str. 638. Smith v. Raydon, cited 1 Will. 39. seems S. C. Thompson v. Marshall, 1 Will. 304. Wilkes v. Earl of Halifax, 2 Will. 256.]*

Hence it hath been adjudged on the statute of hue and cry, that it is not sufficient for the plaintiff to declare that the goods were in his custody, but he must allege that they belonged to him; but that in the case of a carrier, he may maintain an action against the hundred, setting forth the custom by which he is chargeable.

So, in an action upon the case, the plaintiff cannot declare, *quod cum* the defendant was indebted to him such a sum, the defendant in consideration thereof *super se assumpsit* to pay, &c., without shewing the cause of the debt.

207. 213. 642. Hob. 18. Moor, 854. pl. 1167. Hetl. 106. Roll. Rep. 391. Bull. 67. 3 Bull. 207. Cro. Jac. 397. Hard. 132.—But 171. *per* Croke and Chamberlain, there is a diversity where the promise is to pay at a day to come, and where not; for a promise to pay at a day to come implies a forbearance in the mean time; and *vide* Roll. Rep. 396.—And that such a declaration is not made good by verdict. Cro. Car. 6. 31. Sid. 182. Brownl. 14. Poph. 31. Jenk. 293.—Where the plaintiff declared, that the defendant was indebted to the testator of the plaintiff in 20*l.* *quas illi solvise debuit secundum agreementum inter eos habit.*; the judgment was staid after verdict, for that the agreement might be by deed. 2 Lev. 162.

But, if, in an *assumpsit*, the plaintiff declares, that whereas the defendant was indebted to him in 30*l.*, the defendant, in consideration that the plaintiff had given day to the defendant until, &c., did assume and promise to pay, &c.; this is a good declaration, without shewing for what the defendant was indebted, for the debt is not in question; and though it be true, there must be a debt to make this a good consideration, yet that is allowed in the promise being actual.

pl. 1167. 3 Bull. 206, 207. Roll. Rep. 379, 380. Godb. 13. Hob. 216. Roll. Abr. 19.

So, if, in an *assumpsit*, the plaintiff declares, that whereas the defendant had received 24*l.* of several persons, to the use of the plaintiff, in consideration thereof the defendant did assume and promise to pay, &c. This is a good declaration, without shewing of what persons in particular he received the money, because the consideration is executed, and not traversable.

If in an *assumpsit* the plaintiff declares, that the defendant, in consideration of, &c., *inter alia* did assume to pay, &c. This has been held no good declaration; because he ought to set forth the whole promise, which is entire.

But in an *assumpsit* the plaintiff declares, *quod cum* there were several reckonings and accounts between the plaintiff and defendant, and at such a day, &c., *insimul computaverunt* for all debts, reckonings, and demands; and the defendant upon the said account was found to be in arrear the sum of 20*l.*, in consideration whereof the defendant promised to pay, &c., this is a good declaration, without shewing it was *pro mercimoniis*, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which *in pede computi* are reduced to a sum certain;

2 Saund. 379.
10 Co. 77.
a. But for this *vide* Hob. 5. Godb. 186. Cro. Jac.

Hob. 18. Woolaston v. Webb, adjudged after verdict; & *vide* like point Cro. Jac. 397. 548. 593. Moor, 853.

Moor, 854. pl. 1168.

Allen, 5. & *vide* March, 100.

Cro. Car. 116. Hetl. 106. 883. S. C. and Poph. 177. Latch, 141. Palm 442. Yeiv. 70. Roll. Rep. 366. S. P.

certain; and thereupon being indebted to the plaintiff, it is sufficient to ground an action.

2 Lev. 153.
Fawk v.
Pinlack.

In *assumpsit* the plaintiff declared, that the defendant was indebted 20 *l. pro premio* upon a policy of insurance upon such a ship, and the defendant demurred specially, because he did not shew the consideration certainly what the *premium* was, or how it became due: *sed non allocatur*; for this is as good as an *indebitatus pro quodam salario*, which has been adjudged good.

Carth. 276.

Adjudged,

Vant. 44.

S. P. Sid.

425. S. P.

2 Keb. 552.

S. P. Mod.

2. S. P.

(a) For damages recovered in an

assumpsit will

be no bar to

an action of debt grounded on a record or specialty. Cro. Car. 6. Leon. 155. Cro.

Ellis. 242.

In *assumpsit* the plaintiff declared *pro opere & labore* generally, without setting forth what sort or manner of work or labour it was; and though it was objected, that it should be set forth particularly, so that it may appear to the court to be lawful work; yet the court held it well enough; and that the only reason why the plaintiff is obliged to shew wherein the defendant is indebted is, that it may appear to the court that it is not a debt on (a) record or specialty, but only upon simple contract; and any general words by which that may be made to appear are sufficient.

to an action of debt grounded on a record or specialty. Cro. Car. 6. Leon. 155. Cro.

Show. 17.

Cary v.

Becchus.

If the bailiff of a liberty declares, that the franchise and liberty of returning and executing all writs, bills, and receipts out of the king's courts belongs to him; and that the defendant, without his licence, and against his consent, executed a *ferri facias* within the said liberty; this is a good declaration, without setting forth any title, or that he enjoyed the said liberty by grant or prescription. Adjudged upon demurrer to such a declaration; for the court held, that if the defendant had taken issue, it would have been incumbent on the plaintiff to prove a title.

4 Jon. 157.

Hart v.

Bailef,

Carth. 85.

S. C. cited.

Carth. 84.

Show. 64.

3 Mod. 41.

3 Lev. 133.

S. C.

Skin. 65.

pl. 10. 775.

pl. 5.

Heble-

swaite v.

Palma.

(b) Where

in several

cases posses-

sion without

property is

sufficient to

maintain an

action, vide Palm. 200.

So, in an action for stopping an usual and convenient way to his, the plaintiff's, lands, the declaration was held good without shewing a title.

So, in an action on the case for diverting a watercourse, the plaintiff declared, that the defendant *malitiose, &c. infregit* a certain mill dam, & *perinde* did divert the watercourse *ab antiquo & solito cursu erga* the corn mill of the plaintiff, by reason whereof he lost the profits of his said mill; but did not set forth that that water used to turn his mill, or that he had any other profit thereof, or that the watercourse was *antiquus aqua cursus, &c.* Yet the declaration was held good; the court being of opinion, that the (b) possession alone was sufficient to maintain an action against a wrong-doer, and that this was of the same nature with an action of trespass. But Holt, C. J. said, that if the cause had been tried before him, the plaintiff should have proved his mill to be an ancient mill, otherwise he should have been nonsuit.

4 Co. Lutterell's case, and title Trespass.

Lev. 179.

Sid. 279.

2 Keb. 8.

S. C. &

Cro. Eliz.

259. S. P.

In *assumpsit* it was, in consideration he permitted the defendant to take the profits of such lands for seven years last past, at his instance and request, the defendant promised to pay him as much

as they were worth; and it was moved in arrest, &c. that the plaintiff had not set forth a title here as he should have done; but *per cur.* it is well enough; and to maintain such an action as this upon evidence, an actual promise must be proved.

An action upon the case was brought for stopping a way which the defendant had from such a place over *Black Acre*, where the nuisance is, unto such a field by name; and it was ruled to be good, without shewing what interest he had in that field, for it shall be intended to be a common field; but otherwise, had it been *usque ad talem clausum*, there, he ought to shew what interest he has in the close.

In an action upon the case, supposing that he was seised in fee of the manor of *H.*, and of a fair to be held there every Ascension-day, and that the defendant disturbed him to take toll, &c. the defendant pleaded not guilty, and found against him: it was moved in arrest of judgment, that the declaration was not good, because he does not shew a title to the fair by grant or prescription, and therefore no cause of action; but *per cur.* not necessary, because only a conveyance to the action, and is not any claim thereof as to the right, as in a *quo warranto*, and the declaration, without special title therein comprised, is good.

[An action on the case was brought, setting forth, that the plaintiff was possessed of a tenement, and a close of pasture, and a rood of land, &c. in *S. M.*, and that he had right of common in *Mendip* forest for his cattle, &c., as thereunto belonging; that the defendant digged and made coney-boroughs in the said forest, and set nets and gins there, by which his sheep were damaged; and he was deprived of common, &c. It was objected, that the declaration was not good, for that it rested merely upon possession, and did not shew any title to the common, either by grant or prescription. But the declaration was adjudged to be proper, 1. Because it is an action grounded upon the possession against a wrong-doer; to which a title would be only an inducement. 2. Title to the common need not be alleged, because it did not appear whether the defendant was owner of the soil, or a stranger. It is true, if it had been upon special pleading, as, in trespass for distraining his cattle, and the defendant had pleaded, that he was owner of the soil, and so justified the taking, the plaintiff in such case must have replied (*a*), and shewn a title by grant, or prescription, or some conveyance. And lastly, This matter is not traversable; for upon the general issue a right of common must be proved and given in evidence, otherwise the plaintiff cannot maintain his action, but *what right* is not material.

So, in an action for disturbing the plaintiff in the enjoyment of a pew in a church, possession and laying it to be appurtenant to a messuage (*b*) are sufficient against a mere stranger, without laying or proving the plaintiff repaired the pew, or shewing any title or consideration whatever. As against the ordinary indeed, who hath *prima facie* the disposal of all the seats in the church, a title must be shewn in the declaration, and proved.

as appurtenant to a messuage. *Stocks v. Booth*, 1 Term Rep. 428.

Cro. Jac.
43. 123.
Deht v.
Oliver,
adjudged.
[*Benning-*
ton v.
Taylor,
2 *Lutw.*
1517.
Chafin v.
Betsworth,
3 *Lev.* 190. *S. P.*]
Strode v.
Byrr,
4 *Mod.* 418.
Com. Rep.
7. *Skin.*
621. *S. C.*
Dorney v.
Cashford,
1 *Ld. Raym.*
266. *S. P.*
Bean v.
Bloom,
3 *Will.* 456.
S. P.

(*a*) *See*
Vernon v.
Goodrich,
1 *Str.* 6.

Kenrick
v. Taylor,
1 *Will.* 326.
(*b*) In all
cases, it
seems ne-
cessary to
claim the
pew in the
declaration

Waring v.
Griffiths,
1 Burr. 440.

If a plaintiff have a prescriptive right of burial in a church, he need not against a wrong-doer set forth the whole of it: it hath indeed been doubted, whether he may not in such case rely merely upon his possession.

*Vide the
cases supra.*

But, where a person claims a servitude upon another's property, it is said in several cases that he must, against the owner of such property, set forth and prove the whole of his title. However, later cases seem to have gone otherwise.

Sands v.
Trefusis,
Cro. Car.
575.

The plaintiff declared, that he was seised in fee of a mill, and had a watercourse running in the defendant's land to the said mill, and that the defendant had stopped it. This was holden well upon demurrer, without shewing any title to the watercourse.

Winford v.
Wollaston,
3 Lev. 266.
Warren v.
Sainthill,
2 Ventr.
180. S. P.
Blockley
v. Slater,
1 Lutw.
119. S. P.

The plaintiff declared, that he was for four years last past seised in fee of a parcel of land adjoining to the defendant's meadow, *et sic inde seistus per totum tempus prædictum habere, frui et uti debuit quandam viam per quandam januam* of the defendant in the meadow of the defendant *usque* a close of the plaintiff, and that the defendant stopped the gate *cum ferâ & catenâ*; and upon motion in arrest of judgment, the declaration was holden to be good, though no title was shewn to the way, though the defendant was terretenant, and though the charge was against common right, and such a charge as could not commence but by grant.

2 Ld. Raym.
304.

In the case of the King v. *Bucknall*, Lord *Holt* said, "Where a man is obliged to make fences against another, it is enough to say *omnes occupatores* ought to repair, &c., because that lays a charge upon the right of another, which, it may be, he cannot particularly know."

Anon.
1 Ventr.
264.

In an action for not repairing a fence, the allegation was, that the tenants and occupiers of such a parcel of land adjoining the plaintiff's, had time out of mind maintained it, &c. It was moved in arrest of judgment, that the prescription is laid in occupiers, and yet their estates are not shewn; and that hath been judged naught in 1 *Cro.* 155. and 2 *Cro.* 665. But the court said, "It is true there have been opinions both ways, but it is good thus laid, for the plaintiff is a stranger, and presumed ignorant of the estate; but otherwise it is, if the defendant had prescribed."

Tenant v.
Goldwin,
1 Salk. 360.
2 Ld. Raym. 1089.

So, in an action on the case for not repairing a wall, "*debit reparare*" hath been adjudged sufficient.

Rider v.
Smith,
3 Term
Rep. 766.
Yelv. 48.

So, in an action for not repairing a private road leading through the defendant's close, that the defendant as occupier is bound to repair.]

In debt upon a lease, the defendant may declare *quod dimisit*, and need not allege a seisin in himself when he made the lease.

Polyblank
v. Hawkins,
Dougl. 329.

[In covenant on a lease, the plaintiff in stating his title set forth, that one S., who was seised in fee, made the lease in question, and that on his death the reversion descended to the wife of the plaintiff, as the heir-at-law of S., whereupon he (the plaintiff) became seised of the reversion, as of freehold, in right of his said wife. On demurrer, the declaration was holden to be ill, for, from his own shewing, there was a seisin in fee in both in right of the wife.

In general, however, in covenant, the plaintiff need not set out any title, but begin generally *quod cum dimisisset*: and therefore where a plaintiff had merely set out his title imperfectly, as, by omitting the person under whom he claimed, it was holden, that this was surplusage, and could be rejected.]

Aleberry
v. Walby,
1 Str. 229.

In debt against lessee for years for the arrearages of rent reserved upon the lease, he needs not declare that the lessee entered, for the contract is the ground of the action.

4 Leon. 18.

[In an action against a person who farms the post-horse duties, under the statute of 27 G. 3. c. 26. for neglect of duty, the plaintiff must aver specifically, that the defendant is the person appointed under and by virtue of the act of parliament upon whom the duty is thrown. It is not a sufficient title to state that the defendant is a collector of the rates and duties recited in a certain act, &c.]

Short v.
Pruen,
6 Term
Rep. 163.

2. Where the Plaintiff must shew that he hath performed what was requisite on his Part.

It is laid down as a general rule, that in all cases where an interest or estate commences upon condition, be the condition or act to be performed by the plaintiff, defendant, or any other, and be it in the affirmative or negative, there, the plaintiff ought to shew it in his declaration, and aver the performance of it; for the interest or estate commences in him upon the performance of the condition, and not before. But, when the interest or the estate passes presently, and vests in the grantee, and is to be defeated by matter *ex post facto*, or condition subsequent to the condition to be performed in the affirmative or negative, or to be performed by the defendant or any other; there, the plaintiff may count generally, without shewing any performance; and this shall be pleaded by him who is to take advantage of it.

7 Co. 10.
Lil. Reg.
418.

As, if an annuity of 10 *l. per ann.* be granted to a man when he shall be promoted to a benefice, in his demand of it he must shew that he is promoted; but, if it be granted until he be promoted, there he shall have a writ of annuity; and he need not say that he is not yet promoted, because the annuity precedes, and the promotion is subsequent.

Co. 10.
Doct. pl.
85.

If, by the same deed, each party is to do something advantageous to the other, and on such deed there is not a mutual remedy, the plaintiff in his declaration must aver, that he hath performed what was to have been done by him.

Sand. 319,
320.

[So, where two acts are to be done at the same time, neither party can maintain an action, without shewing a performance, or an offer to perform, on his part: for where the performance of the plaintiff is prevented by the neglect or default of the defendant, that is equal to a performance.]

Kingston
v. Preston,
Dougl. 688.
note. Jones
v. Barclay,
Dougl. 684,
Blackwell

v. Nash, 1 Str. 535. Goodisson v. Nunn, 4 Term Rep. 761. Hotham v. East India Company, 1 Term Rep. 638. 645.

Boone v.
Eyre, cited
1 H. Bl. 473.
note. Duke
of St. Al-
ban's v.

Shore, *Id.* 270. Campbell v. Jones, 6 Term Rep. 572.

And where mutual covenants go to the whole of the consideration on both sides, they are in that case mutual conditions, and a performance must be averred. But it is otherwise where they go only to a part, and where recompense may be had in damages.]

2 Mod. 309.

5 Co. 10.

Cro. Jac.

645.

3 Lev. 41.

Show. 391.

Comb. 265.

Vide title Covenant.

Sand. 319.

Pordage

v. Cole,

2 Lev. 74.

Sid. 413.

Raym. 183.

2 Keb. 542.

S. C.

[Trench

v. Trewin,

1 Ld. Raym.

125. S. P.]

Hob. 88.

Nichols v.

Rainbred,

and Hob.

106. S. P.

That where

there are

mutual promises,

the plaintiff need not aver a performance on his part. Yelv. 134. Mod. 62. Roll.

Rep. 336. Vent. 41. Hard. 102. Mach. 75. Cro. Eliz. 703. Lev. 20. 293. Cro. Eliz. 137.

Leon. 186. (a) That both promises ought to be made at the same time, otherwise they will be *nuda*

promissa. Hob. 88. Cro. Eliz. 137. Leon. 186.

Thus, a writing was drawn in these words: *It is agreed that A. shall pay to B. 700 l. for his land and house, &c., the money to be paid before Midsummer; in witness, &c.* It was sealed by both parties; the money not being paid at the day, B. without making or tendering any conveyance of his land, brings an action of debt upon the bill; and resolved, that it was well brought; and in this case it was said, that A. might have an action of covenant against B. for not conveying the land.

J. S. brought an *assumpsit* against J. D., declaring, that in consideration J. S. promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50 s. Adjudged, that the plaintiff need not aver the delivery of the cow, because it was (a) promise for promise.

Martindale
v. Fisher.
1 Will. 53.

[If the plaintiff declares, that in consideration he had agreed to deliver cloth to the defendant, the defendant agreed to pay him so much in case A.'s horse beat B.'s, which he avers he did, he need not aver the delivery of the cloth. *Secus*, if it were in consideration that plaintiff would deliver cloth, defendant would pay; for in that case the delivery must be averred.

Luxton v.
Robinson,
Doug. 620.

In *assumpsit* on an agreement to forfeit a deposit of five guineas, and also to pay another sum of 10 l. if the defendant did not accept possession of certain premises from the plaintiff, and also pay for certain fixtures therein, at a fair appraisement by two appraisers; it was adjudged on a special demurrer, that the declaration was ill, because the plaintiff had not shewn his right to the premises, so that he could have delivered possession according to the agreement. As each was to name an appraiser, he ought also to have shewn that he had done so.]

2 Sand. 107.

In debt on an obligation for payment of money, so soon as several bills of costs are settled, it ought to appear by the declaration that the bills were settled, or that there was some default in the defendant by which means they could not.

3. Where

3. Where general Allegations in the Declaration are sufficient; and therein, of Misrecitals and Omissions.

Although the plaintiff must set forth in his declaration every material thing, without which he could not be entitled to his action; yet, herein the law requires no greater certainty, than the nature of the thing is capable of; and therefore, if a contract be made in general terms, the declaration upon such contract may be in the same terms: as, if the plaintiff declare, that whereas the defendant was possessed of the sixth part of a ship, and it was agreed, the defendant should by writing sell his interest to the plaintiff for 600 *l.*, and that the plaintiff should pay 20 *l.* in hand, and the residue *super executionem* of the said writing; and that in consideration the plaintiff had paid the 20 *l.*, and assumed to perform the agreement on his part, the defendant did assume to perform it on his part; *pred. tamen* the defendant had not performed the agreement on his part: this being on a mutual promise, the breach is well assigned in the words of the promise.

3 Lev. 319.
Keech v.
Knight.

So, if in an *assumpsit* the plaintiff declares, that in consideration the plaintiff would find and provide for a sick man all such necessaries as he should want, the defendant assumed and promised to pay, &c., and avers, that he found him necessaries amounting to such a sum, &c. This is a good declaration, without shewing in particular what those necessaries were, being in the words of the contract; and the adding the particulars would make the record too prolix.

3 Bullst. 311
Crisp v.
Bainton,
Roll. Rep.
173. S. C.

In *assumpsit* for labour and medicines in curing the defendant of a distemper, &c. who pleaded *infra etatem viginti & unius annorum*; the plaintiff replied, it was for necessaries generally; and upon demurrer to this replication it was objected, that the plaintiff had not assigned in certain how, or in what manner, the medicines were necessary; but it was adjudged that the replication in this general form was good.

Carth. 110,
111. Hug-
gins v.
Wifeman,
3 Lev. 170.
S. P.
3 Mod. 69,
70. & vide
Cro. Jac. 486. cont.

In debt upon an obligation, conditioned to satisfy for all goods that an apprentice shall waste, in his replication the plaintiff assigned for breach, that he had wasted *diversa bona ad valentiam* 100 *l.* And adjudged upon demurrer that it was good, without shewing what the goods were, for the penalty of the obligation is to be recovered upon any breach; but *per cur.*, it would be otherwise in (a) covenant where there is to be a recompence for the damages.

Lev. 94.
French v.
Pierce:
(a) In an
action of
covenant
several
breaches
may be
assigned;
otherwise,

in debt upon an obligation conditioned to perform covenants. Cro. Car. 176. & vide title Covenant, and the statute 3 & 9 W. 3. c. 10. *whereby it is enacted, that in actions on bonds for non-performance of covenants, plaintiffs may assign as many breaches as they think fit*.

In an action of covenant, the agreement was to pay rents at several days during the term; plaintiff assigns breach, that he did not pay the several rents at the several days during the term: this was urged to be double, uncertain, and naught; but the court held, that in covenant the plaintiff may assign the breach as general as the covenant, though it includes 20 matters; and that here it

Lev. 78.
Keb. 371.
468. 480.
Conyers v.
Smith.

might be intended that no one rent was paid upon any one day during the term.

Salk. 139.
pl. 5.
Ld. Raym.
478. Far-
row v. Che-
valier.

In covenant by a master against his servant, on a covenant not to buy or sell without the master's leave within two years; the breach assigned was, that he had *diversis diebus & vicibus*, between such a day and such a day, sold to *H.* and to several other persons unknown, goods to the value of 100*l.* After verdict for the plaintiff, it was moved in arrest of judgment, that the breach was uncertain as to time and persons; but the court held it certain enough, and that in covenant it is sufficient to assign a general breach.

Cro. Jac.
298.

If a breach of covenant is sufficiently alleged, the plaintiff need not conclude *& sic non tenuit conventionem in hac*, &c., for that is but repetition.

9 Co. 60.
between
Bradshaw
v. Salmon.
Cro. Jac.
304. S. C.
adjudged;
and that the
defendant
must shew
that he was
seised in fee,
and then the plaintiff must shew a special title in some body else; but the covenant being general, the general assignment of a breach *prima facie* is good. (a) That he was not lawfully seised in fee of an indefeasible estate. Cro. Jac. 369. Raym. 14, 15.

If *A.* leases to *B.* for years, and covenants that he hath full power and lawful authority to lease, &c., and in an action upon this covenant *B.* says, he had (a) not full power and lawful authority to lease, &c., the breach is well assigned, for he hath well pursued the words of the covenant *negative*; and what estate he had lies more in the notice of the lessor than of the lessee; and therefore he ought to shew what estate he had at the time of making the lease, that it may appear that he had full power.

Jon. 218.
Symons v.
Smith.
Cro. Car.
176. S. C.
adjudged, &
vide Hard.
132, 133.

If *A.* covenants to permit *B.*, his heirs and assigns, to take and enjoy the rents, issues and profits of certain lands, and in an action upon this covenant the plaintiff assigns for breach, that *A.* took the profits, & (b) *non permittit B.* to enjoy, &c. This breach is well assigned; for the taking the profits by *A.*, is a special disturbance.

(b) But *non permittit* only is too general. 8 Co. 89. b. 91. b. & *vide* And. 137. 2 Vent. 278.

Sherwood
v. Noone,
1 Leon. 250.

[Where the defendant covenanted, that he would not take wood without the assent or assignment of the lessor or his assigns, it was holden not to be sufficient to allege in the declaration that the defendant took wood *without the assignment* of the lessor or his assigns; for it might be with *their assent*, and so no breach.

Aleberry v.
Walby,
1 Str. 229.

But, where the covenant was, "to pay or cause to be paid," that the defendant had not paid, was holden to be a sufficient assignment of the breach, without adding "or caused to be paid," for if the defendant had caused to be paid, he had paid.

Foster v.
Pierfon,
A Term
Rep. 617.

In assigning a breach of covenant for quiet enjoyment, the plaintiff alleged, that at the time of the demise to him, *A. B.* had lawful right and title to the premises, and having such lawful right and title entered, &c., and evicted him, &c., and adjudged sufficient, though he did not shew what title *A. B.* had, or, that he evicted the plaintiff by legal process.]

Mod. 223.
Boscawin v.
Cook, ad-
judged upon

If *A.* grants a rent to *B.* and his heirs for the life of *C.*, to the use of *C.*, and covenants with *B.* to pay the rent *ad opus & usum* of *C.*, and in an action upon this covenant *B.* assigns the breach

in not paying the rent to him, *ad opus & usum* of C. this breach is well assigned in the words of the covenant, though a negative pregnant.

a special demurrer.
2 Mod. 238.
S. C. ad-

judged, and said, that if it was paid to C., which is a performance in substance, the defendant ought not to have pleaded it; otherwise it shall not be intended.

In trover for a bond the plaintiff need not shew the date; for the bond being lost or converted, he may not know the date; and if he should mistake it, it would be a failure of his suit.

Cro. Car.
26a.
Wilson v.
Chambers,

adjudged, after a verdict for the plaintiff, and affirmed upon a writ of error. Cro. Jac. 638. S. P. adj. judged upon demurrer. Hard. 111. Like point in trover for letters patent. Brown. Ent. 356. a like precedent. Vide Ent. 265. a like precedent.

Cro. Jac. 638. S. P. adj. Brown. Ent. 356. a like precedent.

If in an action upon the case against a lighterman, the plaintiff declares the defendant so negligently governed his lighter, that it took water, and spoiled the goods of the plaintiff *ad damnum*, &c., the declaration is good, without a more special allegation how they were spoiled.

Palm. 523.
Symons v.
Darknol.

So, it hath been held, that a declaration against a lighterman is good, though not alleged in the declaration that he is a common lighterman; as also against a carrier, without alleging that he is a common carrier.

Palm. 523.
Sid. 245.
S. P. yet
said to be
the best way to recite it.

A statute which does not give the action, but is only in affirmation of the common law, need not be recited; as on the statute of *Marlbridge* (52 H. 3.) the plaintiff may declare, that his father was seised in fee of certain lands, and died seised; and that the lands descended to him; and the defendant had occupied them as guardian in socage, without any recital of the statute.

Cro. Car.
219.

[If a plaintiff in his declaration undertake to recite a statute, which statute is the ground of his action, and he misrecite it, the variance is fatal.

Rann v.
Green,
Cowp. 472.

In an action of covenant it is not only unnecessary, but likewise improper to set forth the whole of the deed. So much only as is necessary to entitle the plaintiff to his action ought to be shewn; nor need that part be recited literally, but may be set forth according to its substance and effect; though it is usual and advisable to deviate as little as may be from the expressions in the instrument.]

Dougl. 667.
Cowp. 665.
727.

In an action of debt for an escape of one in execution, it is not sufficient to shew only that a *capias ad satisfaciendum* issued, by virtue of which he was taken, &c., but the plaintiff must shew how he recovered judgment, and thereupon a *capias ad satisfaciendum* issued, &c., for as to the judgment the defendant may plead *nullius in rebus*; and though, if there was no judgment, the sheriff was bound to execute the writ, and perhaps might be fined for the escape, yet, if there was no judgment, there was no debt or duty to the plaintiff.

Sand. 38,
39. Jones
v. Pope.
Lev. 191.
2 Keb. 93.
Sid. 305.
S. C. —
That the
cause for
which ar-
rested must
be shewn

and proved, 2 Lev. 85. — But for what is necessary to be shewn in the declaration, vide Carth. 149. Lutw. 110, 111. 2 Show. 17. pl. 10. Salk. 272. pl. 3. 5 Mod. 414.

If in an action for the escape of B., against the warden of the Fleet, the plaintiff declares, that B. was committed in execution to him, he must conclude *prout patet per recordum*; for that is triable

3 Lev. 393.
Norden v.
Fox, & vide
1 Lut. 111.

and 6 Mod. 3, 9. that by the record, though said to be helped by the defendant's pleading, that he suffered him to escape with the leave of the plaintiff. where a matter of record is the foundation or ground of the suit of the plaintiff, or of the substance of the plea, there, it ought to be certainly and truly alleged; *aliter*, where it is but conveyance; as in escape, the not concluding *propter patet per recordum*, not being the gift of the action, is aided.

Noy, 72.
Vide tit.
Escape.

In an action for an escape on mesne process, the plaintiff must not only shew, that *ad largum ire permisit*, but also that *non compervit ad diem*; because the party being bailable, the sheriff might lawfully suffer him to go at large; though in such action upon an escape after execution, it is sufficient to shew that *ad largum ire permisit*.

Moor, 834.
2 Bull. 236.
Roll. Rep.
47.

In action for the escape of one committed by commissioners of bankrupt, for refusing to answer interrogatories, the plaintiff set forth, that upon the petition of him and other creditors, the Lord Chancellor by commission *dedit potestatem plenam* to the commissioners *vigore statuti* to examine, &c., and that the commissioners offered him interrogatories, &c. And though it was objected that the office of the chancellor is ministerial only, and that it is the statutes which give the power, and it was not shewn what the interrogatories were; yet the declaration was adjudged good; for it is *per commissionem dedit*, &c. *vigore statuti*; and it shall be intended that the interrogatories are lawful till the contrary appears.

Mod. Cases,
78. Tucker
v. Gold-
burne.

In debt upon an assignment of a bail-bond, taken by the sheriff who had arrested the defendant on a *capias*; it was objected, that the plaintiff had not in his declaration set forth the *capias*, or the *teste*, or return of any *capias*; and this on a special demurrer was held fatal, it being the *capias* that gives life to the bond.

Leon. 72.
(a) The
plaintiff
may declare,
&c. that in-
ter alia it
was award-
ed; *per Lit.*
Rep. 312.

If in an action of debt upon an award the plaintiff declares, that the arbitrators did make an award, that the defendant should pay unto the plaintiff 10 *l.*, &c., this is a good declaration, though nothing is shewn to have been awarded on the other side; for it is sufficient (a) for the plaintiff to set forth that part of the award that entitles him to his action.

But 1 Mod. 36. *per Twissden cont.*; but for this *vide* title Award.

Cro. Eliz.
272.
Tenacy v.
Brown.

If in an *assumpsit* the plaintiff declare, that the defendant, in consideration that the plaintiff would forbear him one week, as-
sured, &c., and aver, that he did forbear him one week, but say not one week following; yet this is a good declaration, for it must necessarily be intended so.

Yelv. 49.
Allen v.
Randall.

If in an *assumpsit* the plaintiff declare, that whereas there was a certain bargain between the plaintiff and the defendant for certain woods for which the plaintiff was to pay 20 *l.* at a day after; and that the defendant, in consideration that the plaintiff *asportaret sufficiens hominem fore obligat.* to the defendant for the payment of the said 20 *l.*, did assume and promise that the plaintiff should enjoy the said wood, &c., and the plaintiff aver *quod asportavit B. sufficientem hominem fore obligat.* to the defendant, &c. yet this is no good declaration; 1st, Because it is not shewn (b) how he was sufficient, so that it may appear to the court to be according to the agreement;

(b) *V. de*
Hob. 69.

agreement; 2dly, Because it is not in fact shewn that B. (a) did become bound, or that *obtulit se obligari*, and perhaps he came to be bound, but being there refused.

laid out, or to be laid out, for goods for the use of the defendant, the plaintiff need not aver, that the goods came to the hands of the defendant. Bult. 169. adjudged.

(a) In an action upon promise to repay money

If in an *assumpsit* the plaintiff declare that his father was seised of the manor of D., and of divers lands, &c. in D. in fee, and in consideration that the plaintiff, together with his father *sigillaret quandam indenturam per quam* his father *barganizaret*, &c. the said manor and lands, the defendant did assume, &c., and allege, that the plaintiff such a day *sigillavit indenturam predict.*; yet the defendant, &c.; this is no good declaration; for *diversa terras et tementa* in D. are uncertain, and comprehend not all his lands in D., and therefore the plaintiff ought to have shewn in certain, and particularly what lands were comprised within the indenture.

Yelv. 110. Lord Mor-dant v. Wal-den, ad-judged.

Also, in the above case it was held, that the allegation that he had sealed *indenturam predict.* was not good; for *predict.* ought to refer to some certainty before, but (b) *quandam indenturam* is altogether uncertain; and the plaintiff should have shewed in certain, that he sealed such an indenture *per quam* the plaintiff and his father *barganizaverunt*, &c. *de verbo in verbum*, as laid in the premises of the declaration.

Yelv. 111. adjudged. (b) The plaintiff declared, that whereas *quandam pars domus*, &c. was out of repair, the

defendant, in consideration that the plaintiff would repair *vandem partem* of the said house, assumed and promised, &c. and avers, that he did repair *candem partem*; and though it was objected, the plaintiff should have shewed which part of the house was out of repair, yet after a verdict, it was adjudged for the plaintiff. 2 Leon. 53. 3 Leon. 91.

But, if a perfect indenture in date, in the nomination of the parties and limitation of the land, had been mentioned before, it had been sufficient to say, that they sealed *indenturam predict.*, because by the premises it appears there was *in facto* a true and perfect indenture.

Yelv. 112. per cur.

The plaintiff declares, whereas he and the defendant were joint executors, and the defendant had received all the estate of the testator, and the plaintiff threatened to sue the defendant for one moiety, the defendant, in consideration the plaintiff would forbear, &c. and would shew an account concerning the testator's estate, did assume, &c.; and the plaintiff avers, that he did shew *quoddam compotum*; and though not said *compotum predict.*, yet after a verdict for the plaintiff it was adjudged for him.

Raym. 203, 204.

If in an *assumpsit* the plaintiff declare, that the defendant, in consideration that the plaintiff would lease certain lands to the defendant, rendering 10*l. per ann.*, the defendant did assume and promise to, &c., and aver, that he did make a lease of the said lands, but do not say that it was rendering 10*l. per ann.*; this is no good declaration.

3 Bult. 35. Lee v. Adams, adjudged after verdict for the plaintiff.

If in an *assumpsit* the plaintiff declare, that whereas the defendant had committed a felony, and thereupon had requested the plaintiff to do his endeavour (c) to procure a pardon for the defendant; and thereupon the plaintiff, by all the means he could, and many days labour, did his endeavour to obtain a pardon for

Hob. 105, 106. Lamplough v. Blaithwait, adjudged per totam cur.

præter Warburton; and the rather, because it was after verdict.

Moor, 866.

Brownl. 7.

S. C.

(c) Stile,

465. Like

point, where

the defendant did his endeavour to reconcile differences, &c. (d) But if the plaintiff declare, that the defendant, in consideration the plaintiff had done him *multa beneficia*, assumed and promised, &c. this is not good. Vent. 27. Sid. 413. adjudged, after verdict for the plaintiff; & *vide* 2 Keb. 552.

Roll. Rep.
382.

In *assumpsit* the plaintiff declared, that in consideration the plaintiff would deliver all the corn in a certain barn, the defendant did assume and promise, &c., and avers, that he did deliver all the corn in the barn, but does not shew that there was any corn there; and it was agreed *per curiam*, that had this been on a demurrer, the declaration would not be good; but that being after a verdict, upon *non assumpsit* pleaded, by which issue it was admitted there was corn there; it was adjudged for the plaintiff, and afterwards affirmed upon a writ of error.

Cro. Jac.
503.
Lenerett v.
Rivett, ad-
judged.

If in an *assumpsit* the plaintiff declare, that whereas *J. S.* had acknowledged himself to be indebted to the plaintiff in 10 *l.* for divers trespasses, which 10 *l.* the plaintiff at the defendant's request had accepted; and that the defendant, in consideration the plaintiff would acquit and discharge the said *J. S.* of the said debt, and would permit the said *J. S.* to carry out of the plaintiff's house certain goods, did assume and promise to pay the said 10 *l.* to the plaintiff; and allege *in facto*, that he did acquit and discharge the said *J. S.*, and did permit the said *J. S.* to carry away the said goods: this is no good declaration, because he doth not shew how he did acquit the said *J. S.*, for it could not be without deed, which ought to have been particularly shewn; and though the performance of the other part of the consideration is sufficiently averred, yet that will not help it.

Raym. 400.
Agillonby v.
Towerfon,
adjudged,
after ver-
dict for the
plaintiff.
Moore, 595.
11th point
adjudged.

If in an *assumpsit* the plaintiff declare, that whereas there was a certain discourse between the plaintiff and defendant concerning a marriage to be had between the nephew of the plaintiff and the niece of the defendant; and thereupon the defendant, in consideration the plaintiff would do his endeavour, and labour to persuade his nephew to marry the niece of the defendant, did assume and promise to pay to the plaintiff, &c., and aver, that such a day, and divers other days and times *omnibus modis quibus poterat conatus fuit & elaboravit suadere* his said nephew to marry the defendant's said niece, &c., this is a good declaration, without shewing in particular how he did his endeavour; for if he should set forth his several speeches to his nephew in the praise of the young lady, or the advantages of a married life, &c., the record would be too long.

4. Where the Averments must be positive and express in the Declaration.

The declaration must contain such certain affirmation, that it may be traversed; for if there be no certain affirmation to make the declaration itself traversable, it will not be cured after a verdict, because it is a defect in substance; as, if the declaration be *quod cum* the defendant (a) assaulted him, and the defendant plead not guilty, here is nothing put in issue, for the pleadings have affirmed nothing; and though the defendant be found guilty, yet cannot the plaintiff have judgment, because nothing is positively affirmed: but, if the plaintiff declare *quod cum* the defendant *concessit se teneri*, or *quod cum mutuatus fuisset & non solvit*, or, *quod cum dimisit*, the defendant *ejecit*; in these cases there is a positive charge upon the defendant; and the *quod cum* being a branch of the whole period, and making one sentence with the latter part of it, it is a positive affirmation, and therefore being equally positive, it is equally traversable with the latter part, and therefore a man may plead *non est factum*, *non mutuatus*, *non dimisit*; because, though these come under the *quod cum*, yet, taken together with the rest of the sentence, being positive, they make substantive issues of themselves.

If on a demise the plaintiff declare, *quod cum per quandam indenturam testat. existit quod dimisit*, this hath been held ill after a verdict; because there is no positive affirmation that there was a demise; and so he hath not set forth a demise in a manner that it might be traversed, for the traverse must be of the demise, and not of the indenture; but if in covenant he declare, *quod cum per quandam indenturam testat. existit*, that the defendant did covenant, this, with a *profert*, is good; because when he says the indenture attests that he did covenant, this is a certain allegation there was such an indenture, and the indenture only is traversable on the issue of *non est factum*.

So it hath been held, that *licet* is an affirmation; for what is contained under it, as *licet ad hoc faciend. superius requisit.*, is a positive affirmation that there was a request.

In debt on the statute 12 Car. 2. c. 25. for selling wine without licence, the plaintiff began his declaration by way of recital, *pro*, viz. *quod cum* the defendant at several times, between such a day and such a day, had sold wines by retail by the pint, &c.; on the general issue pleaded, and verdict for the plaintiff, it was moved in arrest, that the declaration was not positive, but by way of recital only, and so doth not directly charge the defendant with the crime intended: *sed per curiam*, The plaintiff shall have judgment; for all the precedents in the like cases are after this manner; as, in debt upon the statute of tithes, &c. Moreover, this is an action of debt, wherein the offence is only an inducement to the action; or it is the non-payment of the penalty which is the original cause.

Co. Lit. 303.
Plow. 128.
Cro. Jac.
361, 362.
2 Bull. 214.
Yelv. 121.
Cro. Eliz.
33. 44.
Co. Ent.
161.
2 Sand. 319.
(a) 2 Lev.
206.

Lutw. 535.
877. & vide
Lev. 12. 75.
Sand. 375.

Sand. 116.
Lev. 194.
2 Vent. 278.
Dyer, 257.
Carth. 216.
Show. 337.
Mullacke
qui tam v.
Speering.

2 Salk. 636.

pl. 2.

Hore v.

Chapman.

* This is

the form in the writ, but the count must contain a positive allegation.

In trespass the plaintiff declared, *quare* vi & armis clausum fregit*, and after verdict for the plaintiff judgment was arrested; for *quare* is not positive, but interrogatory, and much worse than *quod cum*.

For this *vide*

Roll. Abr. 4.

Cro. Car.

254, 487.

2 Sid. 127.

4 Co. 18.

Dyer, 25.

286. Allen,

92. 2 Bulst.

291.

3 Bulst. 76.

Sid. 21.

Roll. Rep. 43.

193. —

In case for selling two oxen, affirming they were the

defendant's, whereas in truth they were the property of J. S., without alleging, that he *sciens* they

were the property of J. S., yet the declaration was held good. Carth. 90. —

† The general issue

is in fact a traverse of the *sciens*, for unless the plaintiff on the trial prove the defendant knew his dog

was accustomed to bite sheep, his cause of action falls to the ground, as in such case the defendant is

not guilty of any thing which can entitle the plaintiff to an action.

It hath been held a good declaration to say, *quod defendens quendam canem ad mordendum oves consuetum scienter retinuit*, without saying, *quod retinuit quendam canem sciens canem predictum ad mordendum oves consuetum*, for this is tantamount, for the word *scienter* goes to all the precedent matter; and the court said, the *sciens* was not † traversable, but ought to be proved in evidence, and that otherwise the action did not lie.

Noy, 21.

In debt upon an obligation, the condition whereof was to perform all covenants comprised within certain indentures, bearing every date with the said obligation, and, in truth, both obligation and indentures were without date; it was held, that the plaintiff ought to have averred a date of the obligation, and that the indenture bore equal date therewith.

Yelv. 18.

Soprani v.

Skurro, ad-

judged.

If in an *assumpsit* the plaintiff declare, that whereas it was agreed between the plaintiff and one A., that the said A. should lease a certain house to one B. for seven years; and it was also agreed, that B. during the said term, should repair the house with tile and slate only, and thereupon an indenture was drawn; but because there was a covenant therein, that B. should be bound in all manner of reparations, B. refused to seal the said indenture and the plaintiff refused to seal a bond for performance, &c.; and further shew, that in the said house there was a great wall, part whereof was ruinous, and likely to fall during the said term; and that the defendant, in consideration that the said B. would seal the said indenture, and the plaintiff would seal the said bond, did assume and promise, that he the said defendant would maintain and uphold the said wall *durante predicti termino 7 annorum*, and aver that the said B. the said indenture, and the plaintiff the said bond did thereupon seal; and in fact say, that the said wall, during the said term, did fall, &c.; this is no good declaration, because not expressly averred that A. did demise the said house; and if there was no demise, it was not possible for the defendant to repair it during the term; and, for any thing that appears, the indenture was sealed only on the part of the lessee, and not on the part of the lessor.

Yelv. 38.

Heyford v.

Reeve, ad-

judged.

If in an *assumpsit* the plaintiff declare, that whereas the defendant had distrained six oxen of the plaintiff's for a quit-rent due to the bailiffs of B., and thereupon the defendant, in consideration

th

that the plaintiff would pay the money for the redemption of his said cattle, did assume and promise, upon request, to shew to the plaintiff, or to such other person or persons as he should name, a sufficient record to charge the said lands with the said quit-rents; and allege, that he appointed *B.* to see the said record, and requested the defendant to shew it *B.* accordingly; but that the defendant had not shewn to the said *B.* any sufficient record to charge the said lands; this is a good declaration; for though the sufficiency of the said record is not triable *per pais*, and the plaintiff might have averred a breach generally, *scilicet*, that he did not shew any record, yet this is sufficient and most proper for the plaintiff to lay the breach according to the promise; and in this case the defendant may plead, that he did shew *tale recordum* reciting it, and conclude, which was sufficient; and thereupon the plaintiff may demur, and put the sufficiency thereof to the judgment of the court.

If in an *assumpsit* the plaintiff declare, that the defendant, in consideration of, &c. assumed and promised to take the son of the plaintiff to be his apprentice for seven years, and to find him meat, drink, and apparel, &c., during the term, but aver, that he did not find him meat, drink, and apparel, &c., but do not aver that he did put him, or that the defendant did accept him as his apprentice; this is no good declaration; for it ought to appear that he was his apprentice, else the defendant was not bound to provide for him.

Cro. Jac.
406.
3 Bull. 222.
Roll. Rep.
414. Talker
v. Wrigg.

If in an *assumpsit* the plaintiff declare upon a promise made by the defendant, to pay 50*s.* to the plaintiff when the defendant should have received the money, and aver, that the defendant hath received the money, but yet hath not paid, &c.; this is no good declaration, because it doth not appear how much money the defendant hath received, and perhaps he hath not received so much as 50*s.* and though the promise is general, yet the breach ought to be laid so as to be adequate to the consideration *.

Mod. 169.
agreed *per cur.*, but being after a verdict adjudged for the plaintiff.
* The best method would have been to have

declared generally, that the defendant was indebted to him in 50*s.* for money had and received by defendant to the plaintiff's use, and being so indebted, he promised to pay, and then, on proving any part received, the plaintiff would have been entitled to his verdict, and the declaration would not be liable to any exception.

If in an *assumpsit* against an executor the plaintiff declare, that the testator of the defendant, in consideration of, &c., did assume and promise that he would leave the wife of the plaintiff as good a portion as he should give to any of his children; and aver, that the testator to such a daughter *dedit* such a portion, but did not leave, &c.; this is no good declaration, because it does not appear when he did give this portion, and perhaps it might be before the promise.

Latch, 203.
by the judges against one, after verdict.

5. Of the Certainty required in the Description of the Thing declared for.

The law requires no greater certainty than the (a) nature of the thing will admit of; as, where an action is brought for things not subject

For this *vide* tit. Trespass.
(a) That

where the thing is well described, the court ought not to be too strict in scanning the words; and that if the thing is so described, that the jury may know what is meant thereby, it is well enough. *Stile*, 136. 235.

subject to distinction by number, weight, or measure; as, in trespass for breaking his close with beasts, and eating his peas, without saying how much; yet this declaration hath been held good, because no body can number or measure the peas that beasts can eat.

For this *vide* tit. Trover and Conversion.

So, where there are several parts which compose an aggregate body, there, it is sufficient to mention the body, and it is not necessary to ascertain the several parts; as, trover for a ship and sails is good, because the sails go to make up the aggregate body; but if it had been for sails only, it would not have been good without specifying the number and quality: so, trover lies for a library of books*.

* *Sed quæ?*

Raym. 2.
Seaman v. Barns, adjudged.

If in trover the plaintiff declare for two pair of pot-hooks, &c., and hangers; this declaration is not good, because of the uncertainty of the word hangers; and they cannot be intended such upon which the pot-hooks used to hang, because they do not immediately follow the word pot-hooks; but there are several other words between.

Vide tit. Trover.

So, trover for a beam, and scales and weights, is not good for the weights, because there may be more or less of the weights used with the scales, and therefore altogether uncertain as to the quantities or weights of them.

a *Sand.* 74.
Taylor v. Wells, adjudged.

If in trover the plaintiff declare *pro decem paribus velorum & tegulorum, Angliæ* curtains and vallance; this is a good declaration, and certain enough, and shall be intended for ten pair of curtains, and ten of vallance; and in such artificial things there needs no other description, than to name them by their usual names by which they are commonly called, without shewing the quantity of yards or stuff of which they are made.

Vide tit. Trover, and the several authorities there cited. † If for writings, the plaintiff perhaps had better sue in detinue, as on recovery in that action he will be entitled to a return of the things in specie, besides damages for the detention.

Where a thing is laid in the declaration by way of aggravation, though such allegation is uncertain, or that circumstance is not proved to the jury, yet this shall not arrest the judgment; because the gist of the action is the thing itself in demand, and the aggravation is only the manner of doing it; and though this may increase the damage something, yet it is not to be out of proportion to the thing in demand; as, if trover be brought for a box of writings †, and charters or vestments, this is good, because the trover is for the trunk, and for the detention of the goods therein, which are withheld by the detention of the trunk, but not for the value of the goods; and therefore anciently they held that trover lay only for a trunk locked, but now they admit it though the trunk be not locked, because the detaining is still the same.

Keb. 825.
Prior v. Dawkes.

In an action upon the case for setting an house on fire *per quod* (amongst divers other goods) *ornatus & equis aratris & carnecis a. &c.* it was held certain enough: so, if he had mentioned only *diversa bona*; for when a man's house is burnt, he cannot set forth the certainty of the goods he lost.

But, where in an action on the statute of *bue and cry*, the plaintiff declared that he was robbed of a certain sum of money, as *diversa bona & catalla in custodia ipsius*, to the value of 30*l.*, and because he had not set forth the goods particularly, and that he had not likewise alleged that they were his goods, it was held, that as to this part he could not have judgment.

Declaration in trespass for breaking his close and taking away his fish, without expressing either the number or nature of them, was held insufficient: but, in an indictment for taking fish out of a pond, the number need not be expressed, for damages are not to be recovered; but the party is to be fined according to the circumstances of the fact, and not according to the number of the fish.

So, trespass *quare arbores succidit ad valentiam*, &c., was held insufficient for not expressing the kind of trees.

6. Of the Declaration's being good in Part, and void in Part.

It seems to be now agreed, that if a declaration be good in part, though bad as to another part, that the plaintiff is entitled to judgment, for so much as is well alleged, especially, if it be not an (a) entire demand: also, where the jury find greater damages than the party declares of, the court may, to prevent error, give judgment for so much as the party declares of, *nullo habito respectu* to the rest: also, the party may (b) release the overplus, and take judgment for the rest.

When for two things, and of his own shewing it appears, that he cannot have an action for one of them, or a better writ, there, the writ shall be well for that part for which it is good. *11 Co. 45. Bedford's case. (b) Where the plaintiff may release damages for part, and take judgment for the rest, 1 F. N. B. 107. Moor, 281. Leon. 92. 2 Bulst. 280. Brown. 235. S. ile, 364. Hard. 58.*

As, where the party avowed for 5*l.* rent, and a *nomine pœna* for non-payment at the day, but laid no actual demand of the rent, the avowry was held naught as to the *nomine pœna*, because it could not be forfeited without a demand of the rent; yet he had judgment for the return of the cattle, because he had a lawful cause to distrain for rent arrear, and the demands were several.

So, where the plaintiff brought an action of debt upon the statute of usury, and declared, that the defendant *corruptive* did lend 40*l.* *cont. formam statuti*, and such a day did also lend 20*l.* *contra formam*, &c., but did not say *corruptive*; upon *nil debet* pleaded the plaintiff had a verdict, and it was moved in arrest of judgment that the declaration was not good for the last 20*l.* because it wanted the word *corruptive*; but, notwithstanding, the court gave judgment for what the plaintiff had well declared, and a *nil capiat per billam* was entered as to the residue.

So, if in trespass the plaintiff declare for taking the mare of the plaintiff, and several goods, but do not say of the plaintiff, and thereupon the defendant demur, the plaintiff may have judgment for the mare, and release the action for the rest.

So, if an action of debt be brought upon several bonds, and it appear that one is not due, the plaintiff may recover the rest.

Roll. Abr.
785. Cro.
Car. 458.
(a) As, in
ejectment of
land and a
free fishery,

In ejectment, if (a) part of the things be well demanded, and others not, and a verdict be given for the plaintiff for the whole, and entire damages, the plaintiff may release all the damages in that which is not well demanded, and pray judgment for the residue.

because an ejectment does not lie of a free fishery. Cro. Jac. 144. 146. 1 Roll. Abr. 784. — So, in an *ejectione custodie & heredis*, where it does not lie of the custody of the heir, but of the land only. Dyer, 369. 10 Co. 130. 5 Co. 108. 2 Bulst. 28. — So, in an ejectment of a messuage, cottage, and tenement, if it be found for the plaintiff, and one entire penny damages given to the plaintiff for the whole, because an ejectment does not lie of a tenement, the plaintiff may release all the damages, for that it is entire, and have judgment for all the land, saving the tenement. Cro. Eliz. 119. 3 Leon. 128. 2 Bulst. 28. Stile, 30.

Roll. Abr.
784. Ash-
ford's case.
2 Sand. 286.
Likepoint.

In a writ of debt for 100 *l.* against an executor, if the plaintiff count upon an obligation for 99 *l.*, and upon a *mutuatus* by the testator for 20 *s.*, and upon the issue the jury find for the plaintiff in the whole, and assess damages entire, where it appeared no action lay against the executor upon the *mutuatus* of the testator; yet, if the plaintiff release the 20 *s.* and all the damages, he may have judgment for the residue.

Roll. Abr.
785. Barber
v. Pomeroy,
Stile, 175.
& vide Allen,
29.

In debt for rent the plaintiff declared for more than was due upon his own shewing, and upon *nil debet* pleaded, the plaintiff had judgment, and damages and costs; and it was moved in arrest of judgment, that the plaintiff had made an (b) entire demand for rent to a certain sum, when it appeared that he could not have an action for so much; yet the court held, that he might release the surplus and damages, and take judgment for the residue.

(b) In all
actions of
debt the
plaintiff is

privy to the sum in demand; and therefore ought at his peril to declare for the true debt; and the reason why he ought to demand the very sum is, because if he should do otherwise, and recover, he might afterwards bring an action for the true sum, and so the defendant would be doubly charged; and therefore in debt on a bond, if the plaintiff declares for less than is due, he shall never have judgment. 2 Roll. Rep. 54, 55. 5 Mod. 213. cited. [It is not true, that in debt the plaintiff should demand the very exact sum due, that he cannot recover any other sum than that which he demands. Many instances might be given where this action lies, and yet where it is impossible to state the demand with precision, as, in debt against a tenant who holds over, under the stat. of 4 G. 2. c. 28. for double the value of the land; or in debt for treble the value for not setting out tithes, under the stat. of 2 & 3 E. 6. c. 13.; or, for the value of foreign money. In all these cases the extent of the demand is uncertain at the commencement of the suit; the value is to be found by a jury. But if the declaration import a title to a fixed, gross sum, to a duty numerically certain, there, the evidence must shew a right to that very sum, else the very gist and foundation of the action fails. But this is not peculiar to this species of action: in *assumpsit* as well as debt the case proved must be consistent with the declaration; the proof must be commensurate with the allegation. Walker v. Whitter, Dougl. 6. Aylett v. Lowe, 2 Bl. Rep. 1221. Rudder v. Price, 1 H. Bl. 550. Grant v. Aslie, Dougl. 731.]

7 Mod. 87.
per Holt,
Ch. J.
2 Salk. 658.
pl. 3. S. C.
2 Ld. Raym.
814. S. C.
(c) As, in
debt for the
arrear of
rent, in
which the
plaintiff de-
clared for
more rent,
and for a

If there be a certain stated sum specified in the deed itself, that shall not be abridged by any *remittitur* or release of the plaintiff, if he declare upon that deed: as, if a man bring debt upon a bond of 30 *s.*, and declare upon a bond of 20 *l.* this will be bad; because he has brought his action for more than is due, and this rests upon the deed only, and the sum in it does not amount to his demand. But if the action be brought upon a deed which refers to a matter of fact, that makes the duty more or less; if then the fact which is referred to will entitle him to a less sum only, and he demand more than the fact which the deed refers to upon (c) computation will entitle him to; there, let him remit so much of his demands as the facts does not make out, and it will be well, and

and he shall have judgment for the rest; for that fact which is not made out is not contradicted by the deed.

Shewing appeared to be due to him. Sand. 282. *Dupper v. Baskervil.* — So, where the plaintiff declared for 100*l.* due for so many years, and it appeared upon the record in casting up the sums, that he had declared for 8*l.* too much. 5 Mod. 212. *Thwait & Ux. v. Lady Ashfield*, Comb. 365. S. C.

longer time than upon his own

Assumpsit, and two several counts laid; one was a promissory note, and the plaintiff counted thereon as on a bill of exchange, upon the custom of merchants; on *non assumpsit* entire damages were given, and judgment accordingly; and upon a writ of error brought in *B. R.*, it was held 1*st*, That the plaintiff could not declare upon the promissory note as upon a bill of exchange; and as there could be no such count or action, so there could be no such damages. 2*dly*, That they could not reverse the judgment in part, viz. as to the one count, and affirm it as to the other; and denied *Jacob and Mill's case*, *Hob.* 6. and took this difference, viz. where the judgment is partly by the common law, and partly by statute, it may be reversed in part, for that which was a judgment at common law will remain a judgment, and be complete without the other.

Salk. 24. pl. 3. Cutting v. Williams. 7 Mod. 155. S. C. 2 Ld. Raym. 825. S. C. 11 Mod. 24. S. C.

(C) Of Imparance: And herein,

1. Of the Nature thereof, and the several Kinds.

(a) *Imparance* is, when one, who is to answer to the action of another, desireth some time to advise what he shall answer; and (b) it is nothing else but the continuance of the cause till a further day.

2 Lih Reg. 41. 2 Show. 310. pl. 321. (a) This *libertas in- terloquendi*

has been thought to arise from a notion of religion, which is mentioned in St. Matthew, chapter v. verse 25. *Agree with thine adversary quickly, whilst thou art in the way with him*; they looked upon the plaintiff at the time of declaring to be in his way towards judgment: and that therefore, since the defendant was ordered by the precepts of religion to agree with him, that there was a necessity to give him time for that purpose, and therefore *libertas loquendi* was entered on the roll. *Gilb. Hist. C. P.* 42, 43. (b) When the defendant appears, and the parties by consent obtain a day before the declaration, this is called *dies datus prece partium*. *Gilb. Hist. C. P.* 41. — A day given before the count is called *dies datus*; but when after it is called an imparance. *Hard.* 365, 366. But for this diversity between an imparance and the *dies datus*, vide *Moor*, 79. pl. 209. 3 *Leon.* 14. *N. Bendl.* 153. pl. 214. *Cro. Eliz.* 740.

In the Common Pleas they anciently proceeded by original writs, which were warrants out of Chancery for them to proceed; those always gave the defendant notice of the cause of action; and as he had a view of the writ before he appeared, if he had any dilatory plea he was to put it in immediately; but when he pleaded in chief, and came in towards the end of the term, they gave him time to make his defence, which was called imparance.

2 Show. 444. Skin. 2. pl. 2. Yelv. 211. Lev. 197. *Gilb. Hist. C. P.* 182.

But in the King's Bench, when the defendant comes in by *latitat*, he does not know, till after his appearance, for what the plaintiff declares; and as he had not sight of the bill beforehand, he had time allowed him to plead any plea in abatement, which is called a special imparance.

12 Mod. 529.

When

2 Show. 310.
Pl. 321.

When the Common Pleas proceeded on *clausum fregit*, as the defendant was under the same disadvantages as when he was arrested on a *latitat*, he had the same privilege as to time to make his objections to the declaration.

12 Mod.
529.

This begot the distinction between a general and special imparlances, which latter is again distinguished into the general special imparlance, and that which is still more special.

Gilb. Hist.
C. P. 183.
* Imparlances are now much discouraged, as tending to delay plaintiffs in their just demands.—

The general imparlance is entered on the imparlance roll in the words following, *petit licentiam interloquendi*, which, in the King's Bench, and on *clausum fregit* in the C. B., is entered of course, and is all * that is done the first term; but in special originals, returnable in an issuable term, the courts have denied the defendant leave to imparl, in order to put off a trial. Also, after this general imparlance, the defendant cannot regularly plead any dilatory plea.

Note: If a declaration be not delivered or filed, and also notice of the filing given before the last four days of term, the defendant is entitled to an imparlance of course.

Gilb. Hist.
C. P. 183.
(a) Mr. Justice Powell thus lays down the different

The general special imparlance is entered thus, *salvis sibi omnibus & omnimodis advantagiis & exceptionibus*; that which is more special is, *salvis sibi omnibus advantagiis ad breve, billam five narrationem* (a); the general imparlance is of course, but the special must be obtained from the court.

kinds of imparlances: There are two sorts of imparlances; the one general, after which one cannot plead in abatement at all; the other special, with a *salvis sibi omnibus exceptionibus tam ad breve quam ad narr.*, after which one may plead in abatement of the writ and count; and this sort of special imparlance may be granted by the prothonotary: there is another sort of imparlance more special, with a *salvis sibi omnibus exceptionibus & advantagiis quibuscunque*, which cannot be granted without leave of the court, and is discretionary, after which one may plead to the jurisdiction of the court. 12 Mod. 529. 1 Lutw. 46. 2 Bl. Rep. 1094. — * In B. R. on a declaration of Hilary, there may be an imparlance to Trinity term; for it is the course of that court to give imparlance on declaration till the day of pleading. Fletcher v. Richardson, Ca. temp. Hardw. 322. Time to plead is the same as an imparlance. Barnes, 345.

2. What the Defendant must do before any Imparlance.

Dyer, 210.
7 H. 6. 39.
22 H. 6. 7.
a. Palm.
406. Latth.
83. Cro.

If a defendant pleads to the jurisdiction of the court, he must do it *instantèr* on his appearance; for if he imparls, he owns the jurisdiction of the court by craving leave of the court for time to plead in.

Car. 9. Stile, 90. Hard. 365. Gilb. Hist. C. P. 183, 184. [But after a general special imparlance, he may plead to the jurisdiction of the court. 2 Bl. Rep. 1096.]

Sid. 328.
Cro. Car. 9.
& vide tit. Ancient Demesne.

But the plea of ancient demesne may be pleaded after imparlance; because the lord may reverse the judgment by writ of deceit, and it goes in bar of the action itself in that court.

Raym. 34.

[But see 1 Vent. 235.]
The defendant after imparlance pleaded to the jurisdiction of the court of B. R., that he was a member of the Privy Chamber, and ought not to be sued in any other court without the special licence of the Lord Chamberlain of the Household for the time being; this was held an ill plea, and the court offended thereat.

Gilb. Hist.
C. P. 184.
Dyer, 210.

If the defendant in a plea of land would have view, he must demand it before imparlance; for by imparling he undertakes to defend

defend the lands mentioned in the plaintiff's count, and it would be absurd in him to defend what he does not know. pl. 26.
That a view cannot be
had, nor non-tenure, nor jointenancy pleaded, after imparlance; but in Jenk. 130. it is said, a view may be had after imparlance *.....* In personal or mixt actions, views may be had on motion made, even after notice of trial, if there is time sufficient. In B. R. a rule for a view is drawn up on motion signed by counsel.

If in (a) dower the defendant pleads *semper paratus*, this must be before imparlance. Dyer, 300.
Hob. 62.
(a) Error
on a judgment in dower in Durham, where after imparlance the defendant pleaded detinue of charters, and judgment on demurrer for the plaintiff; and that judgment affirmed in B. R. Show. 271. Burdon v. Burdon.

So, tender and *uncore prift* must be pleaded before imparlance; by craving time he admits he is not ready, and therefore falsifies his plea. Dyer, 300.
Hob. 62.
Sid. 365.
Lutw. 238. 2 Mod. 62.

In *assumpsit* for goods sold, the defendant imparled specially, with a *salvis sibi*, &c. in common form, and afterwards he pleaded in bar to the action, that he tendered the money demanded to the plaintiff on the very day on which he had laid his request in the declaration, and that from that day forward *semper paratus fuit* to pay it, & *proferet hic in cur.*; and on demurrer to this plea, one objection was, that this tender could not be pleaded after an imparlance, being contradictory to that part of his plea, viz. *semper paratus*, and after several debates, the plea was for this adjudged ill; and in this case the court held, that the special imparlance made no difference, as it appeared thereby that he was not *semper paratus*. Carth. 413.
Salk. 622.
pl. 1.
Comb. 443.
Giles v.
Hart,
3 Salk. 353.
Id. Raym.
254. S. C.

[A tender must therefore be pleaded before imparlance, of the same term with the declaration; unless the declaration be delivered or filed so late, that the defendant is not obliged to plead to it that term: and then it may be pleaded of course within the first four days inclusive of the next term; or even afterwards, upon motion, as of the preceding term.] Tidd's Pr.
247.
1 Burr. 59.
Barnes, 343.
351. 355.
357. 359.
361, 362.

3. What he is to plead after a general Imparlance.

After a general imparlance the defendant can only plead in bar to the action, and cannot regularly plead any dilatory plea in abatement; as outlawry, excommunication, jointenancy, misnomer, or non-tenure. 2 Roll.
Rep. 59.
Jenk. 130.
[A plea in abatement after a ge-
neral imparlance is bad on a general demurrer. Buddle v. Wilson, 6 Term Rep. 369. It has been considered too so far as a nullity, that the plaintiff may sign judgment as for want of a plea. Doughty v. Lascoules, 4 Term Rep. 520.]

But, though outlawry after imparlance cannot be pleaded in abatement, yet, if the ground or cause of action be forfeited, as it is in felony, it may be pleaded in bar after imparlance; so, of a debt certain and due to the outlaw, which vests in the king by the forfeiture, outlawry in the plaintiff may be pleaded after imparlance, and the turning the remedy from an action of debt to an action on the case (according to the modern practice, to avoid the Bro. Non-ability, 36.
2 Roll. Rep. 59. Cro.
Eliz. 203.
2 Vent. 282.
3 Lev. 29.

law-wager) whereby it becomes uncertain and sounds only in damages, shall not divest the king of what he was once lawfully possessed of.

Doct.
pl. 224.
Lutw. 1117. So, if one be excommunicated after the term to which the imparlance is, such excommunication may be pleaded after imparlance.

Jenk. 130. That the demandant is an alien may in a real action be pleaded in bar after imparlance, as well as to the writ before imparlance.

Lutw. 23.
1178. After a general imparlance (a) a feme cannot plead coverture in abatement, but may plead it in bar*: but note, that if the marriage was after the cause of action accrued, it must be pleaded in abatement.

(a) In an assise against baron and feme, the feme tenant *per receipt* not allowed to imparl. Dyer, 298. pl. 28. — * It hath been a common practice so to plead; *sed qu.* If it can be a good bar, as plaintiff may maintain another action against husband and wife?

2 Lev. 190. So, in an action against an executor, he may plead that he is
Lutw. 1178. not executor in bar after imparlance, but not in abatement.

3 Leon. 232. In an action of debt, the defendant pleaded an attachment made in London after imparlance, and adjudged ill.

4. What may be pleaded after a special Imparlance.

Vide the authorities *supra*. It is clearly agreed that all pleas in abatement, unless to the jurisdiction, may be pleaded after a special imparlance.

[Where the defendant pleaded a misnomer in abatement after an imparlance, which was entered thus: "And A. B., who was arrested by the name of A. C., comes, &c." the court held this to be tantamount to a special imparlance. *Brewster v. Capper*, 1 Will. 267. 1 Bl. Rep. 51. S. C. But this resolution hath been over-ruled in a later case. See *Doughty v. Lafcelles*, 4 Term Rep. 520.]

2 Roll. Rep. But it hath been doubted whether privilege could be pleaded
244. after a special imparlance, because it is neither an objection to the
Sid. 29. writ, bill, or count: but it seems to be now settled (b) that it may
2 Show. 145. be pleaded after a special imparlance, inasmuch as it does not oust
pl. 124. the court of their jurisdiction, but is a privilege which each court
(b) Hard. allows to the officers of another to be sued in their own court.
365.

Lutw. 46. An action of assault and battery was brought against one of the
Gilb. Hist. members of the university of Cambridge, and a general imparlance
C. P. 185. given from one term to another. The chancellor of the university
10 Mod. comes and claims cognizance of pleas by virtue of a charter in
125. Case of the University of Cambridge. Queen Elizabeth's time, whereby *cognitio placitorum*, with exclusive
2 Will. 406. words *non alibi*, &c., was given to the court of the vice-chancellor
S. P. to proceed *secundum legem & consuetudinem universitatis*, in all cases
where any of the body of that university should be defendant, which charter was confirmed by act of parliament, of which they produced a copy; and whether this claim, being made after imparlance, should be received, was the question? and adjudged that it should not: and herein the court held, that, though the crown might grant consurances, yet it could not grant them with power to proceed by any other law than the common law; that as it was necessary to plead this privilege, so there was the like necessity

to plead it according to the rules of law, which must be before a general imparlance.

On a plea to the jurisdiction on special privileges, it is usual to grant a special imparlance; as in the common case of consuance, &c., for *Oxford*, &c., but they cannot imparl generally.

5. In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparlance.

It is said, that where the cause is by original, it is a favour of the court whether they shall have an imparlance or not.

Skin. 2.
pl. 2. vide
subra.
2 Show. 145.
pl. 121.
Lil. Reg.
43.

Also it is said, that on a special *capias* in *C. B.*, the defendant shall plead the same term (especially if it be an issuable term) the writ is returnable, without any imparlance, because the whole case is set forth in the writ; and an imparlance being only the better to inform himself of the cause of action in order to his defence, there is no occasion for it when he is sufficiently informed thereof by the special *capias*.

Want of an imparlance where allowable, if prayed, is error: *Comb. 13.*
Serius, if not prayed.

A second imparlance was moved for in a *quo warranto*, and said to have been granted in the case of the city of *London*, but the court denied it; for *Astry* said, that by the course of the court they were to have but the common imparlance; and the court said, that being *ex gratia* they may grant or deny it as they please.

Comb. 12.

If a man plead by force of an indenture which is lost, and affidavit made thereof, the party shall be compelled by the court to shew his counterpart, and he to plead thereto, otherwise the court (a) may grant an imparlance.

Cro. Jac.
429.
(a) The
court would
not grant the
defendant

an imparlance, though he was sued upon a bond of twenty-eight years old, and could not see the bond, but bid him pray oyer of it, and plead, for the antiquity of the bond is no cause of imparlance. *a Lil. Reg. 42.*

It is said that no imparlance is allowed in a *homine replegiando*, or in an assise, unless upon good cause shewn; because it is *festinum remedium*.

3 Salk. 186.
Ld. Raym.
285.

A. bound by recognizance to appear and answer to an information, appeared and prayed an imparlance; the Attorney-General said an imparlance is not to be denied, but asked how long he shall be allowed; and *per cur.* an imparlance is a reasonable time to advise; and these have been from one return-day to another, but now they are always from one term to another in the Crown-office; but by *Holt*, C. J. it seems reasonable that the defendant should have the same time on such appearance as if he had stood out, and come in upon attachment or *capias*, viz. the same time that the length of the process would take up, and no more; for when he had come in upon that, he must plead *instantèr*.

Salk. 397.
pl. 3.
6 Mod. 243.
S. C. The
Queen v.
Rawlins,
& vide
3 Mod 315.
Comb. 3.

Heretofore, when one came in upon a recognizance or *habear corpus*, he was put to plead *instantèr*, which was thought hard, and is therefore now redressed.

6 Mod. 243.
per Northey
arguenda.

Sid. 325.

On an amendment

defendant shall have an imparlance or costs, at his election. *Lechill v. Reynell*, 2 Str. 950. — In action for words defendant shall have imparlance, on affidavit of plaintiff's being under prosecution for the offence. *Barnes*, 224. — If defendant is lunatick there shall be imparlance. *Barnes*, 225. — It shall be granted, though writ returnable on first return, if declaration was not delivered with notice to plead. *Barnes*, 225. — If plaintiff has a rule to file a bill to warrant proceedings, he may enter imparlance on roll; but if not entered in time, he pays costs. *Barnes*, 227. — If notice of declaration is served on Sunday, imparlance shall be granted. *Barnes*, 309. — If *habeas corpus* removes a cause from sheriff's court to B. R. November 6, and declaration is delivered November 12, and rule to plead given, the court will not grant imparlance. *Wood v. Wenman*, 1 Will. 154. — On process returnable the first, second, or third return of any term, if declaration is delivered within four days before the end of the term, defendant shall plead without imparlance. General Rule C. B. T. 8 G. 3. 2 Will. 381. — Not in real actions. *Barnes*, 2. — Not after a peremptory rule to plead. *Barnes*, 215. — Nor if notice to plead has been served, though not indorsed on the declaration. *Barnes*, 226, 227.

(D) Of making Defence: And herein, of the Difference between full and half Defence.

Co. Lit.

327. b.

DEFENCE cometh from the word *defendo*, so called from the manner of pleading, viz. *venit & defendit*, and is twofold; 1st, Half defence, which is *venit & defendit vim & injur.* 2^{dly}, Full defence, viz. *venit & defendit vim & injur. quando*, &c.

Co. Lit.

327. b.

Lit. § 199.
Brownl. 75.

* Defence, in its true legal sense, as defined by Mr. Justice Blackstone, signifies not a justification, protection, or guard, which is now its

popular signification, but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians: A general assertion that the plaintiff hath no ground of action; which assertion is afterwards extended and maintained in his plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or, in the vulgar acceptation, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of, in the next. *Vide Black. Com.* 3 V. 296., &c.

Co. Lit.

327. b.

3 Lev. 240.
Hampson
v. Bill.

Latw. 9.

Defence also, says he, is so necessary in all cases, that though the defendant appear and plead a sufficient bar without making defence, judgment shall be given against him.

And therefore, where in debt on an obligation the defendant *venit & dicit*, that the plaintiff was excommunicated, &c. without making defence, &c., it was adjudged ill, and a *respondeas ouster* awarded.

But, though this be a general rule, and though the *venit* is the record of the defendant's coming into court, and is necessary to make him a party; yet it hath been held, that the *defend. vim & injur.*

injur. were not (a) used in *clausum fregit* and assaults, and that therefore the want of them in those cases is not fatal, though shewn for special cause. (a) As appears in the old Book of Entries, fol. 5. 13. 30.

Also, where a plea to the jurisdiction was offered in an inferior court, without making defence, it was resolved not to be necessary where the court have no jurisdiction of the *matter*; otherwise, where not of the *person*. Vent. 334.

So, where an attorney of C. B. was sued in B. R. in action *qui tam*, for exercising the office of under-sheriff longer than one year, and he *venit & dicit*, and pleaded his privilege, and held good without defence. Salk. 30. Comb. 319. S. C. Kirkham v. Wheeler, Ld. Raym. 27.

In ejectment the defendant *venit & dicit* that the land is ancient demesne, without making defence; the plaintiff demurred specially; and it was resolved that the plaintiff may refuse the plea for want of defence; but that if he receives the plea, he admits a defence; as, if one pleads outlawry, he ought to plead it *sub pede fagilli*, and if he does not so plead it, the plaintiff may refuse it; but if he accept the plea, he shall not demur for that cause, for it is well enough if he allow it. Salk. 217. Ferrers v. Miller. Carth. 220, 221. S. C. adjudged; and that being a plea to the jurisdiction, it is good without

out *defendit vim & injuriam*, and that most of the precedents were so. 3 Lev. 182. North v. Hoyle, S. P. resolved, and said, that the precedents were both ways.

Defence is never made in a *scire facias*.

3 Lev. 182.

(E) The several Kinds of Pleas: And herein,

1. Of Pleas to the Jurisdiction; and therein,

1. To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction and a Claim of Conusance.

HERE it will be necessary to observe, that the courts of *Westminster* are the superior courts of the kingdom, and have a superintendency over all the other courts by prohibitions, if they exceed their jurisdiction, or writs of error and false judgment, if their proceedings are erroneous, and have conusance of all transitory actions, except between the scholars of *Oxford* and *Cambridge*; and every thing is supposed to be done within their jurisdiction, unless the contrary appears; but, on the other hand, nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged to be so. Also, such inferior courts being bounded in their original creation to causes arising within the limits of their jurisdiction, if a debtor, who has contracted a debt out of such limited jurisdiction, comes within it, yet they cannot sue for such debt; and if any such action be brought, the defendant may plead to the jurisdiction. Gilb. Hist. C. P. 188, 189. See tit. Courts, Letter (D).

But there is a distinction, which is now fully established, between the counties palatine and other inferior courts, in this last respect; for a county palatine is a general court for all the subjects of the palatinate, and not merely for the causes arising within that palatinate; Sand. 74. Sid. 331. Peacock v. Bell. Gilb. Hist. C. P. 189, 190.

palatinate; so that if a debtor goes from a foreign country into a palatinate, his obligations go along with him as much as if he went from one kingdom into another; and if it were otherwise, a palatinate jurisdiction would be a shelter and *asylum* to debtors, for no process but the supreme prerogative process runs there; and therefore it hath been determined, that though the cause of action be out of the palatinate, yet if the party be a subject of that palatinate, as he is by coming into that dominion, that the action may be brought against him there.

4 Co. 213.
Id. 103.

In all actions transitory the superior courts have a jurisdiction, unless the plaintiff by his declaration shews that the action accrued within a county palatine; or, if it be between the scholars of *Oxford* and *Cambridge*, in which case the university shall have consuance; because by their charter, confirmed by act of parliament, they have jurisdiction over the persons of their scholars. But, though an inferior court might have determined it, yet the superior court, being once possessed of the action, cannot be hindered from proceeding.

4 Inst. 224.
Roll. Abr.
489.

Hard. 509.

(a) So, an-

cient de-

mesne, or

held of the

king's man-

or, may be

pleaded.

Herne's

Pleader, 7.

351.

Hanf. 103.

Tho. 2.

Rast 419.

—So may

the jurisdic-

tion of the

cioque

ports.

4 Inst. 224.

But *vide*

Carth. 109.

Et quare;

for it is there said to be such a franchise as Ely, and there resolved, that Ely, being no county palatine,

but only a royal franchise, the defendant cannot plead to the jurisdiction of a superior court, but must

demand consuance.—But in what cases, in what manner, consuance is to be made, *vide* V. 2. 102.

Carth. 11.

354.

If the plaintiff in his declaration shews that the action accrued in a county palatine, the defendant cannot take advantage of it in arrest of judgment, nor can he take advantage of it by way of demurrer, but must plead to the jurisdiction of the court. And here note, that wherever the defendant can plead to the jurisdiction of the courts at *Westminster*, there, the franchise may demand consuance, but not *vice versa*.

Patch.

5 C. 2. in

B. R.

Also in such cases, as the defendant may plead to the jurisdiction of the courts of *Westminster*, leave must be obtained from the court

court for that purpose (a); as was done in an ejectment brought in *B. R.* for lands in the county palatine of *Lancaster*.

Jones v. Hammond.
Andr. 368.

(a) So, Trin. 3 & 4 G. 2. in *B. R.* *Trustant v. Brocklehurst*, on the demise of *Lady Lawley*, leave was given to plead to the jurisdiction for lands lying in *Cheshire*. *Barnard. K. B. 352. 365.*

As to pleading to the jurisdiction of an inferior court, herein we must again take notice, that inferior courts are bounded in their original creation to causes arising within such limited jurisdiction; so that if an action is brought on a promise in a court below, not only the promise but the consideration must be alleged to arise within its jurisdiction; for a debtor who has contracted a debt does not, by coming into the limits of such jurisdiction, give such court authority to hold plea thereof; nor is it sufficient to allege the cause of action within the jurisdiction of the court, but it must be proved on the trial; and if the plaintiff proves a consideration out of the jurisdiction, it cannot be given in evidence; and if it is, the defendant's counsel may tender a bill of exceptions; and upon such bill of exceptions the judgment will appear to be erroneous.

2 Inst. 231
Roll. Abr.
545. 6.

Oilb. Hist.
C. P. 138,
139.

As, in an action in an inferior court for calling the plaintiff whore, by which she lost her marriage, it was adjudged, that the loss of the marriage should be laid within the jurisdiction, the words not being actionable without special damage.

Raym. 63.
Lev. 69.
Sid. 85.
— And
Salk. 404.
pl. 1. *S. P.*

adjudged, the loss of the marriage being held to be the gist of the action.

So, if in the marshal's court the plaintiff declares, that in consideration the plaintiff, at the request of the defendant, had taken pains to procure him a lease of an house in *Holborn*, the defendant *apud S. infra jur.*, &c. promised to pay him 10 l. &c. this is not sufficient to entitle the court to a jurisdiction, inasmuch as it does not appear that *Holborn*, where the house stands, is within the jurisdiction; and the jury are not only to try the promise, but the consideration also.

Lev. 50.
Sid. 65.
Ramsley v. Atkinson.

So, in an *indebitatus assumpsit* for money for a cow sold, it must appear that the sale was within the jurisdiction; for the being indebted there does not necessarily imply that the sale was there, for he that is indebted in one place is so in every place.

Sid. 87.
Lev. 96.

So, in debt for rent upon a lease made *infra jur.* of an inferior court, it must appear also, that the lands lie within the jurisdiction; for if part of the cause arises within the inferior jurisdiction, and part without, the inferior court ought not to hold plea.

Lev. 104.
Sid. 151.
Vent. 2.
S. C.
Drake v. Beare.

But, if that which is only inducement, or matter of aggravation, be alleged to be out of the inferior jurisdiction, this will not oust such inferior court of its jurisdiction; as, if in the court of *H.* the plaintiff declares, that he lent his horse at *H.* for the defendant to ride to *B.*, and that the defendant assumed at *H.* to redeliver him, this is well enough; for it is not the riding but the re-delivery which is the cause of the action.

Sid. 151.
189.
Vent. 72.

So, where in case the plaintiff declared in the court of *Bath* in *com. Somerset*, that he was a taylor, and that he used the said art

Cro. Cat.
570.
Jon. 450.

Roll. Abr.
546. S. C.
Howell v.
Ireland.

for several persons inhabiting *tam infra civitat. predict. quam alibi infra regnum Angliæ*, and the defendant, to scandalize him in his said art, said these words of him, *Thou hast stole as much cloth out of my suit and cloak which thou madest for me as did make thy wife a wench*, by which he lost his customers; it was holden, that the action lies in that court, notwithstanding the allegation, *quam alibi infra regnum Angliæ*, for that is only matter in aggravation of damages.

Salk. 404.
pl. 1.
6 Mod. 223.
S. C. Stan-
nion v. Da-
vis. 2 Ld.
Raym. 795.

So, in a writ of error of a judgment in the palace-court in an action on the case, wherein the plaintiff declared, that such a day, in such a parish in the county of *Middlesex*, he delivered to the defendant (being an innkeeper) a gelding safely to be kept in his inn, and that he suffered him to be taken out of his stable, and rid so immoderately that the gelding was spoiled: it was objected in error, that the riding did not appear to be within the jurisdiction of the marshal's court. But *per cur.*—In actions in inferior courts it is necessary that every part of that which is the gist of the action should appear to be within their jurisdiction; otherwise, of such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remain, as in this case; and therefore the judgment was affirmed.

2 Inst. 329,
230.
Raym. 189.
Mod. 81.

The defendant, when sued in an inferior court for a matter not arising within its jurisdiction, must plead to the jurisdiction; and if such plea be refused, the courts above will grant an attachment.

(a) F. N. B.
45, 46.
2 Roll. Abr.
317.
(b) Where
upon the
statute
Westm. 1.
c. 35, a pro-
hibition will
be granted,
vide Salk.
201. pl. 5.
202.
(c) 2 Mod.
271, 272.

Also, it hath been (a) held, that if the defendant admits the jurisdiction of such inferior court, the courts above may grant (b) a prohibition; but in the case of (c) *Mendyke v. Stint* it hath been adjudged, that after verdict and judgment no prohibition lies; but in this case it was said, that if any matter appears in the declaration which sheweth, that the cause of action did not arise *infra jurisdictionem*, a prohibition may be granted at any time: so, if the subject-matter of the declaration be not proper for the judgment and determination of that court; or if the defendant, who intended to plead to the jurisdiction, be prevented by any artifice, or by the attorney's refusing to plead it, or, if his plea be not accepted, or be over-ruled; in all these cases a prohibition will lie at any time.

3 Inst. 312.

If in the county-court, or other inferior court, they shall divide a debt of 20*l.* into several plaints, under 40*s.*, in such case the defendant may plead the same to the jurisdiction of the court, or may have a prohibition to stay that indirect suit.

Carth. 289,
290.

But it hath been held, that no action will lie for suing in a court that hath no jurisdiction of the matter. [But *quare.*]

2. The Manner and Time of pleading to the Jurisdiction.

5 Mod 145,
146.
Carth. 263.
Salk. 298.
pl. 9.

A plea to the jurisdiction is not properly a plea in abatement, though in its consequence it be so; and therefore is to have its proper conclusion; as, *respondere non debet*, or, *si curia cognoscere velit*, and not *quod billa cassetur*:

According

According to the order of pleading, the defendant must first plead to the jurisdiction of the court, and this he must regularly do before imparlance; for by craving leave to imparl, he submits to the jurisdiction, except where ancient demesne is pleaded, which may be done after imparlance, because the lord might reverse the judgment by writ of disceit; and it goes in bar of the action itself in that court, because it is *coram non judice*.

The defendant must make (a) but half defence, for if he makes the full defence *quando*, &c., he submits to the jurisdiction, the, &c., being *quando & ubi cur. consideraverit*.

386. (a) Where an inferior court hath no jurisdiction of the matter, it is not necessary to make any defence at all. Vent. 334.

The defendant must plead *in propria persona* (b), for he cannot plead by attorney without leave of the court first had, which leave acknowledges their jurisdiction; for the attorney is an officer of the court, and if they put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court.

sitting, and oath must be made of the truth thereof; but in Carth. 402. it is held, that a plea to the jurisdiction need not be on oath, as a foreign plea must.——No dilatory plea without affidavit. 4 Ann. c. 16. § 11. [(b) In these two points, viz. that they must be pleaded in person, and that in pleading them, the defendant must make but half defence, pleas to the jurisdiction differ from pleas in abatement; for these may be pleaded by attorney, and with full defence. Lutw. 7. Wheatley v. Cudmerston, Mich. 15 G. 2. C. P. Thompson v. Stockdale, Hil. 23 G. 3. K. B.]

2 H. 6. 30.
22 H. 6. 7-
Doct.
pl. 234.
Hard. 365.
Lutw. 46.
Dyer, 210.
Stile, 30.
Litch. 83.
Co. Lit.
197. b.
Lutw. 9.
Show. Rep.

6 Mod. 146.
that such
plea must be
put in *pro-
pria persona*,
and whilst
the court is
sitting, and
Wheatley v.

He who pleads to the jurisdiction, ought by his plea to give jurisdiction to some other court.

Doct.
pl. 234.

See farther on this subject, Vol. I. 2.

(F) Of Pleas in Abatement.

See tit. *Abatement*, Vol. I.

(G) Of Pleas in Bar and in Chief: And herein,

1. Of the General Issue, and how formed.

ISSUE is thus defined by my Lord Coke, a single, certain, and material point issuing out of the allegations and pleas of the plaintiff and defendant, consisting regularly of an affirmative and negative, to be tried by twelve men; and is either general or special.

Co. Lit. 126.

The general issues were contrived in such words as were most proper to deny the whole fact in the declaration; as, in a charge of trespass, the general issue is (c) not guilty; in debt, that he owes nothing (d); if the action is grounded on a specialty, *non est factum*, or that it is not his deed; for the debt being grounded on a specialty, he admits the debt, unless he denies the deed; for the seal continuing, it must be dissolved *eo ligamine quo ligatur*.

(c) That
not guilty is
a good plea
to any mis-
feasance
whatsoever,
Cro. Eliz.
257.
3 Mod. 324.
Skin. 280.

[*Nisi in arrears* is a good plea to an action of debt for rent; it is the general issue. See, to an action of covenant,

cessant, because it confesses the covenant to be broken, and tends but in mitigation of damages. *Wain v. Theobald*, Cowp. 588. *Hare v. Savile*, 1 Brownl. 19. *Nil debet* is also a good plea to debt for rent. *Hardr.* 332. 2 *Ld. Raym.* 1503. *Bull. N. P.* 170. (d) *Cro. Jac.* 377. 531. to an usurious bond or sheriff's bond *non est factum* cannot be pleaded, but must be avoided by special pleading. *Hob.* 7. *Et vide* titles Sheriff and Usury.

Co. Lit.
126. a.

An issue being taken generally referreth to the count, and not to the writ; as, in account, the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of T. The defendant pleadeth, that he was never his receiver in manner and form, &c.; this shall refer to the count, so as he cannot be charged but by the receipt by the hands of T.

Co. Lit.
126. a.

An issue shall not be taken on a negative pregnant, which implieth another sufficient matter; but upon that which is single and simple, as *ne dona pas per le fait* implies a gift by parol, and therefore the issue must be *ne dona pas modo & forma*.

Co. Lit.
126. a.

Some issues be good upon matter affirmative and negative, albeit the affirmative and negative be not in precise words (a); as, in debt for rent upon a lease for years, the defendant pleads, that the plaintiff had nothing at the time of the lease made; the plaintiff replieth, that he was seised in fee, &c.; this is a good issue.

Co. Lit. 126. a. Bro. Issue, 28. So, if issue be tendered by an affirmative, and the other join, it is good, though there was not a negative. As, if an executor plead, *no assets*, and the plaintiff reply, that he purchased another writ, and then he had assets, and tender an issue thereon, and the defendant join, it is good. *Aldrich v. Weltham*, *Cro. Jac.* 580. 589. So, to debt upon bond, the defendant pleaded, dures of imprisonment; to which the plaintiff replied, that the defendant was at large and at his own disposal, and executed the bond of his free will, and not for fear of imprisonment, and concluded to the country. To this there was a demurrer, and judgment given for the plaintiff, which judgment was affirmed in error. For *per curiam*—This is such an affirmative as implies a negative; like the case of pleading in a writ of right, where the demandant counts, that he has more right than the tenant, and the plea of the tenant is, that he hath more right than the demandant. The ancient rule of requiring an affirmative and negative hath been long broken into, as, in the common case of infancy, where formerly they not only replied full age, but also traversed the infancy, which is not now required. *Sir T. Jones*, 6. It is enough, if the second affirmative is so contrary to the first, that the first cannot in any degree be true. *Tomlin v. Purvis*, 2 Str. 1177. 1 Will. 6. S. C. However, in *Sav.* 86. it is said, that where there are two affirmatives, one of which implies a negative of the other, the issue cannot be properly joined upon them without a traverse.]

Co. Lit.
126. a.
23 H. 6. 21.

Where the issue is joined of the part of the defendant, the entry is *et de hoc ponit se super patriam*; but if it be of the part of the plaintiff, the entry is *et hoc petit quod inquiretur per patriam*.

Co. Lit.
126. a.

(b) The reason is, that it would be inconvenient to go on to a replication, because to reply generally would leave it too large and comprehensive, and to

reply any particular kind of estate would be too narrow, and consequently immaterial. 1 P. Wms. 259. Every

Every issue consists of an (a) affirmative and negative; and an issue being once well tendered must be accepted, and closes the pleadings.

Co. Lit. 126.
Sand. 338.
Lutw. 623.
1139.

Comb. 36. (a) A distinction was thus taken by counsel, viz. that where an affirmative came after a negative, there, issue ought not to be joined, but ought to be left on the other side; but, where the affirmative was first, and the negative came after, there, it ought to be joined. But Holt, Ch. J. said he had never heard of this distinction, and therefore gave but little regard to it. Carth. 88.

In an *audita querela*, to avoid the execution of a recognizance, the plaintiff set forth, that it was defeasanced upon payment of divers sums of money at certain days, and that he was at the place appointed and tendered the money, and that the defendant was not there to receive it: the defendant pleaded (b) *protestando*, that the plaintiff was not there to pay it, and that he was there ready to receive it, *absque hoc*, that the plaintiff was ready to pay it; which being specially demurred to, the court held the plea naught; and that there being an express affirmative and negative, there should have been no traverse; for so they may traverse one upon another *ad infinitum*.

Cro. Elis.

754-5.
Huish v.
Phillips.
(b) A protestation
availeth not
the party
that taketh
it if the issue
be found
against him;
and therefore,
if the
issue be

found for a villein, he is enfranchised for ever; and yet in some special cases, albeit the issue be found against him that maketh the protestation, yet he shall take benefit of his protestation; as, if a man entereth into warranty, and taketh by protestation the value of the land, albeit the plea be found against him, yet the protestation shall serve him for the value. Co. Lit. 126. a.

The reason of joining issue is, that the party may come prepared to defend one single point; which holds in all cases, except in barratry; and even in that notice must be given of the point the prosecutor intends to proceed on.

Lucas's
Rep. 299.
vide title
Barratry.

In an action of false imprisonment, the defendant justifies by force of a *latitat* out of B. R. by force of which he took him; the plaintiff replies, that he did it *de injuriâ suâ propriâ*, &c. It was moved, that this was naught after a verdict, and not helped; but the court held it well after a verdict; but that upon demurrer it would be naught, as being multifarious, jumbling matters of record and matters of fact together.

Raym. 50.
Keb. 125.
161.
Beesly v.
Walker.

An action of debt was brought upon a recovery in the court of *Norwich*; the defendant shews, that the court is holden by custom before other persons, *absque hoc*, that the plaintiff such a day recovered *secundum consuetudinem*, &c., upon which it was demurred; and in defence of the plea it was said, that it is not the record that is put in issue, but the custom only, and that may well be traversed; for which were cited *Hob. 244. Hutt. 20. 1 R. 3. 9.* But the whole court held the plea pregnant and insufficient; for he has made the day parcel of the issue, which he ought not to have done, but have said only (c) *modo & formâ*; and they held clearly, that the custom to hold courts might well have been traversed, if that point had been singly brought into issue; but here, matter of record is mixed with matter of fact, which is ill on a general demurrer; and therefore judgment was given for the plaintiff.

Lev. 195.
Sid. 302.
2 Keb. 107.
122. S. C.
Dring v.
Repsal.
(c) Where
modo & formâ
are of the
substance
of the issue,
and where
but words of
form, this
diversity is
to be observ-
ed; where
the issue
taken goeth
to the point
of the writ

or action, there, *modo & formâ* are but words of form; but otherwise it is where a collateral point in pleading is traversed; as, if a scoffment be alleged by two, and this be traversed *modo & formâ*, and it be

be found the feoffment of one, there, *modo & forma* is material: so, if a feoffment be pleaded by deed and it be traversed, *absque hoc, quod feoffavit modo & forma*, upon this collateral issue *modo & forma* is so essential, that a jury cannot find a feoffment without deed. Co. Lit. 281. b.

Croket v.
Jones,
2 Str. 714.
3 Ld. Raym.
3441.

[The plaintiff declared upon two bills of exchange, and several other promises: the defendant, as to the two first counts upon the bills of exchange, pleaded, *quod actio non accrevit infra sex annos* and as to the other counts *non assumpsit* generally. The plaintiff replied, that upon such a day he sued out a *latitat*, which he continued down to the present declaration, and averred, that the cause of action arose within six years before the suing out of the *latitat*. The defendant in his rejoinder, *protesting* that there was no such writ issued as set out by the plaintiff, for plea said, that after the six years were expired, *viz.* such a day, the plaintiff first sued out a *latitat*, which he set forth, and that he appeared to it; and that the plaintiff declared upon it, as above, and traversed that he appeared and put in bail to the writ mentioned in the replication and concluded with an averment. The plaintiff demurred, and shewed for cause, that the rejoinder is contrary to the record of appearance, and a negative pregnant. The plaintiff had judgment.

Co. Lit.
356. a.

An issue ought to be upon a point, which may be well tried. Thus, if it be alleged, that a woman was *enseint* by her husband at the time of his death, the issue must be, if she was *enseint*, not *enseint* by her husband, for *filiatio non potest probari*.]

2. Immaterial and informal Issues, and where aided.

Ido. tit.
Amend-
ment.

Here the general rule is, that where the issue is immaterial, verdict will not aid it; but where it is only informal, it is helped.

Carth. 371.
Lev. 12.
3 Mod. 137.

An immaterial issue is, where what is immaterially alleged by the pleadings is not traversed, but an issue taken on such a point as will not determine the merits of the cause: an informal issue is, where it is not traversed in a right manner.

Cro. Ellis.
227.
Brownl 229.
Carth. 371.
3 Roll. Rep.
117. Cro.
Jac. 380.

A verdict cannot help an immaterial issue, because what is alleged in the pleadings is not put in issue; or, if it be, it is not decisive between the parties, and so the verdict is no good foundation for the judgment; and if what is material in the pleadings be not put in issue, it is not made necessary to be proved on that trial; but if it be not decisive, then what is necessary to be proved on the trial will not in all cases be a foundation for the judgment; for the courts in these cases are judges on what point they ought to go to issue, so as to be a legal charge by the plaintiff, or discharge by the defendant; since it is the province of the judges to settle the matter of law, and the jury the matter of fact.

1 Leon. 66.
Kirbee v.
Levis.
3 Leon. 195.
3 C. cited.
Godb. 56.
3 C. cited.

If the plaintiff declares upon a promise to find the plaintiff, his wife and two servants, with meat and drink for three years, upon request; and the defendant pleads, that he promised to find the plaintiff and his wife with meat, &c. *absque hoc*, that he promised to find, &c. for two servants, &c., and the plaintiff replies, that he

did

did promise to find, &c. for three years next following, & *hæc petit*, &c., and thereupon a verdict is found for the plaintiff; yet he shall not have judgment; for the promise in the replication is not the same with that in the declaration, which was traversed by the defendant; and so there is no issue joined, and therefore is not helped by the statute.

If in debt on a bond conditioned for the payment of 105 l. at a certain day and place, the defendant pleads, that at the day and place he paid *prædict.* 100 l. *quas solviffe debuit secundum formam & effectum conditionis*; and the plaintiff replies, *Quod non solvit prædict.* 105 l. &c., and a verdict is found *quod non solvit* the said 105 l.; yet the plaintiff shall not have judgment; for *prædict.* 100 l. shall not be intended the 105 l., and so they meet not, and there is no issue.

If in a *sci. fa.* upon a judgment against the administratrix of J. S., the defendant pleads, that the said J. S. made B. within age his executor, and that administration *durante minore ætate* of the said B. was committed to the defendant, and that such a day the said B. attained the age of seventeen, and then refused to be executor, &c., and that when the said B. attained his said age, the defendant had fully administered, &c. and the plaintiff replies, that at the time the said B. came to his said age *devastavit diversa bona*, &c., and the defendant rejoins, *Quod ipse non devastavit*, &c., and thereupon issue be joined, and found for the defendant; she shall have judgment; for the devastation must be intended by the administratrix, and the plaintiff shall not avoid the verdict by an exception to his own replication.

In trespass the defendant pleads an accord between the plaintiff and J. S. of the one part, and the defendant of the other part; the plaintiff replies, *Quod non habetur talis concordia* between the plaintiff and defendant, *qualis* the defendant had alleged; and on issue joined a verdict for the plaintiff; yet he shall not have judgment; because the plaintiff does not traverse the same concord that is set out in the defendant's bar, but puts another concord in issue, not alleged in the defendant's bar, between the plaintiff and defendant only, and the court cannot be certain which is proved on the trial; and though it may be said in this case, that either may bar the action, yet only one thing is to be put in issue; and if it should be otherwise, there would be no correspondence between the *probata* and *allegata*.

In debt on a bond conditioned for the payment of 8 l. on a certain day, the defendant pleads payment on the day in the condition, *et de hoc ponit se super patriam*, & *prædict.* the plaintiff *similiter*; and found for the plaintiff: here, the defendant has closed the issue on the plaintiff by the *hoc ponit se super patriam*; yet the defendant cannot take advantage of the informality of his own plea, and it is waived on both sides when they go to issue on the substance of it.

But, if in trespass the defendant pleads a special justification, and the plaintiff replies *de injuriâ suâ propriâ absque tali causâ*, there, though the issue is found for the plaintiff, yet it is wrong

Cro. Jac.
185.
Sandbank
v. Turry.
Hob. 113.
Cro. Car.
593. S. P.
adjudged.

Cro. Car. 79.
93. Oxford
v. River,
adjudged by
three judges
against two,
who held,
there was no
issue, and
so the ver-
dict void and
not aided by
the statute
of jeofails.
Hob. 35.
Lit. Rep.
52. S. C.
Roll. Rep.
86.

Cro. Car.
316, 317.
Parker v.
Taylor.
Sid. 290.
S. C. cited.

Sid. 341.
Cro. Jac.
599. S. P.
adjudged.

after

Ball. Rep.
4. S. P.
adjudged.
Scot. 1. 10.
2. 2. 1. 10.
3. 2. 1. 10.
4. 2. 1. 10.
5. 2. 1. 10.
6. 2. 1. 10.
7. 2. 1. 10.
8. 2. 1. 10.
9. 2. 1. 10.
10. 2. 1. 10.

after verdict, because the *injuriâ suâ propriâ* does no more than affirm the declaration, and does not confess or deny the bar; and therefore the gift of the bar is not put in issue at all, but rather stands confessed by the replication since the cause is not traversed; for saying it was *de injuriâ suâ propriâ* is no more than saying, that notwithstanding the cause mentioned in the bar the defendant committed the injury, which the bar being a sufficient excuse cannot be; but it does not in the least put the bar in issue.

§ Co. 66. — The position in this paragraph is too general. — There are many cases where the general replication with the general traverse is sufficient. Many where it is not.

Sid. 341. 2.
Barton v.
Chapman.

If in an *assumpsit* for wares sold, the defendant pleads *quod tempore quo, &c.* he was an infant, and the plaintiff replies they were for necessities, & *hoc petit quod inquiretur per patriam, &c.*, and thereupon issue is joined, and a verdict found for the plaintiff, though this traverse is informal, because the plaintiff ought not to have closed the issue, but to have given the defendant an opportunity of rejoining, that there might have been a proper negative to his affirmative; yet, since the matter of his replication is put in issue, viz. whether they were necessities or not, the defendant has waived all objections to the form, and by such waiver it appears that he is not any ways injured by not rejoining, and it being found that they were necessities, the plaintiff ought to prevail.

Cro. Jac.
411.
Haines v.
Boucher.

In debt on a bond conditioned for the payment of 60 *l.* on the 25th of June, the defendant pleads payment on the 20th of June *pro radum formam & effectum conditionis, & sur ceo* issue is joined, and the verdict finds *quod non solvit* 60 *l.* at the 20th; the plaintiff shall not have judgment, for the issue is *dehors* the matter of the condition, and so void, and it might have been paid the 25th, though it was not paid the 20th, so that it does not appear the condition was broken. But, where the issue is decisive between the parties, though it be not so apt, yet this shall be cured after a verdict.

Cro. Jac. 44.
Yelro 54.
Pigott v.
Pigott.

As, in replevin the defendant avows that *Ellen Enderby* was seised in fee, and took *Pigott* to husband, and had issue by him *Thomas*; that *Ellen* and *Thomas* granted a rent-charge for which he distrains; the plaintiff replies, that one *Fisher* being seised in fee gave the land to *J. Enderby* in tail, who had issue *Ellen*; that *J. Enderby* died, and *Ellen* entered, and being seised in tail took *Pigott* to husband, and had issue *Thomas*, who is dead, who granted, &c. *absque hoc*, that *Ellen* was seised in fee; though this was an informal issue, for the plaintiff ought to have traversed that *Thomas* the grantor was seised in fee; yet it is a decisive issue, for it is allowed on both sides that *Thomas* was in by descent from *Ellen*; and if *Ellen* was seised in fee, *Thomas* was so too, and, consequently, had good right to make the grant.

§ Co. 49.
Nichol's
1010.
Moor, 6. 10.
§ Co. 110.

If in debt upon a single bill the defendant pleads payment, without an acquittance, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for the payment without an acquittance is no plea to a single bill; yet, because issue was

was joined upon an affirmative and negative, and verdict for the plaintiff, he shall have judgment: adjudged upon a writ of error in *Camera Scaccarii*, and the first judgment affirmed accordingly.

Eliz. 455.
S. C.
3 Bull. 301.

In an action of debt, if not guilty be pleaded, and there be a verdict for the plaintiff, it shall be aided by the statute; because being an ill plea, and a false one, the plaintiff ought to have his judgment, both for the badness of the plea, and for its falsehood: but, if the verdict had been for the defendant, yet the plaintiff should have judgment; because the declaration is not answered by the plea.

Noy, 56.
Cro. Eliz.
773.
2 Jon. 184.
[2u. Whether not guilty would not be a good plea in debt on a penal

statute, as for not setting out tithes, usury, &c. ? 1 Term Rep. 462. Upon a *deposuit* against executors, not guilty may be pleaded as well as *nil debent*. *Ibid.*]

So, if in an *assumpsit* the defendant pleads not guilty, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for though this is an (a) improper issue in this action, yet because there is a disseisin alleged, not guilty is an answer thereto; and it is but an issue misjoined, which is aided by the statute.

Cro. Eliz.
470.
Curbyn v. Brown.
(a) Where in debt against an Hard. 458.

executor upon the bond of his testator the defendant pleaded *non est factum*.

If in debt against A. as executor of B. the defendant pleads, that B. died intestate, and that administration of his goods was committed to C., and the plaintiff replies, that, before the said administration granted, divers goods, &c. came to the hands of the defendant, which, as executor to the said B. *administavit seu aliter ad usum suum proprium disposuit & convertit*, &c., and thereupon in the disjunctive issue is joined, and found for the plaintiff, he shall have judgment (b); for the point in issue is directly found, and so it is within the statute; and this also is no improper issue; for whether he administered or converted to his own use, both must be as executor.

Hob. 49.
Keble v. Obaston,
[(b) So, an issue, that gold was found in a ship passing or upon its passage from London to R. is good. Hardr. 17.
19. So, that the customs

were not concealed or withholden. Hardr. 17. Dyer, 43. b. So, that he paid or caused to be paid. Hardr. 19. For an issue may be upon a disjunctive, where the words of the disjunctive proposition are synonymous.]

If in replevin the defendant avows for damage-feasant, and the plaintiff replies, that he was seised in fee of a messuage and certain land, and that J. S. was seised of another messuage and land, and that they two, and all those whose estate, &c. had common, &c. in the place where, &c., and conveys to himself the other messuage and lands for years, and so justifies, &c., and the defendant traverses the prescription, and it is found for the plaintiff; though the prescription thus confessed for several is grossly faulty, and (c) the issue thereupon confused, yet after verdict it was saved by the statute.

Hob. 113.
(c) If in debt upon an obligation the defendant pleads the statute of usury, & *quod corrupte agreat, fuit, &c.* & *quod querens corrupte recipit*, the usury

is taken upon both, and found for the defendant, he shall have judgment; though this issue is double, the one part material, and the other not. Moor, 574. pl. 790. If in debt for rent the defendant pleads *nil hab. in tenementis*, and the plaintiff replies *quod. hab. bonum & sufficientem statum*, &c. but does not shew what in particular, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for though the issue is informal, yet the substance of the matter is found, viz. that he had an estate, &c. *Glas v. Gill*, Yelv. 227. Cro. Jac. 312. & vide Bull. 41.

Si. 189.
 Lev. 183.
 Walsingham
 v. Comb.
 (a) So, where
 the covenant
 is to repair,
 and the plaintiff assigns the breach, that the defendant suffered the houses to be ruinous, & sic non re-
 paravit, and the defendant pleads, that he did not suffer them to be ruinous. Moor, 399. Cro. Elis.
 457. 2 Leon. 116.

If in an action of (a) covenant the plaintiff assigns a breach, that the defendant was not seised in fee, & sic infregit conventionem, and the defendant pleads non infregit conventionem; and thereupon issue is joined, and a verdict for the plaintiff, he shall have judgment; for this is but an informal issue.

Sid. 444.
 Vent. 70.
 2 Keb. 623.

In an action of assault and battery, the defendant pleads, that the plaintiff neglected his service, *per quod moderatè castigavit*; the plaintiff replies, *Quod non moderatè castigavit*; and the issue was found for the plaintiff: though this be an informal traverse, being rather a traverse of the chastisement than of the moderate manner of doing it, and the right traverse should have been *de injuriâ suâ propriâ absque tali causâ*, yet after verdict it is good; because the jury have ascertained that he did not beat him moderately.

(b) Heb.
 112, 113.
 Moor, 867.
 Talker v.
 Salter.

If an issue be on a point that is impossible in substance and nature of the thing, it is not cured by the verdict; but, if it be only impossible in the manner and form of it, a verdict will cure it: for where the substance is impossible, no verdict can cure it, because it cannot make that true which cannot possibly be; but where it is only impossible in the manner of it, there, the thing which is possible may be found to be or not, and the manner which is impossible totally rejected (b): as, if an action of assault and battery be brought, and the defendant justify by conveying to himself an estate by copy of a parcel of the manor of C., whereof D. is seised, and that the plaintiff came upon it, and that he laid his hands *mollitèr*; the plaintiff reply, and convey to himself an estate by copy of another parcel of the manor, and that D., lord of the manor, had for himself and tenants a way over the defendant's piece of land; issue is joined, and verdict for the plaintiff; this is a void prescription; for a copyholder, being originally but a tenant at will, could not prescribe at will, but in the name of the lord, for an easement; and for an easement out of the manor he could not prescribe in the lord's name, but must lay it by custom as the *lex loci*; but being laid here by way of prescription, it is in its own nature void; and the verdict could not make that which was repugnant to the nature of the thing to be true or false, and by consequence could not help it.

Cro. Car. 78.
 Jou. 140.
 Latch. 158.
 Noy, 85.
 Purchase
 v. Jigon.

But, in debt on a bond conditioned for the payment of 100 l. on 31 September, if defendant pleads payment at the day, and it is found against him, the plaintiff shall have judgment; because the payment is what is material, and the day is impossible and altogether idle and void; for not being paid before the end of that month the obligation is absolute.

Woolley v.
 Briscoe.
 1 Str. 554.
 8 Mod. 173.
 S. C.

[In an action upon a contract for stock, which was required by act of parliament to be registered before the 1st of November 1721, the defendant pleaded, that the contract was not registered before the 1st of November 1720, *secundum formam stat.*; the plaintiff replied, it was registered before the 1st of November 1720, *secundum formam*

ferman flat ; upon which they were at issue, and the plaintiff had a verdict. Upon motion in arrest of judgment, that this was an immaterial issue, the court held it well enough ; the registering of the contract was the material part ; and the time which was impertinently alleged, may be rejected as surplusage.

To debt upon bond the defendant pleaded, *plend administravit* ; Collet v. Maßerman, 1 Will. 238. the plaintiff replied, that the defendant had assets in his hands to satisfy the *damages* aforesaid, and thereupon issue was joined ; and the jury found a verdict for the plaintiff. It was moved in arrest of judgment, that this is an immaterial issue, for it ought to have been, whether the defendant had sufficient to satisfy the *debt and damages*. In answer, it was said, that the word *damages* is only surplusage, and by leaving it out, the issue will be a sensible, material issue, viz. that the defendant had sufficient to satisfy, &c.; and of that opinion was the court.]

If in trespass issue is taken, that the prebendary of *A.*, and all his predecessors, &c., had used time out of mind to keep a shepherd, for the better keeping together their sheep feeding in the said pasture from the sheep of *T. Earl of S.*, and the issue is found for the plaintiff accordingly ; though it is senseless and impossible that the sheep of the prebendary, &c. time out of mind could be kept from the sheep of the Earl of *S.*, being but one man's life, yet the plaintiff shall have judgment ; for the substance of the issue is the keeping the sheep of the prebendary, &c., and the other part is but a consequence thereof, that thereby they were kept from the sheep of the said earl. Hob. 117. Napper v. Jasper.

In debt upon a bond against an administrator brought in *Hil. term 22 Jac.* the defendant imparled ; and in *Easter term 1 Car.* the defendant pleaded a judgment upon a bond, dated *anno quinto regis nunc*, where it should have been *regis Jac.* and that he had not assets *ultra* to satisfy that judgment ; and thereupon the plaintiff joined issue, that the said recovery was by fraud and covin ; and it was found for the plaintiff : though it was impossible there could be a bond *anno quinto regis Caroli*, which was not then come, yet the plaintiff, having a good declaration, had judgment. Cro. Car. 25. Knight v. Harvey.

In covenant on a conveyance of lands, the vendor covenants, that he was seised in fee, and assigns a breach, that he was not seised in fee, and so had not performed his covenant ; the defendant pleads, that he had not broken his covenant ; and on the issue so joined, a verdict was for the plaintiff : it was moved in arrest of judgment, that this was not any issue, it consisting only of two negatives, viz. that he was not seised in fee, and so had not performed his covenant on the plaintiff's part, and that he had not broken his covenant on the defendant's part ; also, that the pleading is too general, for that he ought to answer particularly in covenant to the breach assigned ; and it was said, that though in actions founded upon tort, the declaration, being special, may be answered generally, yet in actions founded on a contract, a special declaration must be answered specially. The court at first doubted, but afterwards gave judgment for the plaintiff ; for it is an issue, though argumentative and informal ; for if he had not Lev. 183. Side 189. 2 Keb. 10. 13. 47. S. C. Trin. 18. Car. 2. between Wallingham v. Coombe.

broken his covenant he was seised in fee, and if he was not seised in fee, he had broken his covenant; that it is not wholly immaterial, and informal issues are cured by 32 H. 8. c. 30. after verdict, though immaterial ones are not.

3. Of special Pleas; and therein of Pleas amounting to the General Issue, and of Matters which may be pleaded or given in Evidence.

(a) Pleading that amounts to the general issue is not to be allowed; and when such plea is pleaded, it is a good cause of a special jury.

The defendant is at liberty to plead the general issue, or traverse any material point of the declaration; but (a) he cannot plead a plea that amounts to the general issue; for pleas which amount to the general issue are only facts on which the issue may be turned in evidence, and therefore are not issues of fact, to be referred to the court, but matters of evidence to be determined by a jury, and consequently not good pleas; because they draw to the examination of the court what is proper to be determined by a jury.

demurrer since 27 Eliz. c. 5. and before it, of a general one. 10 Co. 95. a. The reason of pressing the general issue is not for insufficiency of the plea, but not to make long records when there is no occasion. Hob. 127. A plea which amounts to the general issue is only matter of form, Roll. Rep. 212 3. and therefore must be specially shewn as cause of demurrer. Cro. Car. 157.

3 Mod. 166.

Where the defence consists in matters of law, there, the defendant may plead specially; but, where it is purely fact, the general issue must be pleaded. And in all actions the defendant may shew any matter to the court why the action does not lie; and this being matter of law, is proper to be shewn to the court, and not to the jury; for being questions of law, the judges are to determine whether they discharge or bar the plaintiff's action; but such bars or matters produced by the defendant may be traversed by the plaintiff, whether they are true or not, which subsequently draws them to the examination of a jury.

5 Mod. 232.
2 Salk. 580.
pl. 1.
Hob. 174.

Whatever therefore makes the fact complained of to be lawful, is matter of justification, and to be shewn to the court; because the court are judges how far the fact, if done, was lawfully done; and therefore on not guilty in trespasss the defendant cannot shew a licence to prove there was no trespass; because though the licence makes it no trespass, yet he shews that licence to an improper jurisdiction, viz. to the jury, who are not proper judges of the law.

So, if the defendant shews a release of a debt to a jury, it is no evidence; because, though the release makes it to be no debt, he shews it to an improper jurisdiction. But, though a man must shew all matters to the court that confirm the fact complained of, and discharge it, yet, where any thing goes in denial of the fact, there, it must be given in evidence on the general issue; because whatever denies that cause of complaint is matter proper to be exhibited to the jury, who are judges whether the fact was, or not; and therefore actions of trover and *assumpsit*, which are modern inventions to get rid of the law-wager, which lay in the ancient

action

action of debt and detainue, were so formed, that almost every thing may be given in evidence on the general issue.

As, in trover, the plaintiff declares of the property of the goods and chattels, and that they came by finding to the defendant; whatever matters are alleged that confess property in the plaintiff, will entitle him to his damages, and whatever deny it, are on the general issue; and therefore levying by distress, releases, and the like, which were anciently in this action, are now given in evidence; because they disaffirm the property of the plaintiff on which his action is founded.

*Vide title
Trover and
Conversion.*

So, in *assumpsit*, the action is formed on a contract, and the trespass to the plaintiff is the non-performance of it; and though the issue be *non-assumpsit* instead of the old issue not guilty, yet on this issue every thing may be given in evidence which disaffirms the contract, for that goes to the gift of the action; since if there be no contract to be performed at the commencement of the action, there can be no trespass for the non-performance of it: and therefore a release goes to the gift of this action; for it shews there was no cause of action at the time this action was commenced; for as in trover he must have a right to the thing, so in *assumpsit* he must have a right to the thing declared on; therefore every thing that shews the contract to be void, as, non-age, or more money lost at play than the statute allows, may be given in evidence on the general issue (a).

*Vide title
Assumpsit.
[(a) So, on
non-assump-
sit, the de-
fendant may
give in evi-
dence an
usurious
contract;
for that
makes it a
void pro-
mise. Lord
Bernard v.
Saul, 1 Str.
498. And
in general,
whatever*

affects the promise may be given in evidence on this plea: as, where a seaman had sued in the Admiralty court for his wages, and had judgment against him there, and afterwards brought an *assumpsit* at law, the defendant was allowed to give the sentence in evidence on *non-assumpsit*. 2 Str. 733.]

But matters of law, which do not go to the gift of the action, but to the discharge of it, even in these new-framed actions, are to be pleaded, as the statute of limitations: so, if a less sum be paid before the time; because that is not a performance which destroys the being of the action, but a collateral agreement that destroys the performance of it.

*Carth. 387;
Salk. 278.
pl. 1.*

If matter be pleaded which amounts to the general issue, yet, if there be also a special matter of justification joined in the same plea, the plea is good.

3 Lev. 41.

In trover the defendant pleaded a sale in a market overt, and thereby justified the conversion; and ruled that a *nihil dicit* should be entered, if he did not plead the general issue, for that it amounted to it. And in another (a) case in trover the defendant pleaded another plea amounting to the general issue; and the court doubted, whether they should compel him to plead the general issue, or award a writ of inquiry; but resolved at last to award a writ of inquiry.

*Cro. Jac.
165.*

(a) *Cro. Jac.
319.*

In an action on the case by a commoner for digging pits, the defendant justified, that he was lord of the soil, and digged for coals, doing as little damage as he could, and that he left sufficient common; and on demurrer adjudged against him, that it amounted to the general issue.

Sid. 106.

Vent. 249.
2 Lev. 92.
Cro. Eliz.
329.

In trespass, if the defendant pleads property in a stranger or himself, it amounts to the general issue; otherwise, in replevin, in which case it may be pleaded in bar or abatement. But, where in trespass the plaintiff declared, that the defendant broke his close, and took *quedam averia*, &c.; the defendant pleaded the cattle were his own, and that *J. S.* took them from him, and put them in the plaintiff's close by his assent, and that he took them, &c.: It was held a good plea; for the plaintiff does not declare that the property of the goods is in him; and when the defendant's beasts are taken from him by wrong, he may justify retaking them wherever he finds them.

Cro. Eliz.
371. Salk.
344. pl. 2.
Ld. Raym.
87.
Comyns, 4.
pl. 4.
5 Mod. 175.
Carth. 356.
Salk. 394.
pl. 2.

Where the matter of the plea confesses the cause of action but avoids it, the defendant may plead specially, though he might have given it in evidence; otherwise, where the matter of the plea does not avoid but deny, as in *assumpsit*, the statute of gaming may be pleaded, though it might be given in evidence on the general issue.

Holt, 328. pl. 2. 12 Mod. 96.

In trespass for taking his horse, the defendant pleads that the horse was the horse of *J. S.*, and that the plaintiff took and impounded him, and that he the defendant took him by replevin, &c.: this amounts to the general issue, for it does not so much as admit a possession in the plaintiff; for the taking and impounding gave him no possession, because the horse was thereby in the custody of the law, so no colour of action left to the plaintiff.

Salk. 394.
pl. 3.
2 Ld. Raym.
968.

In *assumpsit* the defendant pleaded *quod ipse performavit omnia ex parte sua performand.*; and this was held to amount to the general issue; *sed Q.* for the *assumpsit* is admitted, so that this is but a discharge.

5 Co. 119.
resolved per
curiam.
2 Inst. 483.
S. P.

If a man executes a deed by (a) *duress* he cannot plead *non est factum*, for it is his deed, though he may avoid it by special pleading, judgment *si actio*, &c.

(a) In a plea of *per minus* the very manner of it, as, whether for fear of life, member, or imprisonment, ought to be specially laid. *Vide* Keb. 516.

Colborne v.
Stockdale,
1 Str. 493.

[So, if the bond were given for a gaming debt, the statute should be pleaded; and the defendant in his plea should set out the game played at, and conclude *contra formam statuti*, that the court may see that it was within the statute.]

Hob. 72.
Humberton
v. Howgil.
(b) Though
the statutes
relating to
sheriffs
bonds and
usurious
bonds are
penned in
very strong
terms,

Upon an issue *seoffavit vel non*, the jury found a seoffment, but a covinous one, and the court was of opinion, that upon this issue a covinous seoffment was a seoffment, and that if the party would have taken advantage of the covin, he ought to have done it by special pleading. It is there likewise said, that a *non est factum* cannot be pleaded upon the (b) statute of usury or sheriff's bonds, the reason of which is, that these things have the appearances of seoffments and bonds, though they want the validity.

yet the bonds are void only as to their efficacy; for in these cases the defendant cannot plead *non est factum*, but must avoid them by special pleading. *Dyer*, 375. b. *Cro. Eliz.* 925. *Hob.* 72. 166.

It is said by my Lord Chief Justice Holt, that all the special *non est factums*, in case of *escrow* and *rafure*, are impertinent, for thereby the defendant brings all the proof upon himself; whereas if he had pleaded *non est factum* generally, he would turn the proof of whatever is necessary to make it his deed upon the plaintiff *.

vered to another on condition? Indeed in pleading an *escrow* some are of opinion it should conclude, and so not his deed. *Vide post*.

6 Mod. 218.
* *Sed qu.*
As to the case of an *escrow*; for it is his deed, though perhaps deli-

In debt upon a lease for years the defendant may plead entry into part, upon which follows suspension, and it does not amount to the general issue,

Vent. 2.

In every action on the case for a misdemeanour the defendant may plead generally not guilty, or traverse the point of the writ, as *ne forga pas, non ejecit, non rapuit, non manutenuit, &c.*

Dyer, 122.
Doct. pl. 203.

But in trespass *non depascit herbas* is no plea, but he ought to plead not guilty, the other being only argumentative.

22 H.6. 37.
Doct. pl. 204.

In dower the tenant pleads, that the husband of the demandant was only tenant for life, the remainder in tail to his son; and this was held an ill plea, it amounting to the general issue *ne unques seise que dower*.

40 E. 3. 15.
Doct. pl. 205.

In debt against an administrator, the defendant pleads, that the intestate was indebted to him by bond 80*l.* and that goods to that value & *non ultra* came to his hands, which he detains for his debt; and on demurrer it was objected, that it amounted to the general issue of *plenement administer*: but the better opinion of the court was, that this is no cause of demurrer, for the plea is (a) sufficient; and besides, it is some matter in law which hath been allowed always to be pleaded specially, and not left to a jury; and the reason of pressing a general issue is not for sufficiency of the plea, but not to make long records when there is no cause, which is matter of discretion; and therefore it is to be moved to the court, and not to be demurred upon.

Hob. 127.
Sir Henry Warner v. Wainsford.
(a) That it is a good plea, and safer than pleading the general issue.
Nov. 106.
Winch. 19.
Cro. Car. 157.
Cro. Jac. 165.
Leon. 178.

Hob 218. Like point, & *vide Raym.* 230. [It was holden in *Plumer v. Marchant*, 3 Burr. 1380. as settled, that an administrator may either plead a retainer, or give it in evidence on *plene administravit*.]

In an action on the case by a commoner, the plaintiff declared, that the defendant had inclosed the places in which the plaintiff had a right of common, and likewise had put his cattle in those places, by which he could not *in tam amplo & beneficiali modo* enjoy the same; the defendant pleaded, that he put his cattle in rightfully, and that the plaintiff had common enough; and on demurrer it was held, that the plea was the same as not guilty, and therefore amounted to the general issue; yet the court likewise held, that for that reason alone the plaintiff had no cause of demurrer; for that the defendant may well disclose the matter of law in pleading, which is a much cheaper way than to have a special verdict; and that this is on the same reason of giving colour: but, if the matter, by which the defendant justifies, be all matter of fact, and proper for the trial of a jury, then the defendant ought to plead the general issue.

2 Mod. 274.
Birch v. Wilmson.

Pafch.
29 Car. 2.
in C. B.
Nicholls v.
James.

(a) For this
vide Cro.
Ellis. 705.

In assault and battery at *Maidstone in com. Kent*, the defendant pleads, that he is possessed of a house in *D.* and that the plaintiff with another woman came to his door, and the other woman endeavoured to turn him out of possession, and thrust him down, and that in his fall he threw down the plaintiff against his will and fell upon her; *absque hoc*, that he is guilty of a battery at *Maidstone* or any other place *extra*, &c. Plaintiff demurs, 1st (a), Because the defendant has traversed the place without alleging any such local justification as to make it material. 2dly, Because the plea amounts to the general issue. *Per cur.*—The justification, if we may call it so, is local; but the plea does amount to the general issue: but we are not bound to give judgment for the plaintiff upon that, though he do assign it as cause of demurrer; it is a discretionary thing, and we may allow of a plea that does amount to the general issue, if it contain any thing that may breed a scruple in the *lay gents*; and therefore they advised the parties to compound the matter.

5 Mod. 314.
Hackshaw
v. Clerk.

An action on the case was brought upon a bill of exchange, to which the defendant pleaded, that after the acceptance of the bill he gave a bond in discharge thereof; and upon demurrer to this plea it was objected, that it amounted to the general issue; for, the debt upon the bill being extinguished by the bond, the defendant ought to have pleaded *non-assumpsit*, and to have given the bond in evidence; and the court seemed to be of that opinion; but by consent the defendant pleaded the general issue.

2 P. Wms.
258. [Vide
tit. Bank-
rupt, *supra*,
vol. 1.

P. 452.
A general
plea of
bankruptcy
in *Ireland*,
referring to
an *Irish* act
of parlia-
ment, and
concluding
to the country,
(in a mode similar to that given by stat. 5 G. 2. c. 30. § 7. to bankrupts in *Eng-land*.) is bad. *Quin v. Keep*, 2 H. Bl. 553.]

By the statute of bankrupts a liberty of pleading *generally* is given to the bankrupt, and thereby he may avoid the hazard of pleading *specially*; but then he must take upon himself the proof of his conformity to the statute in every particular; or, if he thinks fit to plead the matter specially, then he must set forth every point; and by it he has this advantage against the plaintiff, that he must reply to one particular only, upon which issue must be taken: but, where he pleads the matter specially, but does not set forth the whole, judgment must be given against him; for by the act it is so to be pleaded as that the whole merits may be tried.

Carth. 380.
5 Mod. 252.
Hallet v.
Byrt.

In trespass for taking three cows at *Beomister in Dorsetshire*, the defendant pleaded specially, that the Bishop of *Sarum* was seised in fee of the hundred of *Beomister* in the right of his bishoprick, and that he and all his ancestors, time out of mind, had a hundred court of all personal actions under 40s., and of replevin within the said hundred from three weeks to three weeks; and that the Bishop, and all those whose estates, &c. had used time out of mind by their steward of the said hundred, upon complaint made, &c. to replevy cattle unjustly taken at any place within the said hundred, and that the Bishop had demised the said hundred unto *Carleton Whitlock*, Esq. for three lives, by virtue of which he was seised, &c. and that the plaintiff and T. S. took those

those cows, being the cows of one *E. G.* at *Beomister* within the said hundred, and impounded them there, and thereupon the said *E. G.* complained to *Henry Samways*, steward of the said *Carleton Whitlock* of his hundred court afore said, of the unjust taking the said three cows; and that thereupon the said steward made his precept to the bailiff of the said hundred, &c. to replevy those cows; by virtue whereof the defendants took them and delivered them to the said *E. G.* On a special demurrer to this plea, for that it amounted to the general issue, it was adjudged that the plea, in the form it was drawn, did amount to the general issue, for that the defendants had not admitted by their plea so much as a possession of the cows in the plaintiff at the time of taking, &c. for they say the cows were then impounded, which is the custody of the law, and not of the party, so that the defendants by their plea had not given any colour of action whatsoever to the plaintiff.

If there are three or more partners, and an action is brought against two of them, and they plead the partnership, this amounts to the general issue *.

Carth. 63.
per Holt,
and two
other Judges.

* The text is equally erroneous, as I conceive the Reporter, Carthew, to be, no such plea of partnership being pleaded. The defendants pleaded the general issue of not guilty; and though in Carth. it is said that judgment was given for plaintiff, yet Salk. and all the other reporters of this case, who are numerous, expressly say, judgment was given for defendants, by reason of all the partners not being made defendants. It was to be sure argued that such matter ought to have been pleaded in abatement, if defendants mean to take advantage of such matter; but then it was doubted whether it was pleadable in abatement, it only amounting to the general issue. Vide 2 Salk. 440.—*N. B.* This case in Carthew was against some of the owners of a ship, for damages to goods. [It was in form an action of *assumpsit*, and its authority hath been denied in later cases; for it hath been holden, that in *assumpsit* against one partner, the partnership must be pleaded in abatement, and cannot be given in evidence. *Rice v. Shute*, 5 Burr. 2611. *Abbot v. Smith*, 2 Bl. Rep. 947. And the law is the same in an action on the custom of the realm. *Buddle v. Willson*, 6 Term Rep. 369. In an action *ex delicto*, that there are other partners not named is no cause of abatement, for every tort is several. *Mitchell v. Tarbutt*, 5 Term Rep. 649.]

In many cases, though a man plead a thing which may be given in evidence, yet this shall not amount to a general issue; as, where the plea goes by way of confession and avoidance, as, in trespass, where the defendant acknowledges the plaintiff to have a good cause of action, unless for the matter which the defendant has pleaded in his plea; in such case such plea shall not amount to a general issue.

Skin. 362.
pl. 5.
per Holt.

In an appeal of maihem if the defendant plead not guilty, he cannot give in evidence that it was *se defendendo*, but ought to plead it by way of justification in bar of the action.

2 Inst. 336.

In trespass brought by *R.* for breaking his close and beating his servant, and carrying away his goods; upon not guilty pleaded the jury found this special matter, viz. that Sir *F. B.*, Chancellour of England, was seised, and leased to the plaintiff and one *A.*, which *A.* assigned his moiety to one *C.*, by whose command the defendant entered: And it was moved in arrest, &c. that this tenancy in common betwixt the plaintiff and him, in whose right the defendant justifies, could not be given in evidence; so it could not be found by verdict, but ought to have been pleaded specially: but the whole court was against that, and held, that it might be given in evidence.

3 Leon. 94.
Roffe's case.

Co. Lit. 47.
b. In debt
for rent the
defendant

may plead *nil debet*, and give in evidence *nil habuit in tenementis*, per Holt, Ch. J. Or on such plea may give eviction in evidence. Comb. 238. [But in *assumpsit* under the stat. 11 G. 2. for use and occupation, *nil habuit in tenementis* is not good. Lewis v. Willis, 1 Will. 314.]

Dyer, 92. a.
Pl. 6

In waste the defendant may plead *nil wast fait*, and give the lopping of trees in evidence.

Dyer, 276. a.
Pl. 51.

But, if waste be assigned in houses, and the defendant plead *nil wast*, he cannot give in evidence that the houses were repaired before the action brought, but ought to plead it specially; for having once committed waste, he ought to discharge himself by shewing the special matter to the court, which would be a good bar.

Carth. 356.
5 Mod. 175.
Salk. 344.
pl. 2.
J. d. Raym.
87.
Comyn, 4.
pl. 4.
5 Mod. 175.
Carth. 356.
Holt, 328.
pl. 2.
12 Mod. 96.
Husley v.
Jacob.

In an action brought against Jacob a goldsmith, upon a bill of exchange drawn by the Lord Chandos on the said Jacob for 112 guineas, which was accepted by him, the defendant pleaded in bar, that after the 29th of September 1664, and before the making that bill of exchange, viz. on such a day, the said Lord Chandos and the plaintiff Hussey played together with dice, at a certain play, called Hazard, upon tick and credit, without ready money, and that the Lord Chandos then and there at one time and meeting lost to the plaintiff the said 112 guineas upon tick, and that for the security of the payment of the said guineas lost as aforesaid the said Lord Chandos, on the day and year in the declaration, &c. made the said bill of exchange, and directed it to the defendant, requesting him to pay, &c. and that the defendant did accept of the said bill and assume upon himself, as the plaintiff had declared, *quorum premissorum pretextu & vigore statuti in ea casu edit. & provis.* the said bill of exchange so by him accepted, and the acceptance thereof, and the promise of the said defendant so as aforesaid made, *devenerunt & fuerunt & modo sunt vacua & nullius vigoris in lege, & hoc, &c.* To which the plaintiff demurred, and shewed for cause, that it amounted to the general issue. *Sed per cur.*—The plea is good, both as to the matter and form, and it does not amount to the general issue; and it is not a rule, that because such a matter may be given in evidence, therefore it ought not to be pleaded specially; for it often happens to be in the election of the defendant, either to plead it specially or not, as he may be advised; as for instance, the pleading of a release, coverture, or infancy, in an *assumpsit* is certainly good; and yet those things may be given in evidence upon *non-assumpsit* pleaded: however, the defendant sometimes may not be willing to put such matters of law to the judgment of the jury, or, perhaps, may design to save the costs of a special verdict.

Salk. 278.
Pl. 1.
ruled by
Holt at
Hertford
assizes.

In debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense: But in case on *non-assumpsit* the statute of limitations cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise.

[Whatever]

[Whatever is matter of inducement may be given in evidence on the general issue: *secus*, of matter of substance. 4 Burr. 2469.

A proviso in the same act of parliament, whereon an action is brought, and the matter provided in it, may be given in evidence on the general issue: as, in an action against a parson for merchandizing, contrary to 21 H. 8. c. 13. which has a proviso for necessities to maintain his household. So, it seems, that a proviso in the bribery act of 2 G. 2. c. 24. that a person, who has been a discoverer, shall not be an object of that law, may be taken advantage of under the plea of *nil debet*.] Ibid.

4. Of sham Pleas, and the Consequence of false Pleading.

The pleading a sham plea, or such a one as the party knows to be false, is a great abuse of the justice of the court; and such pleas have not only been set aside with costs, but the parties censured, and otherwise punished according to the discretion of the court.

If it appears judicially to the court, on the defendant's own shewing, that he hath pleaded a false plea, this is a good cause of demurrer; as, where the defendant brought an indenture into court, and pleaded that it contained no covenants, and on inspection it appeared to contain several, judgment was given against him. Sand. 316. Smith v. Yeomans.

It hath been holden, that pleading a false plea is within the statute of *Westm. 1. (3 Ed. 1.) c. 29.* which my Lord Coke says was made in affirmance of the common law. 2 Inst. 215. Vent. 213.

If therefore, says he, a serjeant, or an apprentice of the law, in pleading a matter of fact issuable for his client, allege the same to be done at a town in such a county, where indeed he knoweth there is no such town, of purpose to delay justice, *et a' enginer la court*, this is a deceit within the statute, and hath been so holden. 2 Inst. 215.

And if the client would have the attorney plead a false plea, he ought not to do it, for he may plead *quod non sum veraciter informatus & ideo nullum responsum*, and that shall be entered in the roll to save him from damages in a writ of deceit; and if an attorney ought not wittingly to plead a false plea, *a fortiori* (a), a serjeant or apprentice ought not to do the same. 2 Inst. 215. (a) Though counsel are obliged to be faithful to their clients, yet not to manage their causes in such a manner, as justice should be delayed or truth suppressed. Vent. 213. per Hale.

In debt upon an obligation the defendant pleaded *non est factum*, and afterwards *relucta verificatione* confessed the action, and the judgment against him was *in misericordia*: it was moved, that it should be *capiatur**, because he once denied his deed, and so ought to be fined to the king; and of this opinion was *Gawdy*; but *Fenner* and *Williams* held otherwise, because a fine is not payable but where he denies his deed, and it is found against him upon a false plea, and the jurors are troubled with the trial thereof; there, for troubling the king's courts, and for troubling the country, Cro. Jac. 64. Davis v. Clerk. * The *capiatur pro fine* is taken away, and other provision made in lieu thereof, by 5 W. & M. c. 12.

country, and the falsity of his plea, he shall be fined and imprisoned; but when it is not found against him, but he relinquishes his plea, he shall only be amerced, and accordingly the judgment was affirmed.

Co. Lit.
366. 2.

In dower if the tenant pleads non-tenure for part, and detimes of charters for the residue, and these pleas are found against the tenant, the demandant shall recover damages for all the time from the death of her husband, without any defalcation, for which reason the tenant ought to be careful that he does not plead a false plea.

Dyer, 225.
Doct.

pl. 181.
* If the bond is condition-
ed to pay
on or before,
payment

before the day, *scil.* such a day is good. Anon. T. 3 G. 3. 2 Willf. 173. — If money is payable at or before such a day, and is paid before, it should be pleaded paid at such precedent day; and plaintiff may reply, not paid that day, nor before, nor after. Fletcher v. Hennington, P. 33 G. 2. 2 Burr. 944.

Co. Lit. 366.
Doct. pl.
280.

In a formedon, if the tenant pleads warranty and affects descended, and the demandant takes issue thereon, and the issue is found for the demandant that affects did not descend, and thereupon the demandant recovers; in this case, although affects afterwards descend, yet the tenant shall never have a *scire facias* on the same judgment; for by his false plea he hath lost the benefit of the statute of Gloucester, and of the statute *de donis* in this point.

Doct. pl.
281. *Vide*
title Heir
and An-
cestor.
Cro. Car.
436.

If an heir at law pleads *riens per discent*, which is found against him, there shall be a general judgment of his body and other lands and goods, because of his false plea.

In a writ of annuity against one as heir to his ancestor the defendant pleaded, *non est factum patris sui*, and found against him; whereupon it was moved that the execution ought to be awarded of his proper lands, and of his lands descended, because he had pleaded a false plea: But *per cur.* — The denying the deed to be his father's was not a false plea in his cognizance; and although it were false, yet being charged in respect of his ancestor's deed, the land of his ancestor shall only be taken in execution, for that is the cause of his charge.

(H) Traverse : And herein,

1. The Nature thereof.

Doct. pl.
344. 2 Lil.
Reg. 586.
Co. Lit. 282.
Yelv. 195.
† In most
cases it does

A Traverse is the denial of some material point alleged in the pleadings, and which, if properly taken, closes † the issue. It may be taken to the declaration, bar, replication, &c.; and therefore, if properly taken to the declaration, it destroys the plaintiff's action; and if to the bar, it destroys what is said in avoidance

age of the action; and if to the replication, what was said in not close, but only offers the avoidance to the bar.

And if the traverse is material, issue must be taken thereon by the adverse party: a traverse, properly called, being by *absque hoc*, or without this, that, &c., and concluded with a verification. The author here, perhaps, mean a general traverse, or a positive denial of the most material fact alleged or pleaded by the opposite party; in which case the party so denying, concludes to the country: but the common acceptance of the term is, where issue is offered in the above-mentioned form, the party concluding with a verification. — N. E. A general traverse *absque tali causa* concludes to the country.

But, for the better understanding the nature of a traverse, we shall in the first place insert some general rules that have been laid down herein.

And, first, it is laid down, that where a matter is expressly pleaded in the affirmative, which is expressly denied by the other party, there, a traverse is needless; because in such case a sufficient issue is joined.

36 H. 6. 19.
Cro. Elis.
755. Lit.
Rep. 15.
same rule.

Vent. 101. same rule laid down; and that if it were otherwise, they might traverse one upon another in *quodammodo*.

As, where in *audita querela*, to avoid the execution of a recognizance, the plaintiff set forth that it was defeasanced upon the payment of divers sums of money at certain days, and that he was at the place appointed, and tendered the money, and that the defendant was not there to receive it; the defendant pleaded *protestando*, that the plaintiff was not there to pay it; and that he was there ready to receive it, *absque hoc*, that the plaintiff was ready to pay it, which being specially demurred to, the court held the plea naught; and that there being an express affirmative and negative, there should have been no traverse.

Cro. Elis.
754-5.
Huish v.
Phillips.

So, if in an assise the defendant pleads a scoffment by a stranger, which he avers to be absolute and without any condition, and the plaintiff replies that it was on condition, this is sufficient without any further traverse.

2 Roll.
Rep. 35.
Hob. 72.
72.

But this rule, that there shall be no traverse where the matter alleged by one party is expressly denied by the other, must be understood of those cases where the denial makes a complete issue; for though the matter contradicts, that is not sufficient without an apt issue is formed upon an affirmative and negative; as, where the death of a man is positively alleged on one part, and his life by the other party, here the death ought to be traversed*, otherwise no issue is joined.

5 H. 7. 5, 6.
Vent. 283.
Lutw. 15.

* *Sed quid de hoc*, unless the traverse conclude to the country?

A traverse therefore seems to be properly taken when the adverse party to the declaration, plea, replication, &c. forsaking the general issue sets up a title for himself, or sets forth a particular specification of his case, with a justification thereof, &c. with a traverse (a), *absque hoc*, or denial of the matter alleged by the adverse party, or that the same is true in that (b) manner and form he hath alleged; and such specification is called an (c) inducement to the traverse.

Hob. 103-4.
(a) That *absque hoc*, so that without that, &c. are the proper words of a traverse.
Sand. 22.
2 Salk. 628.

pl. 2. Ld. Raym. 349. (b) Where the words *modo & forma* are only words of form and not of substance, and the diversities therein, vide Co. Lit. 281. Doct. pl. 344. (c) Such inducement is said to be the shewing of cross matter contrary to the allegation of the adverse party, Dyer, 365. pl. 33.

34, 302.

Hence it is said to be a rule, that when any thing pleaded specially by the defendant, is directly contrary to the matter in the declaration, such plea is not good without a traverse; yet it is in the election of the other party to waive the advantage thereof, or demur thereupon.

Cro. Car.

336.

(a) Also, it

is said to be a rule, that nothing can be an inducement to a traverse but such a thing as is traversable. 2 Leon. 32. *per* Manwood. [In general, the inducement to a traverse cannot be traversed: it ought, however, to be such, as, if true, will defeat the title of the other party; otherwise it amounts to a negative pregnant. *Per* Parker, C. B. Park, 131.]

3 Mod. 320.

(b) That matter of

law cannot be traversed, *Yelv.* 200. nor where part is matter of law, and part matter of fact. 2 Mod. 55. [Hence, in an information in nature of a *quo warranto*, the defendant made title under the constitution of Heniton, and then traversed the usurpation: the Attorney-General, without taking any notice of the title, joined issue on the traverse; and it was holden to be ill, because the user being admitted by the defendant's making title, the usurpation was a matter of law, not to be sent to a jury. *Rex v. Blagdon, Pasch. 2 Geo.* cited in 2 Str. 841.—But matter of law connected with fact is clearly traversable; as seisin in fee, or in tail, *Ewer v. Moile, Yelv.* 140. *simony, Rast. Entr.* 532. a. right of a county to repair a bridge, 2 Lev. 112. right to present to a church. *Grocers' Company v. Archbishop of Canterbury, 3 Will.* 234. 2 Bl. Rep. 776.]

Cro. Jac.

221. *Yelv.*
151. *Bedell*
v. Lull.

[In this case, according to *Yeverton*, the court said, that the traverse ought to pursue the very words of the plea traversed.

Though perhaps this may be too

strict, and it may be not necessary to follow the very words of the plea; yet, most certainly the traverse must be *ad idem*, it must be the same with the plea in effect and substance; thus, where in trespass, a plea alleged the injury to be in consequence of cutting a beam, the replication, traversing its being previous, was adjudged ill. *Humphreys v. Churchman, Ca. temp. Hardw.* 289.]

(c) 2 Sand.

5. 28.

Koll. Rep.

235.

Et vide infra.

Hard. 317.

(e) But a defendant cannot traverse a matter not al-

leged in the declaration. 2 Vent. 79. 2 Lutw. 1560. 1480. But, if the plaintiff assign several breaches, the defendant may traverse any of them. *Salk.* 138.

And therefore, where in ejectment upon a lease made by *E. J.* the defendant pleaded, that before *E. J.* had any thing to do, &c. *M. J.* was seised in fee, after whose death the land descended to his heir, and that *E.* entered and was seised by abatement; the plaintiff replied, and confessed the seisin of *M.*, but said, that he devised it in fee to *E. J.* who entered; *absque hoc*, that *E. J.* was seised by abatement; upon demurrer, this was held to be an ill traverse; for the plaintiff had confessed the seisin of *M.* and avoided it by the devise, and therefore ought not to have traversed the abatement; for having derived a good title by the devise of the lessor, it is an argument that he entered lawfully, and it was that alone that was issuable, and not the abatement; therefore it was ill to traverse that, because it must never be taken, but where the thing traversed is issuable.

The traverse is regularly to be taken to the (c) most material point alleged by the other party, and is not to be (d) multifarious, but to a single point.

But any part of what the defendant (e) makes his title is traversable; as, if in trespass the defendant allege a seisin in fee in *J. S.*, and a demise to himself; the plaintiff may traverse either the seisin in fee, or the demise, at his election.

Also,

Also, when the defendant traverseth any part of the plaintiff's count or declaration in a *quare impedit*, it ought to be such part as is inconsistent with the defendant's title, and being found against the plaintiff, absolutely destroys his title; if it do not so, however inconsistent it be with the defendant's title, the traverse is not well taken.

It is laid down as a general rule in all the books which speak of this matter, that there cannot be a traverse upon a traverse, that pleadings and proceedings may not be endless; for if that were permitted, each party might go on traversing *ad infinitum*.

An issue joined upon an *absque hoc* ought to have an (a) affirmative after it.

S. P. admitted to be the general rule; but the court seemed to think, that where an *absque hoc* comprises the whole matter generally, as *absque tali causa*, it may conclude *& de hoc ponit se super patriam*; but where it only traverses a particular matter, as *absque tali warranto*, &c. it ought to be averred. 7 Mod. 305. L. P. [Although it is a general rule that a traverse must conclude with a verification, yet it may, and when it comprises the whole substance of the plea, it ought to conclude to the country. Boyce v. Whinkler, Dougl. 96. Haywood v. Davies, 1 Salk 4. Robinson v. Railey, 1 Burr. 316. Smith v. Dovers, Dougl. 428. Hedges v. Sandon, 2 Term Rep. 439.]

But for the exceptions to this general rule, vide *infra*.

Co. Lit. 126. (a) Salk. 4. pl. 10.

In assault and battery, the defendant pleaded a release of all actions, &c. The plaintiff replied, that the release was gotten by duress, &c. The defendant rejoined, and shewed cause why it was not gotten by duress; *absque hoc*, that it was voluntary, *et hoc petit quod inquiratur per patriam*: upon this issue the cause was tried, and the plaintiff had a verdict; and it was moved in arrest of judgment, that he ought not to conclude to the country after a traverse; because a traverse itself is negative, and therefore the defendant ought to have joined issue in the affirmative: it was admitted, that if issue had been joined before the traverse, it might have been helped by the statute of jeofails; but not being so in this case, the judgment was arrested.

3 Mod. 203.

If the defendant's plea be in the negative, the plaintiff need not traverse it, for a negative cannot be traversed; and therefore, if an executor or heir in debt, for a debt due by the testator or ancestor of the defendant, pleads no assets, or *riens per descent prater*, &c., the plaintiff, without traversing the *prater*, may reply generally assets *ultra*, without saying what, or where they are.

Palm. 511. 2 Mod. 50. But for this vide 8 Co. May Shipley's case, Cro Car. Dorchester

v. Webb. Hob. 104. Yelv. 165.

But for the fuller explication of this matter we shall consider more particularly:

2. In what Cases a Traverse is permitted.

It hath been held, on the 26 H. 8. c. 3. for payment of tenths, which enacts, *That after default and certificate made thereof to the court, under the seal of the bishop, the benefice shall be void*, that the party may traverse such certificate; for herein the bishop acts only as an officer, not as a judge.

Cro. Eliz. 20. Leon 279. Mibor, 141. 915 Savil, case 63.

But, if, on a trial of general bastardy, the party be certified a bastard by the ordinary, such certificate cannot be traversed; for herein the ordinary acts as judge; and such certificate shall bind perpetually the person certified a bastard, though he was not party to the suit; as all persons are estopped to speak against the memo-

Roll. Abr. 36.

rial of any judicatory, because the act of the publick judicatory, under which any person lives, is his own act; and were they not thus bound, there might be contradiction in certificates.

If upon a judgment obtained by *A.* he sues out a *scire facias*, upon which *J. S.* is returned tertenant, he cannot traverse this return of the (*a*) sheriff.

(*a*) That a sheriff's return of a rescous cannot be traversed. *Dyer*, 212. *Cre. Ells.* 780.

Hawk. P. C. On the statutes against forcible entries and detainers, it hath been holden, that one justice of peace may make a record of a forcible detainer, and that such record is not traversable; because the justice of peace in making thereof acts not as a minister, but as a judge.

It hath been held, that presentments in the quarter sessions of the peace, and even in *B. R.*, are traversable; and that if it be so in courts superior to the leet, *a fortiori*, it must be so in presentments at the leet.

Carth. 74. but for this *vide Hawk. P. C. c. 76. § 72. 83.*

2 Hawk. P. C. c. 11.

It is held, that wherever an escape is finable, the presentment of it is traversable; but where the offence is amerciable only, there the presentment is of itself conclusive, such amerciements being reckoned among those *minima de quibus non curat lex* *.

are traversable, or their truth called in question.—Perhaps in all cases, by removing them into *B. R.* or by pleading to actions brought on them for recovery of the amerciements; or where there is a distress and replevin.

But for this *vide title Coroner, letter (D).*

It is held by some opinions, that an inquisition taken by the coroner *super visum corporis* cannot be traversed; also, in respect to that high credit which the law gives to an inquisition found before a coroner, it hath been held, that if an inquisition finds that a person has been slain, and that *J. S.* hath fled, he forfeits his goods and chattels; the coroner's inquest being of that solemnity as not to be traversable.

The probate of a will is not traversable; and herein it is settled, that the ecclesiastical courts having the probate of wills, they, as incident to such jurisdiction, have power to determine all those matters that are necessary to the authenticating of such testament: therefore, if the seal of the ordinary appears, it cannot be suggested, or given in evidence in the common law courts, that the will was forged, or that the testator was *non compos*, or that another person was executor; for of these they had proper jurisdiction, and the remedy must be by appeal.

If the ordinary refuse a person presented to him for cause, such cause is traversable, and shall be tried by the metropolitan, if the party be living, but if dead, by a jury; for though the bishop be judge in examining, yet, as his proceedings are not of record, the cause of refusal is traversable.

Dyer, 254.
Gouldf. 351.
3 Leon. 199.
5 Co. 57.
but *vide*
Show. P. Cases, 88.
3 Lev. 313.
Watkins v. Barry,
1 Str. 444.
Hayley v. Fitzgerald,
Id. 643. *S. P.*

[In debt on a bail-bond, the defendant traversed the arrest of the principal; and on demurrer, judgment was given for the plaintiff; for otherwise this would be a way to avoid all bail-bonds that are civilly taken, without exposing the party by an arrest.]

3. In what Cases a Traverse is necessary.

Herein it is laid down as a general rule, that where the matter alleged by the defendant in his plea is contrary to the matter set forth in the declaration, there must be a traverse or denial of such matter set forth in the declaration. So, if the replication contradicts the matter alleged in the plea, &c. (a), as, where the defendant alleges seisin in one from whom he claimeth, the plaintiff cannot allege seisin in another from whom he claimeth, without traversing, confessing, or avoiding the seisin alleged by the defendant.

Lutw. 381.

(a) Cro. Ellis. 30.

So, if it be alleged by the defendant, that the party died seised in fee, and the plaintiff allege that he died seised in tail, he must traverse the dying seised in fee (b), because two affirmatives cannot make an issue.

5 H. 7. 11, 12. Doct. pl. 349. Dyer, 312.

b. S. P. (b) Leon. 78. S. P.

The omission of a traverse where necessary is matter of substance; and therefore, where in trespass for taking his horse the defendant pleaded, that he was seised of such lands, and entitled himself to an heriot; the plaintiff replied, that another person was jointly seised with the defendant, *et hoc paratus est verificare*; on demurrer it was adjudged for the defendant, because the plaintiff ought to have traversed the sole seisin.

2 Mod. 60. Snow v. Willem; & vide Cro. Jac. 221. that the plaintiff having said enough in his case to

avoid the bar, if he had traversed it also it would make his replication naught. *Et vide* 1 Leon. 43-4. that a traverse is but matter of form, and the want thereof shall not prejudice the other party in point of judgment; but the judges ought to judge upon the substance, and not upon the manner or form of pleading; & vide title Amendment and Jeofail.

Where a man confesses and avoids, he needs not traverse; but, where in *assumpsit* against the defendant as executor, he pleaded that the testator made J. S. executor, who proved the will, and took upon him the execution thereof, and concluded in abatement; here, because he had not traversed, *obsequo hoc*, that he was executor, or administered as executor, it was adjudged against him.

2 Mod. 168. Singleton v. Bawtree.

When a malefeasance is laid to the defendant's charge, he ought expressly to traverse it, and not to answer it by argument; but in waste the defendant may say it was ruinous, without answering expressly to the waste: so, in case of an innkeeper, he may allege a robbery, without traversing it was by his default.

Cro. Ellis. 281.

In debt for rent, the plaintiff declared on a lease of four acres of land at 5 l. rent, and for rent arrear he brought the action: the defendant pleaded to part *nil debet*, and to the residue, that the lease was of the said four acres, and of one acre more, and that before the rent was arrear, the plaintiff entered into the fifth acre: on which the plaintiff demurs; and the reason shewn on the argument was, for that he did not traverse, that he demised four acres only. But on the other side it was said for the defendant, that the traverse ought to come on the plaintiff's part, viz. he ought in his replication to have maintained the lease in the declaration,

Sand. 206. Sid. 405. Raym. 175. 2 Keb. 467. Lev. 263. Salmon v. Smith.

claration, and have traversed, that he demised the fifth acre. To which it was answered; that that would be a departure from his declaration, and therefore the traverse ought to have been on the defendant's part; for when he pleads another lease than that upon which the plaintiff declared, he ought to traverse the lease on which the plaintiff declared; viz. to plead the lease of the fifth acre, *absque hoc*, that he demised the four acres only; and so held the court, and gave judgment for the plaintiff.

Vent 211.
217. Sir
Ralph Bo-
vey's case.
Lutw. 381.
S. C. cited.
Latch, 200.
S. P. ad-
judged.
Et vide
Cro. Jac.
657.

In an action against a sheriff for an escape, the plaintiff declared, that the defendant being sheriff of *Surry* voluntarily suffered J. S. whom he had in execution to escape, the defendant protesting, that he did not let him voluntarily escape, pleaded, that he took him upon fresh pursuit. To which it was demurred; because he did not traverse the voluntary escape: and resolved for the defendant; it being impertinent for the plaintiff to allege it, and no ways necessary to his action; and it being out of time to set it forth in the declaration, being a matter that ought to come in in the replication. And *per Hale*, C. J.—It is like leaping before one comes to the stile; as, in debt upon a bond, the plaintiff should declare, that at the time of the sealing and delivery of the bond the defendant was of full age, and the defendant should plead *demage*, without traversing the plaintiff's allegation.

Lutw. 381.
Duppa &
al. v. Ste-
phens.

But in debt by the gentlemen ushers of the king for a fee of 5 l. due to them from one who had received the degree of knighthood, they declared, that time out of mind they had used to receive a fee of 5 l. of every person who voluntarily and without compulsion had received the degree of a knight, &c. The defendant pleaded, that he had taken the degree in sole obedience to the king; but because he had not traversed *absque hoc*, *quod de receptis vel suscepit gradum militaris voluntarie & sine compulsionem*, it was adjudged for the plaintiff; for the voluntary acceptance of honour, without compulsion, is of the essence of the action, and not like the aforesaid case of an escape.

Dyer, 66. b.
pl. 15.

In account against one as bailiff of a manor such a year, it is a good plea, that J. S. was his bailiff that year; but there, he must traverse that he himself was not.

Dyer, 66. b.

So, in escape against a gaoler he may plead, that the prison was broken open by the king's enemies, or that it was burnt by sudden fire; but then he must traverse, that the escape was not in other manner, or as the plaintiff hath alleged.

Poph. 67.

(a) That
where the
parties in
pleading
vary in the
estate alleged,

If in trespass the defendant entitles himself by the feoffment of a stranger, and the plaintiff replies and maintains that the same stranger did enfeoff him, this cannot be a good issue (a) without a traverse of the feoffment alleged to be made to the defendant.

or in the quantity thereof, there ought to be a traverse. Yelv. 140.

Stile, 150.
198. 210.

In assault and battery the defendant pleads a special plea, and justifies; the plaintiff replies *de injuria sua propria*; upon which issue is joined, and a verdict for the plaintiff; but in arrest of judgment it was held, that the replication was not good, in not answering the special matter pleaded, and traversing *absque tali causa*.

so that an issue might be joined on an affirmative and negative; and therefore the court ordered a replender.

If in covenant for payment of money the defendant pleads, *Stile, 373.* that he was at *Lisbon* in *Portugal* at the day of the payment of the money which he had covenanted to pay, the plaintiff may reply, that he was in *England*, without a traverse, *absque hoc*, that he was in *Portugal*.

If account be brought against two, and one of them plead *ne unques son receiver*; this is good without a traverse, that he and his companion were receivers. *Godb. 43.*

If in trespass for chasing his ewes, being great with lamb, so as by driving them he lost his lambs, the defendant justifies, that they were damage-feasant, and that therefore he drove them to pound, &c.; this is naught without a traverse*; for though he might take and drive them to pound, yet this should have been without any prejudice to them, and was therefore a matter traversable. *3 Leon, 15.*
* Instead of a traverse he should have pleaded he drove the ewes gently, doing as lit-fee what tra-

the damage as he could, and there would not have been any occasion for a traverse; nor do I think could, properly, have been taken.

If there are two prescriptions, one pleaded by the defendant by way of bar, the other set forth by the plaintiff in his replication, without any traverse of that which is alleged in bar, this is naught. *2 Leon. 209.*
that one prescription pleaded against another. *Carth. 116.*

other is not good without a traverse, *vide Yelv. 217. 9 Co. 59. 2 Mod. 104.*

As, where in trespass for cutting oaks the defendant pleads, that he was seised of a messuage in fee, and prescribes to have *rationabile estoverium ad libit. capiend. in boscis*; the plaintiff replies, that the *locus in quo* was within the forest, and that the defendant and all those, &c. *habere consueverunt rationabile estoverium, &c. per liberationem forestarii*: upon a demurrer, the replication was held naught; because the plaintiff ought to have pleaded the law of the forest, *viz. lex forestie talis est*, or to have traversed the defendant's prescription, and not to have set forth another prescription in his replication without a traverse. *2 Leon. 209, 210. Ruffel v. Broker.*

In trespass for pulling down his hurdles in his close, the defendant justified, that *J. S.* was lord of the manor of *D.*, and that the said *J. S.*, and all those whose estate he had in the said manor, had a free course for their sheep in the place where, &c., and that the tenant of the said close could not there erect hurdles without the leave of the lord of the manor, and that the said *J. S.* let to the defendant the said manor, and because the plaintiff erected hurdles without leave, &c. in the said close he threw them down, as it was lawful for him to do: The plaintiff replied of his own wrong, without cause, &c. and it was held an ill replication, because the plaintiff had not traversed the prescription. *4 Leon. 16. Ruithbrook v. Pufanica.*

4. Whether there may be a Traverse upon a Traverse.

It is laid down as a general rule, that there cannot be a traverse upon a traverse; because that in all pleadings whereupon a
Vol. V. C c traverse
Co. Lit. 282. Hob. 104.

Hutt. 97.
Sand. 20. 22.
Vaugh. 62.
1 Jon. 216.
Cro. Car.
105.

* *Vide ante*,
67. n.

(a) That
whatever is
traversable

and not traversed is admitted †. Salk. 91. — † This is avoided by protesting against every thing the party does not mean to admit: though the protestation does not put the adverse party to prove what is so protested against, where issue is taken on another point; but the protestation operates as an exclusion of a conclusion; or, in other words, the record cannot, as to the points protested against, be used as evidence against the party protesting, as to those points; because by protesting he has denied them: had he not protested, those points might, perhaps, as between the same parties in another suit relative to the same matter, be considered as admitted: and the party protesting might in such subsequent cause find it necessary to offer an issue on some point that came under the *prostando* in a former cause.

Hob. 104.

This rule is thus laid down by my Lord *Hobart*, that regularly, whensoever a traverse is taken apt and material to the plaintiff's title, the plaintiff is bound to it, and cannot for the same thing leave it, and force the defendant to accept another traverse tendered by him.

20 H. 4. 2.
12 E. 4. 6.
2 Rich. 3. 9.
Hob. 104.

But, if a man bring an action of trespass for breaking his close on a certain day, if the defendant plead a release of actions, he shall traverse all trespasses after; if a feoffment, he shall traverse all trespasses before; if a licence for once, all before and after: and in these cases the plaintiff hath it in his choice to leave the traverse, and traverse the point of justification, *scilicet* the release, feoffment, or licence; or he may allege a trespass before or after, and so join upon the traverse offered, which is traverse after a traverse, but yet is not according to the rule, a traverse upon a traverse to the self-same point.

Hob. 104.

So, if a man bring an action of waste for the felling of trees, and lay that the lessee felled and sold them, and the defendant confesses that he felled them, but say, that he bestowed them in repairing the house, *absque hoc*, that he sold them; the plaintiff may reply that he let them rot, or any like case of waste, *absque hoc*, that he employed them in reparations; and though this be a traverse upon a traverse, and directly to the same thing, yet it is out of the above-mentioned rule, because the traverse in this case was not material; for the plaintiff might have declared of the selling only, and the other point was mere surplusage.

Poph. 107.
Cro. Eliz.
418.
Moor, 350.
S. C. Para-
mor and
Verrald.
1 Lutw.

1437. S. C.
cited, and
like point

adjudged, Cro. Eliz. 99. S. P. adjudged. (b) There never shall be a traverse upon a traverse, but where the traverse in the bar takes from the plaintiff the liberty of his action for the place or time, or such like; for there, the plaintiff may maintain his action for the place or time, and may traverse the inducement to the

traverse.

traverse, and needs not to join with the defendant in the traverse, but at his pleasure may do the one or the other: but, when the inducement is made and concluded with a traverse of a title shewn by the plaintiff, there, the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse. Cro. Car. 105. 2 Lutw. 1630. S. P.

In trespass, the defendant justifies his entry by the command of J. S. Plaintiff replies, and shews that J. S. was seised in fee, and let unto him at will, and traverseth the command of J. S. The defendant maintains his plea, that J. S. commanded him to enter, and that he entered by his command, and traverseth the lease at will; and it being hereupon demurred, it was adjudged for the plaintiff, that the command is traversable, and that therefore the defendant's rejoinder to make a traverse upon a traverse is not good.

Cro. Car.
586. Thoma
v. Shering.

Where one traverses a thing which he had before confessed and avoided, this is merely form, and aided upon a general demurrer; for the other party might traverse that traverse, and also the inducement to it.

Carth. 166.
2 Lutw.
1632.

Where to an indictment for not repairing a bridge the defendants plead, that A. B. ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves; the Attorney-General in this special case may take a traverse upon a traverse, and insist, that the defendants are bound to the repairs, and traverse the charge alleged against A. B., and an issue ought to be taken on such second traverse; and the Attorney-General may afterwards surmise, that the defendants are bound to repair it, and then the whole matter shall be tried by an indifferent jury.

2 Lev. 112:
Sid. 140.
Hawk. P.C.
c. 77. § 9.

So, though regularly a common person cannot take a traverse upon a traverse, yet the king by his prerogative may, upon a title disclosed in the traverse of the party, desert his own title, and take a traverse to such matter disclosed, though this be a traverse upon a traverse.

Vaugh. 62.
64. Mod.
280.
Standf. 64.
for this title Pre-
rogative.

In debt on an obligation conditioned to appear on a bill of Middlesex, returnable *die Sabbati prox. post quinden. Pasch.*, the defendant pleads, that he was arrested on a bill returnable *die Veneris*, and pleads the statute of 23 H. 6. c. 9. and that the bond was given for ease and favour. The plaintiff replies, that he was taken on a bill returnable *die Sabbati*, and not *die Veneris*. The defendant rejoins, that he was taken by virtue of a bill returnable *die Veneris, absque hoc*, that he was taken by virtue of a bill returnable *die Sabbati*, on which the plaintiff demurred: and it was argued, that the rejoinder was ill, and a traverse upon a traverse; for when the plaintiff replied, that he was taken by a bill returnable *die Sabbati & non die Veneris*, the *& non die Veneris* was a traverse, whereon the defendant might have joined, and taken issue. On the other side it was argued, that the *& non* was not any traverse, at least not a formal traverse, or such as the books mention, that a traverse cannot be taken on a traverse; and to have joined issue on the *& non die Veneris* would have made an immaterial issue; for it matters not whether he were taken by virtue of a bill returnable *die Veneris*, or not; for if he were not arrested on a bill returnable

Lev. 192.
Saund. 20,
21.
2 Keb. 94.
105. S. C.
Bennet v.
Pilkins.

dispute between the parties. But this judgment was reversed in the Exchequer-chamber. For the first traverse was of the right of all the king's subjects to fish in an arm of the sea, stated by the defendants; but this was clearly a bad and an immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken, that if at the trial it had been proved, that it was the separate right of others, and not of the plaintiff, the issue must have been found for the plaintiff, not only without his being obliged to prove either possession or right, but where in fact he had neither possession nor right. An immaterial traverse may be passed over, and the matter of the inducement traversed; which had been properly done by the defendant in this case.

In prohibition, for that the defendants had petitioned the court for a common council, complaining of an undue election of the plaintiff as a common council man, which court had no jurisdiction therein, the jurisdiction belonging to the court of mayor and aldermen, the defendant pleaded, that the common council have no jurisdiction, *absque hoc*, that the jurisdiction is in the court of mayor and aldermen: the plaintiff replied, that the common council have it not, and concluded to the country. The defendants demurred, and shewed for cause, that the replication is a departure, and that the plaintiff ought to have taken issue on the traverse. But *per curiam*—The traverse is immaterial; for what is the ground of sending a prohibition? Not because the court of aldermen have a right, but because the common council have none; and therefore the traverse which would avoid trying the right of the common council, and bring that of the court of aldermen in question, is immaterial. And where the first traverse is immaterial, that is, where it will not put the proper point in issue, there may be a traverse upon that traverse.

In *quare impedit* by the king, for the next turn of a living void promotion, the defendant pleaded, that the crown presented one, who is since dead, and that he himself is parson imparsoned, and concluded with a traverse, that the church is still vacant by the promotion. This plea is a full confession and avoidance, without the traverse; which for that reason is immaterial, and therefore may be passed over.

In *quare impedit*, the plaintiffs entitled themselves to the advowson in question, as executors and devisees in trust under the will of Caleb Lomax, whom the declaration stated to have been seised in fee of the advowson, and to have presented on a former avoidance. The defendant in one of his pleas stated a title to the advowson in one Ellis, who presented in 1680; that Ellis conveyed it to Killigrew; that Killigrew devised it to his wife Lucy for her life; and that the reversion on the death of Killigrew descended to his three daughters in coparcenary. It then stated an avoidance during the life of Lucy the widow, and a presentation by Lomax the father of the testator, usurping on Lucy. It then stated, that the living again became vacant after the death of Lucy, by the resignation of the then incumbent Romney, and that the crown by usurpation on the right of the eldest coparcener presented again

King v.
Bolton,
1 Str. 117.
1 Br. P. C.
98. S. C.

Rex v.
Archbishop
of Armagh,
2 Str. 837.

Thrale v.
Bishop of
London,
1 H. Bl.
376.

the same clerk. It then stated an avoidance by the death of that presentee, and another presentation on that avoidance by *Lomax*, usurping on the right of the second coparcener. A title was then deduced at considerable length to the defendant, from the second and third coparcener, concluding with a claim to present on the existing vacancy, in the third turn. The replication to this plea stated a purchase by *Lomax* of the right of *Lucy* the widow, and a presentation to the advowson made by him during the life of *Lucy*, on an avoidance then happening. It then set forth a fine, levied by the three coparceners of the advowson, and a conveyance to *Lomax* under that fine; and concluded, that the resignation of *Romney* was fraudulent and without notice, and traversed, that upon that resignation it belonged to the eldest coparcener to present. In the rejoinder to this replication the defendant traversed the fine; upon which the plaintiff demurred specially, alleging as a defect in the rejoinder, that there was a traverse upon a traverse. But the court held, that the traverse in the replication was an immaterial traverse, and being such, the defendants were at liberty to pass it by; and therefore the rejoinder was good.]

5. To what Point the Traverse shall be taken; and therein, what Matters are traversable, and of the Manner of taking thereof.

2 Sand. 5. Herein the general rule is, That the traverse must be taken to
28. 6 Co. some material point alleged by the adverse party, which, if found
24. a. Roll. for him who takes it, absolutely destroys the adverse party's right,
Rep. 235. by shewing, that he hath none in manner and form as he hath
Carter, 217. alleged; and being to the (a) principal point alleged, puts an end
Lane, 18. to the matter.
(a) A traverse should
be always of such part, as, if found for the defendant, destroys the plaintiff's action. Comb. 321.

Poph. 161. If in covenant on a charter-party the plaintiff declares, that
Latch. 12. upon the ship's going with the next fair wind, &c. he the defend-
Noy, 75. ant should pay so much; the defendant by way of traverse says,
Bendl. 116. that the ship did not go with the first fair wind; this is an ill
Palm. 397. traverse, not being to the principal point, or gist of the action,
S. C. Con- which is the going of the ship, and not the nature of the wind.
stable v. A traverse must be taken to some matter alleged; and there-
Clobery. fore, where in false imprisonment the defendant justified by pro-
Lutw. 935. cess out of an inferior court, and the plaintiff replied, that the
2560. cause of action accrued out of the jurisdiction, *absque hoc*, that it
accrued within the jurisdiction, the traverse is ill, being of a mat-
ter not alleged before; but it was held, that this being only an
immaterial traverse, no advantage could be taken of it on a gen-
eral demurrer, and that then the residue of the replication should
stand good.

Sand. 21.
Vaugh. 3.
Show. Parl.
Ca. 220-1.

If any thing in the count be traversed, it must be such part as, if true, is consistent with the defendant's title; and if false, or found against the plaintiff, doth absolutely destroy his title; nay, if the traverse leaves no title in the plaintiff, then it is good, whatever comes of the defendant's.

In a *scire facias* against *A.* and his wife, reciting, that the wife *dum sola fuit* recovered in the King's Bench, in an action upon the case, 26 l. 13 s. 4 d. for damages and costs, and had execution of these damages, and is thereof possessed; and whereas afterwards the said judgment was removed by writ of error into the Exchequer-chamber, and there reversed, and restitution awarded; and afterwards she took the said *A.* to husband: The plaintiff thereupon brought this writ to have restitution. The defendant pleaded, that after the reversal had, and before the purchase of this writ, he paid to the plaintiff the said debt and costs of 26 l. 13 s. 4 d. *absque hoc*, that they are *possessionati* of the said money *prout*: And upon demurrer the plea and traverse were both held ill; and, 1st, Three judges held the plea ill, because it is grounded and affirmed against a record; for a payment being against matter of record cannot be a discharge, unless by a matter of record. 2dly, Admitting it a good plea, yet it is ill as pleaded; for he doth not rely upon it, but traverseth that which is not material, *viz. absque hoc*, that he is *possessionatus*, &c. which was idly alleged, and not material or traversable; and by this traverse he waives his pleading of the payment, which being (a) specially shewn for cause of demurrer, the demurrer is good: But *Berkley* held, that payment had been a good plea, if he had relied thereupon; because he avers, that thereby the party is satisfied; and that in divers cases matter in fact may be pleaded in discharge; as, in debt upon an escape, he may plead, that the plaintiff commanded him to let him out of execution, and such like, &c., but as to the traverse he conceived it ill; and therefore agreed with the other justices, that judgment should be given for the plaintiff.

In trespass and ejectment the defendant pleads, that the plaintiff disseised *J. S.* of the land, and then made a lease of it to him, and that afterwards the land descended to the plaintiff. The plaintiff replies, that he was seised of the lands, and traverseth the disseisin on *J. S.* And on demurrer, for that he ought to have traversed the descent, and not the disseisin, it was held by *Rolle*, C. J. that the traversing the disseisin makes an end of all, and was therefore well taken, being the most material matter, although the descent might likewise have been traversed.

Trespass upon the case was brought by bill in the King's Bench, that the defendant's father held of him such lands by knight's service, and died in his homage, his heir within age, and that he tendered unto him a convenient marriage, and shews what, &c., and demanded of him the value of the marriage, &c. The defendant *protestando* to the tenure, *pro placito* traversed the tender, &c., and hereupon the plaintiff demurred: And it was resolved that the plea was ill, for the tender is not traversable *.

* If the marriage tendered was not convenient or proper, how could the plaintiff be entitled to recover?

If the plaintiff in his replication sets forth a grant of copyhold lands such a day, and by such a seneschal; and the defendant by way of rejoinder maintains his bar, and traverses the grant to the defendant the said day, and by the said seneschal, the traverse is

Cro. Car.
328. *Vesey*
v. *Harris*
& *ux.*

(a) That an immaterial traverse is aided by 27 El. c. 5. unless it be specially demurred to. *Dyer*, 366. *Yelv.* 151. Co. Ent. Cro. Jac. 505. 2 Lutw. 221. *Style*, 344. *Wood* v. *Holland*.

Cro. Car. 502. *Arundel* v. *Sanders*. * Why was not the tender traversable if taken in the words of the declaration?

Yelv. 122-3. *Lanc* v. *Alexander*.

* He might ill; for the principal point is the grant, which may be at another court and day, and by another seneschal, and yet good *.

grant, in manner and form, &c.

Yelv. 122. If a feoffment by deed such a day be pleaded, there can be no traverse to the day, because the estate passes by livery, and not by the deed.

6 Co. 24, 25. A difference hath been taken between pleading a feoffment and Cro. Eliz. a grant of a particular estate; that in the first case, if the other 650. Moor, will entitle himself by an elder feoffment, he ought to traverse, 551. Hellyar's case. but not in the last case; because a man may come to a fee-simple by divers means, viz. by disseisin and tort, or by lawful means; 2 Vent. 212. and therefore, when one entitles himself to a particular estate S. C. cited, and held to be only by an elder grant, he shall not traverse the last grant, but shall form, and aided by the compel the other to shew by what title he claims it after the elder 27 Eliz. grant †.

c. 5. † The party having the elder grant may confess the other, and avoid its effects, by shewing his own; and if made by a different grantor, he should shew that before such other grantor had any thing in, &c. his grantor was seised, &c. and made such elder grant.

Marc. 21. A man pleaded a descent of a copyhold in fee; the defendant, to take away the descent, pleaded, that the ancestor did surrender to the use of another, *absque hoc*, that the copyholder died seised: And the opinion of the court was, that it was no good traverse; because he traversed that which needed not to be traversed; for being copyhold, and having pleaded a surrender of it, the party cannot have it again, if not by surrender, as in *Hellyar's case supra*; for as none can have a lease for years but by lawful conveyance, so none can have a copyhold estate if not by surrender.

Doct. pl. In trespass the defendant pleads, that *A.* was seised, and en- 365. feoffed *B.* who enfeoffed *C.* who enfeoffed *D.* whose estate the 6 Co. 24. defendant hath; in this case the plaintiff may traverse which of S. P. and that where the feoffments he pleases. there are several material things alleged, it is in the election of the party to traverse which he pleases.

Sid. 227. If in trespass or case the plaintiff declares that *J. S.* was seised Palm v. in fee, and made a lease to him, and the defendant pleads that Fildhces. *J. N.* was seised in fee, and leased to him, &c.; this seisin of *J. N.* shall be intended by disseisin, for he ought to have traversed the seisin of *J. S.* and said, that long before such a one was seised, &c.

Cro. Jac. In trespass the defendant pleads, that long before the trespass 681. one *James Stephens* was seised in fee, and 12 Eliz. enfeoffed *Thomas Norwood* to the use of *James Baker* and *Mary* his wife, and 2 Roll. the heirs of their bodies; and that they had issue *Henry Baker*, Rep. 362. and died seised, which descended unto him, and from him to his S. C. three daughters, and justifies by their lease, and gives colour to Baker v. the plaintiff: the plaintiff replies, that long time before the tresp- Blackman. pas Sir *Thomas Tyrrel* was seised in fee, and gave it to *Edward Baker* and *Joan* his wife, and the heirs male of their bodies, and that they had issue the said *James Baker* and the plaintiff; and that *James* had issue *Henry*, and died, which *Henry* died without issue male;

male; wherefore he as heir male entered, and that the defendant committed the trespass, &c., and traverseth the seisin in fee alleged in *James Stephens*; whereupon the defendant demurs, and shews that he traverseth the seisin in fee of *James Stephens*, whereas he ought to have traversed the gift in tail, which is the principal matter of the bar; but the court held that it was in his election to traverse the one or the other.

Where by the (a) inducement or conveyance to the action the defendant is ousted of his (b) law, there, the defendant may as well traverse the conveyance as the gift of the action. *Dyer, 121. b. Leon. 252. S. P. (a) But,* where a disseisin is alleged by way of conveyance to the title or possession of the plaintiff, it need not be traversed. *Dyer, 635. b. pl. 34.* (b) Where the conveyance to the action is that which doth entitle the plaintiff to the action, it may well be traversed if the defendant cannot wage his law; otherwise, where he may wage his law. *Cro. Eliz. 169. 201. S. P.*

In *assumpsit*, supposing that such a day 4 *Jac.* upon an account betwixt them, the defendant was found in arrear in such a sum, and assumed to pay, &c., the defendant pleads that such a day 4 *Jac.* they accounted, and then he was found in arrear such a sum as the plaintiff supposed, and that the same day he made an obligation for the payment thereof, and traverseth that any other day after the obligation made they accounted together *prout*, &c.: and it was thereupon demurred; for that the account (which is the cause of the *assumpsit*) is not traversable, nor the time, for it is but an inducement and conveyance to the action: But the court held, that the account which was the ground of the promise was well traversable; wherefore it was adjudged for the defendant. *Cro. Jac. 234. Yelv. 171. Bulst. 16. S. C. Dalby v. Cook.*

It is said, that the consideration of a promise is never traversable, nor allowed to be traversed, but it is the promise itself which is traversable. But herein a (c) difference is taken between a consideration of a promise which is executed, and a consideration which is executory; that the one is not traversable, but the other is. *Cro. Eliz. 201. Roll. Rep. 43. 401. Carth. 82. (c) The difference between a promise upon a consideration executed and executory is, that in that executed you cannot traverse the consideration by itself, because it is passed and incorporated, and coupled with the promise. Hob. 106.*

In trover and conversion the conversion is traversable; for it is the substance of the action, and the tort supposed in him, and so may well be traversed; for if one finds goods, but doth not convert them, no action lieth. *Cro. Eliz. 97. per Coke; but for this vide tit. Trover and Conversion.*

[In debt for an annuity, it appeared upon oyer of the deed, that the defendant covenanted to pay it, (if the same were personally demanded by the plaintiff,) whereupon the defendant traversed the demand. The plaintiff demurred: and *per curiam*—The grant is substantive, and so is the covenant substantive, and the demand in this action is not traversable, whatever it might have been, if an action had been brought upon the covenant; but we think it would not be traversable in that case, as it is contained in a parenthesis in the deed.] *Hope v. Colman, 2 Wils. 221.*

In debt on an obligation of 100 *l.* dated 12 *Julii* 10 *Car. 1.* with condition for the payment of 58 *l.* at the end of six months; the defendant *Cro. Jac. 501. Nevison v. Whitley.*

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Trespass of assault, battery, and wounding in *London*; the defendant justifies in the county of *Norfolk*, by virtue of a warrant from the sheriff of *Norfolk*, upon a writ of *latitat, que est eadem transgressio*, &c., *absque hoc*, that he is guilty in *London, vel alibi extra comitatum Norf.* On demurrer one objection was, that he had justified and also traversed, which he ought not to have done: But the court held it well enough; for the justification being in another county, the county wherein the action is brought ought to be traversed; and the plaintiff may maintain the action and issue, if he will, or he may traverse the defendant's plea, at his election.

Cro. Jac.
372.
Hatem v.
Woodcock.
Cro. Eliz.
868. S. P.
adjudged.

If a man bring an action of trespass for breaking his close on a certain day, if the defendant plead a release of actions, he shall traverse all trespasses after; if a feoffment, he shall traverse all trespasses before; if a licence, all before and after.

Hob. 104.
Carter, 207.
Sid. 293-4.
Sand. 14.
Lev. 241.
307.

Mod. 68. That where the justification goes to a time and place not alleged by the plaintiff, there must be a traverse of both.

In trespass laid to be done 1 *May*, the defendant pleads a release made to him 1 *Junii*, and traverses, *absque hoc*, that he was guilty at any other time after the first of *June*; and this was held an ill traverse; for the day not being material in trespass, he ought to have traversed, *absque hoc*, that he was guilty before or after 1 *Junii*.

3 Bull. 209.
Roll. Rep.
406. S. C.
Amson v.
Walcot.

If in trespass for entering a house the defendant says, that it was the freehold of *J. S.* and justifies 27 *Eliz.*, a year before the trespass supposed, and traverses the time before 27 *Eliz.* but says nothing as to the time after; yet the traverse is good; for when he pleads his freehold, or the freehold of another, it shall be intended so to continue, unless the contrary be shewn, and therefore no need of traversing the time after.

Cro. Eliz.
87. Higham
v. Reynold.

Herein also this difference hath been agreed, that where a general action is brought, in which the time is not material, there, upon a traverse to the fact charged upon the defendant, he must add *absque hoc*, that he was guilty either before or after; but, where the thing traversed is not to the point of the action, (though the case may be so, that, if it happened before or after, the action might have lain,) the party need not add *absque hoc*, that he did it before or after, and this, whether the traverse comes in of the plaintiff's part or the defendant's.

Sid. 234.
Keb. 680.
822.

In case upon several promises, the statute of composition of two thirds was pleaded in bar; but the plaintiff shewed the contract to have been since the time of the statute, which the defendant did not traverse in his plea, as he ought to have done; and therefore judgment was given for the plaintiff; for if you vary from the time in the declaration, and make such variance material, you ought to traverse the time in the declaration.

7 Mod. 16.
Beverly
v. Pim.

Trespass and imprisonment laid the first of *May*, 17 *Car. 2.* The defendant justifies, as sheriff of *Coventry*, to arrest him for a breach of the peace made upon him in the execution of his office, for which he arrested him, and carried him before the mayor; and traversed

Lev. 216.
Law v.
King.

(a) If the traverse be taken more narrow than it need, being to the prejudice of the party, no joinal. 2 Lev. 81.—But, where the traverse contains more than is alleged in the breach, it is not good. 3 Lev. 167.

Ch. Eliz.
260. Wood
v. Butts.
If in ejectment the defendant pleads a surrender of a copyhold by the hands of J. S. then steward of the manor, and issue is joined, *absque hoc*, that he was steward; this is naught, for the traverse ought to be general, that he did not surrender; for if he were not steward, the surrender is void: so, of a surrender pleaded into the hands of the tenant of the manor.

3 Lev. 113.
Bridgwater
v. Bydenny.
In battery, the defendant pleads a judgment obtained by A. his father, and an execution thereupon, whereon the goods of J. S. were taken in execution; and that the plaintiff assaulted the bailiffs, and would have rescued the goods; whereupon in aid of the bailiffs, and by their command, the defendant *molliter manus imposit* upon the plaintiff to prevent his rescue of the goods. The plaintiff replied *De injuriâ suâ propriâ, absque hoc*, that the defendant by command of the bailiffs, and in aid of them, to prevent a rescue of the goods, &c. whereupon the defendant demurred generally: and upon argument it was resolved, 1st, That the replication in traversing the command of the bailiffs was not good, for he might of himself do that to prevent the rescue, which is a tort and breach of the peace. 2^{dly}, The defendant's plea is ill, for the action was brought as for a battery at D., and the defendant justifies at S. in the same county, whereas the bailiffs have authority through the whole county, and therefore the cause of justification in the same county not local; so that he should have conformed and justified in the same place, being the same county where the plaintiff declared; and if the place had been material, he ought to have traversed all other places within the same county; & *sic quâcumque via datâ* the plea was held ill.

Mercwood
v. Wood,
4 Term
Rep. 157.
[To an action of trespass in the common called A. the defendant pleaded that A. and B. commons lie open to each other, and then prescribes for a right in both commons. It was holden, that the plaintiff could not traverse part only of the prescriptive right claimed by the defendant, the prescription in A., but must traverse the *whole* prescription, for all prescriptions are entire; and when they are pleaded, the adverse party cannot deny a part only but must either demur or traverse the whole.

Griffith v.
Williams,
1 Will. 338.
To an action of trespass the defendant justified, under a prescriptive right to a duty, and also a prescriptive right to distrain for it. The plaintiff traversed the prescription for the duty, but not the prescriptive right to distrain; and upon demurrer for that cause, the replication was holden good.

Palmer v.
Ekins,
2 Str. 517.
To an action of covenant by an assignee for rent arrear, the defendant pleaded, that the lessor made a conveyance in fee before the lease, and traversed, that he was afterwards seised in fee. This traverse was adjudged to be bad for its generality, as it tied the plaintiff up to prove an estate in fee, when any other would do.]

In replevin the defendant makes conufance as bailiff to *J. S.*, plaintiff pleads, that he took them *de injuriâ suâ propriâ, absque hoc*, that he was bailiff to *J. S.* To which it was demurred: and after argument the traverse was held to be well taken; and a (a) difference observed between an action of trespass *quare clausum fregit*, and an action of trespass for taking cattle or replevin: in the first case, if the defendant justifies an entry into the close by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff shall not in his replication traverse the command; because it would admit the truth of the rest of the plea, *viz.* that the freehold was in *J. S.* and not in the plaintiff; which would be sufficient to bar his action, whether the defendant was empowered by *J. S.* to enter or not; for it is not material that the defendant has done a wrong to a stranger, if it be none to the plaintiff: but in the other two cases, if the defendant justifies taking the cattle as bailiff to *J. S.*, in whom he lays a title to take them, as for a distress, or other cause, there, it may be material to traverse the command or authority; for though *J. S.* had right to take the cattle, yet a stranger who had no authority from him, will be liable; so that both parts of the defendant's plea in this case must be true, and therefore an answer to any part is sufficient: so, in trespass for taking goods; *aliter*, in trespass *quare clausum fregit*.

In replevin the defendant made conufance as bailiff of *J. S.* for a rent-charge; the plaintiff in bar says, that he took the distress without the privy or command of *J. S.*, and that such a day after the distress *J. S.* came first to have notice, & *deadvocavit captiones prædictas*: the defendant demurred generally. *Et per cur.*—The bar is naught, for he should have traversed his being bailiff; and he was ruled to replead accordingly, and to mend his bar, paying costs, and go to trial upon issue, bailiff or not.

If on a presentment for not repairing a highway, it is alleged, that the defendant is chargeable *ratione tenure quarundam terrarum parcell. dictæ peciæ terre, &c. dictæ communi alta via regia inclus. & incrochiat.*; the traversing the *ratione tenure* is sufficient, without answering to the encroachment, being the principal point to be traversed.

A traverse must be taken to some matter alleged; and therefore where in false imprisonment the defendant justified by process out of an inferior court, and the plaintiff replied, that the cause of action accrued out of the jurisdiction, *absque hoc*, that it accrued within the jurisdiction; the traverse was adjudged ill, being of a matter not (b) alleged before; but it was held, that this being only an immaterial traverse, no advantage could be taken of it on a general demurrer, and that then the residue of the replication should stand good.

immaterially alleged. 2 Salk. 628. pl. 2. Ld. Raym. 349.—But whatever is necessarily understood, intended, and implied, is traversable, as much as if it were expressed. 2 Salk. 629. pl. 6.

In case against a sheriff for taking insufficient bail to the intent to deceive him of his debt; the (c) intention to deceive is not traversable.

is not traversable. Style, 383. Leon. 50. S. P. Nor cause of suspicion.

Salk. 107. pl. 1. Trevilian v. Pyne. (a) For this vide Cro. Eliz. 14. Roll. Rep. 46. 2 Leon. 215. Yelv. 148. Comb. 471.

3 Lev. 20. Dobson v. Douglas.

2 Sand. 160. Rex v. Stoughton.

Lutw. 935. 1560. (b) Mere matter of supposal is not traversable, no more is matter alleged out of due time, nor matter

Sid. 96. (c) That matter of intentment Bullst. 224.

Flora and Bleedings.

A tenement, which defendant was pleaded in bar; plaintiff
 saying that the same are pleadable at common law, and traversable
 and the tenements are parcel de antiquo dominio; and it was
 a traverse in law; because he should have traversed, that
 the tenement was ancient demesne, or, that these tenements were

It is true that in a covenant a person cannot take a traverse in any one of the allegations, but must help himself upon (b) evidence; and the traverse must be to the point of the action: as, in covenant to warrant or repair, the plaintiff says, that there were two covenants, the defendant cannot traverse two of them, *that they were covenants*, but must plead covenants performed *.

...the tenant may be specially traversed; which probably
...Carth. 82. (c) In trespass, that which
...Lev. 283. — How
...If there is not any rent in
...If rent is in arrear, he should move the
...If there is any other breach

In last judgment obtained 1 May, 14 Car. 2. before the mayor and bailiffs of Murren, at a court then held according to the custom in and that city, the defendant pleads, that the court then, according to the custom, &c. is held before the mayor, &c. so, that he recovered at the court held the said 1 May, before the mayor and bailiffs, according to the said custom. And then in argument, the traverse was held ill in traversing a matter of record, which is not to be tried *per pais*, and in (e) joining the matter in the custom, which is triable *per pais*, with the matter of record, but he ought to have pleaded *nul tiel record*, which would have made an end of it, or that there was not any such custom, and it is tried in *per pais*: it was likewise held, that making the traverse in the said made the traverse ill.

[illegible]

Defendant pleaded the obligation to the sheriff, conditioned to appear before the court, and that he was taken and imprisoned *virtute brevis* *quindena Martini*, and that the obligation was taken for ease and colour. The plaintiff replied, *Auter brief return. octabis Martini*, and that he was taken and imprisoned upon that, *absque hoc*, and he was in prison *virtute brevis return. quindena Martini*. The court decided generally. Saunders argued, That the traverse was of fact and immaterial; for it matters not whether the writ was returnable *quindena Martini*, or not, but he should have controverted the *perpetuas et verificare*, and left the defendant to traverse the writ returnable *octabis Martini*; and upon this traverse the writ can be taken; for it is not material whether any writ is returnable *quindena Martini*, or not; the only material thing to maintain the goodness of the obligation is this, that the writ is returnable *octabis Martini*. *Sed per curiam*—If the traverse be immaterial, the defendant waiving that should have traversed the writ's being returnable *octabis Martini*; but the

the traverse is well enough in this case, it being taken to the most material thing pleaded in bar to avoid the obligation. They therefore gave judgment for the plaintiff.

In debt on a bond made by a prisoner to an under-sheriff, conditioned to pay 60*l.*, the defendant pleads the statute 23 *H. 6. c. 9.* of sheriffs' bonds, and that this bond was made for ease and favour, and so void by the statute. The plaintiff replies, that it was for the better security of money due to himself, and traverseth the ease and favour: and herein it was adjudged for the defendant; for though the traverse be good, yet the inducement being ill, in not saying that it was *pro bono & vero debito*, the plaintiff cannot recover.

If in an action on the case for stopping three windows, the defendant justifies the stopping of two of them, and traverses the stopping of three windows; the traverse is ill, for the inducement goes only to part, *viz.* the stopping of two windows; and yet the traverse goes to all three, which ought not to be; for if the defendant had stopped only two, yet in case the plaintiff shall recover damages (a) *pro tanto*; and therefore the defendant ought to have pleaded, as to the stopping of one window, not guilty, and as to the other two to have justified, and then every part of the injury alleged by the plaintiff had been put in issue.

tion to his loss, every part is to be put in issue.

In assault the defendant justified, for that he, being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, he *moderate castigavit* the plaintiff, *prout ei bene licuit*. The plaintiff maintains his declaration; *absque hoc, quod moderate castigavit*: After verdict for the plaintiff, it was moved in arrest, that the issue was not well joined; for *non moderate castigavit* doth not necessarily imply that he did beat him at all, and so no direct traverse to the defendant's justification, which *immoderate castigavit* would have been; but *de injuriâ suâ propriâ absque aliquâ tali causâ* would have been the most formal replication; but it was held to be well enough, being after verdict *.

the whole of his plea.

In debt upon a bond entered into, *Eliz. Perkins*, who was the plaintiff's wife, he, as her administrator, brought the action; the defendant pleads, that he delivered the bond to one *Eliz. Perkins, quæ obiit sola & innupta, absque hoc*, that he delivered it to *Eliz. Perkins*, the plaintiff's wife. To which it was demurred specially; for if it be taken, that there are two of the name, the defendant should have pleaded *non est factum* †, for it amounts to no more; or at least he ought to have induced his plea, that there were two *Eliz. Perkins's*; but this traverse is designed to bring the marriage in question, which is not to be tried; wherefore the court gave judgment for the plaintiff.

possession of a person not entitled to recover upon it?—Might not defendant have pleaded generally, admitting the bond to be his, but that it was not given to the *E. P.* mentioned in the declaration, but to another *E. P.*? Indeed now, by virtue of the Stat. 4 Ann. c. 16. § 4. he might plead *non est factum*, and a special plea.

Comb. 245.
Foden v.
Haince.

Yelv. 225.
Bulst. 116.
Sand. 268.
S. C. cited,
and like
point ad-
judged.
(a) That in
an action for
damages,
and in which
the plaintiff
is to recover
in propor-
2 Sand. 266.

Vent. 70.
Aubrey vs
James.
Sid. 444.
2 Keb. 623.
S. C.
* But the
general re-
plication
would have
been better,
as it would
have obliged
the defend-
ant to prove

Vent. 77.
Gifford v.
Perkins.
Sid. 450.
2 Keb. 633.
S. C. ad-
judged.

† How could
non est factum
be an answer
to the bond,
when pro-
duced in
court,

though in

Carth. 125.
Beake v.
Kent,
4 Brod. & J.
2 L.

In *affirmation* against an *exception*, the pleads several judgments, and that she had not since *averred*. The plaintiff replies, that *judgment* *procedum* *est* *verum* kept on foot by fraud. The defendant *rejoins* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus*. And on demurrer it was objected, that the defendant had not *averred* severally to every judgment, and so a *demurrer* *est* *ad* *verum* *procedum* *est* *verum* *sed* *est* *fraus* in one general traverse. And it was said that this general form of pleading was *not* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus* in the plaintiff; for if issue had been *traversed* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* the judgments had been kept on foot by fraud, and so the *demurrer* *est* *ad* *verum* *procedum* *est* *verum* *sed* *est* *fraus* if there alone had been kept, and so the *demurrer* *est* *ad* *verum* *procedum* *est* *verum* *sed* *est* *fraus* for the plaintiff; because the *demurrer* *est* *ad* *verum* *procedum* *est* *verum* *sed* *est* *fraus* for that reason the whole is

the lessor, declaring that he had *demised* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* the lessor, and assigns for *breach* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* him, and oust him of the *possession* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* to distrain for rent *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus*; to which the *defendant* *rejoins* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus*; because, if he had *demised* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus*, he had a good cause of *action* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus*, *et* *que* *hoc*, that he *demised* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus*. But *per* *curiam*.—The *plaintiff* *rejoins* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus* if the plaintiff will join issue *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* the ouster of any part, the *defendant* *rejoins* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus* took a diversity between *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* and you must plead *non* *debet* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus*, as this is.

Of the Sufficiency and Certainty of Pleadings.

Of the Sufficiency and Certainty of Pleadings.

It is a general rule, that every man must *plead* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* and proper for him, according to his *estate* *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* and interest.

And where a bond or other specialty, the *defendant* *rejoins* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus* is otherwise in debt founded *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* upon a prescription, or upon a deed, *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus*.

And where a bond or single *defendant* *rejoins* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus* brought on a bond or single *defendant* *rejoins* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus* without an acquittance *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* returned for him, will not entitle him *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* is in force till it is dissolved *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus*.

And where the *defendant* *rejoins* *per* *curiam* *non* *est* *verum* *sed* *est* *fraus* of an (a) annuity granted for life, *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* for the action is merely founded upon *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* and no action can be maintained; and *est* *verum* *procedum* *est* *verum* *sed* *est* *fraus* though.

though by the death of the grantee the nature of the action is changed, the annuity being determined, yet this proves not but that the action is founded upon the deed. *of a rent-charge, nil debet is a good plea,*
 because the plaintiff hath other remedy to levy it, viz. by distress. Otherwise, upon the grant of a bare annuity, for there being no remedy by distress, the grant must be avoided by matter of as high a nature, viz. by acquittance. Hard. 33.

Where the action is founded upon a penal statute, it hath been adjudged that not guilty is a good plea. Cro. Eliz. 257. Goult. 39.

Moy, 56. 2 Inst. 651. Moor, 924. pl. 1293. [Certain it is, that the plea of not guilty to debt on a penal statute is not such a nullity, as will warrant the plaintiff in signing judgment. 1 Term Rep. 462.]

So, in debt upon the 2 & 3 E. 6. c. 13. for not setting forth tithes, it hath been held, that not guilty or *nil debet* are good pleas. 2 Inst. 651. and Hob. 218. S. P. adjudged.

In debt for the arrears of a rent-charge by will devised to the plaintiff's wife for life, against the administrator of the occupier of the land, it hath been adjudged, that (a) *nil detinet* is a good plea; for a will is no deed, nor wants any delivery; and in this case it was said, that the action was not so much grounded upon the will itself as upon the statute, by which men are enabled by will to dispose of their lands and rents issuing thereout. *nil detinet.* 2 Mod. 266.

In debt for rent, if it be by deed, the proper plea is *non est factum*; but if it be without deed, the defendant may plead *non dimisit*, nothing in arrear, or that he never entered: also, by the better opinion of the (b) books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, since the debt accrued by subsequent enjoyment. Hard. 332. (b) For which *vide* Heil. 54. Dyer, 14. 4 Leon. 18. Vent. 41. Mod. 3. Sid. 423. Palm. 117.

Talk. 209. pl. 7. Ld. Raym. 170. [So, in debt for rent reserved by deed, *riens in arrears* is a good plea. Cowp. 588.]

It is said, that not guilty is a good plea to any misfeasance whatsoever (c), though formerly in actions for nonfeasance not guilty was not pleaded, but they pleaded specially, and traversed any special point alleged in the declaration; and not guilty to such actions was not pleaded till after the time of the case of (d) *Talling v. Fay*. (c) 3 Mod. 324. per cur. Skin. (d) Moor, 355. where the case was; the plaintiff declared on

custom that the parson should find a bull and a boar, to which the defendant, *protestando* that there was no such custom, pleaded not guilty; on demurrer it was held, that not guilty was no plea to an action for a nonfeasance, being two negatives, which cannot make an issue; but the court held, that to an action for a misfeasance it was otherwise. Cro. Eliz. 569. S. C. & *vide* Palm. 393. 2 Roll. Rep. 368.

In *assumpsit*, the defendant pleaded not guilty, issue thereon, and verdict that he was guilty, and that he assumed in manner and form as declared; and it was moved in arrest, &c. that not guilty was no issue in this case, and the finding farther that he assumed is void, not being in issue; but *Wyndham* and *Tawisden* being only in court held it cured at least by the verdict, and *Wyndham* held that not guilty (e) was a good plea, and issue in *assumpsit*, it being a trespass on the case. Lev. 142. Eliington v. Doshant. (e) But in the case of *Marshall v. Gibbs* in B. R. Mich. 9 G. 2. it was ruled to be ill on demurrer, though good after verdict, according to this case. 2 Stra. 1022. S. C.

2 Brownl.
273. Hare
v. Savile,
adjudged.
(a) But this
in 1 Brownl.
91. per cur.
was held a
bad plea, for
damages.

In an action of covenant for non-payment of rent, the defendant cannot plead levied by distress, for that is a confession it was not paid at the day, for it could not be distrained for till after the day. But it was agreed that the covenant alters not the nature of the rent (a), but that nothing behind, or payment at the day is a good plea.

Trin.

5 G. 2.
in B. R.

Nil debet was pleaded to an action brought on a covenant for forfeiture, and on demurrer the plea was held ill.

Meard v. Phillips. 2 Str. 906. S. C.

Keb. 305.

Noy, 46.

Hob. 187.

In trover there is no plea, but a release or not guilty, for every plea in justification is but tantamount.

[The defendant may plead the statute of Limitations, Lutw. 99.] & vide title Trover and Conversion.

2 Salk. 516.

pl. 7. Ld.

Raym. 217.

Brown v.

Cornish.

In *assumpsit* and *quantum meruit* for 20 l. the defendant pleaded *onerari non debet*, because he paid the money at the time, &c. *hoc paratus est verificare*; and it was held by Holt, that *onerari non debet* was no plea here, because the defendant allows the promise to be a good promise, but avoids it by a matter of discharge *ex parte facto*, and therefore in this case he should have pleaded *actionem non*: but, where the matter of the plea shews there never was a good cause of action, *onerari non debet* may be proper; as, in debt on a bond, the defendant may plead *onerari non debet quia riens perdiscent*.

Roll. Abr.

123. 122.

Cro. Car.

110.

Holt. 114.

In account, the defendant may plead, that he was never receiver, agent, factor, or bailiff to the plaintiff; or, if charged as bailiff, he may plead, that he was only hired as his servant to drive his plough, or, he may plead a release, or a submission to arbitration.

Roll. Abr.

123. & vide

Yelv. 208.

So, he may plead in bar, that after the receipt of the sum of which the account is demanded, by the mediation of their friends it was agreed between them, that the defendant should make an obligation of 100 l. for the 100 l. received, and the profit thence to arise; which obligation he did make and deliver according to the plaintiff; for the acceptance of the obligation destroys the duty, and the sum in demand is thereby as strongly released as by a release of all actions.

Dyer, 22.

145.

6 Co. 7.

Ferrer's

case.

4 Leon. 91.

Style, 353.

410.

Cro. Eliz.

830.

Tresham

v. Ford,

adjudged.

But it is no good plea in bar to an action of account, that the defendant hath made payment of the money which he received, or that he hath made satisfaction, or that the defendant hath given him a receipt or an acquittance for the sum received; for these pleas, being matters that shew he was once accountable, are only to be made use of before the auditors.

If in account upon receipt by the hands of J. S. the defendant plead, never his receiver, &c., and the jury find that he was his receiver of such a sum, &c., and the defendant plead before the auditors that he was possessed of several obligations, in which the son of the plaintiff was bound to the defendant, and that J. S. paid him this money in satisfaction of those bonds, and that thereupon he delivered to him the said bonds to the use of the plaintiff, which

which he after accepted; this is no good plea, for it is no more than *not his receiver*, which is found and adjudged against him.

In an assise, the general issue is *nul tort, nul disseisin*; and therefore in an assise of an office it is no plea to say, that there is no such office, for that amounts to no more than saying, that he did not disseise him.

Noy, 223.
& vide tit. Assise.

In an attaint, the petit jury can plead no plea, but such as may excuse them of the false oath.

Kellw. 130.

In an information in nature of a *quo warranto* against a person, to know by what authority he exercised the office of portreve of a borough, *non usurpavit* is no plea, which appears from the nature of the charge, which is for him to shew by what warrant or authority, &c., to which that plea is no answer.

10 Mod.
212. 299.
The Queen
v. Blagden.

In debt by baron and feme the defendant pleaded (a) *ne unques accouple in loyal matrimony*, and on demurrer it was held an ill plea; because it puts it upon trial by certificate, which admits a marriage, but not *secundum leges ecclesie*, and therefore he should have pleaded no marriage in fact, which must have been tried *per pais*.

Show. 50.
Allen & m.
v. Grey.
(a) That
this is no
plea but in
dower or
appeal, vide tit. Bastardy.

In waste the general issue is *nul waste*. So, reparation of waste before the writ brought is a good plea in waste, as is a special non-tenture.

2 Inst. 322.
306.
Noy, 93.

3 Leon. 203. & vide title Waste.

In an action of waste for cutting down 300 oaks, the defendant, as to 200, pleaded that the houses let to him were ruinous, &c. and he cut them down, and keeps them to employ about reparation *tempore opportuno*; and on demurrer this plea was held ill.

Cro. Elis.
593.
Gorges v.
Stanfield.

Every defendant may plead in a *quare impedit* the general issue, which is *ne disturba pas*; because the plea doth but defend the wrong wherewith he stands charged, and leaves the plaintiff's title not only uncontroverted, but in effect confessed; and the plaintiff may, upon that plea, presently pray a writ to the bishop, or (at his choice) maintain the disturbance for damages.

Hob. 162.
Vaugh. 58.
cited.

At common law plenarty before the writ of *quare impedit* brought was a good plea: *secus*, of plenarty pending the writ: but, by the statute *West. 2. (13 Ed. 1. st. 1.) c. 5.* plenarty is no plea in a *quare impedit* or *darrein presentment*, unless it be by the space of six months before the writ brought: also, plenarty by six months is no bar against the king, according to the rule *nullum tempus*, &c.

2 Inst. 360.
vide title
Quare Im-
pedit.

In a *quare impedit*, where the incumbent pleads the presentment of a stranger, there, he ought to shew that the stranger had a title, and that he was seised of the advowson, &c., or that he was seised of a manor, &c., to which, &c. But, where he pleads, that he was in for six months by the presentment of the plaintiff himself, or by collation, by lapse, by the ordinary, there, he need not make any title.

Noy, 30.
Lifter v.
Cramel.

2. That the Plea must be good in Substance; and therein, of Matter of Inducement, and that which is the Gift of the Defence.

(a) Note :
That what
is substance
and what
not, must
be determin-
ed in every
action ac-
cording to
its nature.
(b) A ver-
dict cures

As the plaintiff's action must have all essentials necessary to maintain it, so the defendant's bar must be (a) substantially good, that is, the essence or gift of the plea must be such as, if found for the defendant, the court, according to the rules of law, must dismiss, or give judgment for him. But, if the gift of the bar be naught, it cannot be cured even by (b) a verdict found for him. If indeed it be bad only in form, a verdict will cure it; and if the gift be traversed, all collateral circumstances will be intended after a verdict.

not only such defects as may be called artificial defects, and come within the purview of the several statutes of Jeofail, but natural defects, or the omissions of the parties in their allegations, which must be presumed to have been given in evidence to the jury, otherwise they could not have found a verdict for the party. *Vide* title Amendment and Jeofail, that these statutes do not help substance. 2 Salk. 521. pl. 25.

Cro. Eliz.
268. Pen-
delbury v.
Elmott.

(c) That the
plea ought to
be according
to the de-
mand.
Hob. 327.
3 Lev. 375.

The defendant's plea must fully (c) answer the count or declaration; as, where in assault, battery, and wounding, the defendant pleaded that he was constable of *D.*, and for such a misdemeanor of the plaintiff he laid his hands on him, and carried him to the stocks, *quæ est eadem transgressio*; on demurrer it was adjudged for the plaintiff, because the defendant had not either justified or pleaded not guilty as to the wounding. But, if one pleads that the hurt which the plaintiff had was of his own assault, this is a good answer to all.

Cro. Eliz.
812. Whit-
nel v. Cook.

In replevin the defendant as bailiff to *P.*, who was seised of the third part of the place, &c., justifies for damage-feasant; the plaintiff saith that a stranger was seised of the other two parts, and by his licence he put in his cattle; the defendant saith *de injuriâ suâ propriâ absque tali causâ*, &c., the plaintiff demurs; and it was adjudged no plea, but he ought to answer to the special matter in the bar.

Lev. 16.
Thompson
v. Noel.

So, where in covenant the plaintiff declared, that he, the plaintiff, had covenanted with the defendant to go with a ship to *D.* in *Ireland*, and there to take in 280 men from the defendant, and to carry them to *Jamaica*; and the defendant covenanted to have the 280 men there ready, and to pay for the carriage of them 5*l.* a man, and said, that the defendant had not the 280 men ready, but that he had 180, and those he took and carried, and the defendant had not paid for them; the defendant pleaded, that he had the 280 men ready, and tendered them to the plaintiff, and that he would not receive them, but said nothing to the carrying of 180 men, nor to the non-payment for them; as this was not a plea to the whole, but to the carrying only, judgment was given for the plaintiff on a demurrer.

11 Co. 6. b.
2 Leon. 174.
Godb. 55.

If as to part the defendant joins issue, but says nothing to the rest, and this issue is found for the plaintiff, he shall have

judgment. But (a), if the matter is pleaded to the whole, though in fact but an answer to part, this is a bad plea, and not helped by the statute. Roll. Rep. 161. Cro. Jac. 353. Hob. 187. Goulf. 109. Bolf. 25. Carter, 51. 3 Lev. 39. (a) Hard. 331. — If many words contain one thing in signification, if he answers to them in substance, it is good. Cro. Eliz. 256.

In an action of trespass on the case brought by a commoner against a stranger for putting his cattle in the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleads a licence from the lord to put his cattle there, but does not aver there is sufficient common left for the commoners, this is no good plea; for though it may be objected the plaintiff may reply thereto; yet, being the very gift of the action, the defendant should have pleaded thereto. 2 Mod. 6. Smith v. Feverell. 1 Freeman, 190. S. C.

In debt upon an obligation conditional, the defendant cannot plead in bar matters in discharge of the obligation, but he must plead it in discharge of the sum contained in the condition of the obligation; for it is not a debt simply by the obligation, but the performance or breach of the condition makes it a debt; for the obligation is guided by the condition, so that if the condition be not discharged, the obligation remains in force. Yelv. 192. Cro. Jac. 254. Neal v. Sheffield.

In debt upon a bond, it is no plea, that the plaintiff accepted a new bond, in satisfaction of the old, for that is no satisfaction actual and present, as it ought to be. Hob. 68. Lovelace v. Cockatt.

In debt upon an obligation of 10*l.*, recited to be for rent, entry and suspension, is no plea; because it only answers a recital in the condition, which is not material, and not the condition itself. Hob. 130. St. John v. Digges.

The condition of an obligation was, that if *A.* pay 20*l.* at Michaelmas next, and 20*l.* at Easter after, so 20*l.* at every of the said feasts so long as *A.* shall live, or until *B.* shall be preferred to a benefice of 40*l.* per ann., that then, &c. In an action of debt upon this obligation, the defendant pleaded that *B.* was preferred, &c., before Michaelmas next; and held no good plea on demurrer; for, take it which way you will, he ought to pay the 20*l.* at the said two feasts that are expressly set down, for they are absolute. Noy, 64. Countess of Warwick v. the Bishop of Litchfield.

In debt upon an obligation the condition was, if such lands be proved to be parcel of the manor of *D.*, then the plaintiff may enjoy them without interruption of the defendant, that then, &c., the defendant pleads that they were not proved to be parcel of the manor, and it was thereupon demurred; and it was insisted that he ought to have pleaded, that they were not parcel of the manor, so as proof thereof might have been in that action; and of that opinion was the whole court. Cro. Jac. 232. Elve v. Sabe, adjudged.

In an action on the case against a common bargeman, for goods delivered to him to carry to such a place, &c., if he pleads, that he was discharged of keeping, without saying of carrying them, it is not good. Hob. 18.

In debt upon a bond conditioned to perform covenants, one of which was for payment of money upon making assurances, the defendant pleaded, he paid the money such a day, but did not mention when the assurance was made, that it might appear to the 2 Mod. 33. Durk v. Vincent.

court the money was immediately paid pursuant to the condition; and for that reason the court were all of opinion the plea was not good.

2 Vent. 156.
Brown v.
Rands.

In debt upon an obligation, conditioned to permit the obligor's wife (whom he intended to marry) to dispose of his personal estate, the defendant the obligor pleaded *quod conditio ejusdem scripti nunquam infracta fuit per ipsum ad aliquod tempus hucusque; Et hoc paratus est verificare*; And on demurrer the court held the plea naught, and that for saving the bond, it was necessary to shew he had performed the condition.

2 Mod. 176.
Harriman's
case.

But, where in covenant the breach assigned was, that the defendant did not repair, and he pleaded generally *quod reparavit, Et de hoc ponit se super patriam*; this was held good after a verdict.

March, 77.

If, in a *quantum meruit* for medicines, the defendant pleads, that he had paid to the plaintiff *tot Et tantas denariorum summas*, as the said medicines were worth, without shewing what sum in certain he hath paid, this is no good plea*.

* He should
have pleaded
non assumpsit.
March, 100.

If in *assumpsit* the plaintiff declares, that the defendant did assume and promise to pay the plaintiff so much money, and also to carry away certain wood before such a day; the defendant, as to the money cannot plead that he paid it; and as to the carriage of the wood *non assumpsit*; for the promise being entire cannot be apportioned.

2 Mod. 43.
Mod. 205.
S. C.
Milward v.
Ingram.

[But an account without payment or release is surely no bar in this case.

If the plaintiff declares upon an *indebitatus assumpsit*, and upon a *quantum meruit*, and the defendant pleads, that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff in 30 *l.*, and thereupon in consideration that the defendant promised to pay the said 30 *l.*, the plaintiff promised likewise to release and acquit the defendant of all demands; this is a good plea, for by the account the first contract is merged.

Mayor, &c. of Scarbro' v. Butler, 3 Lev. 237. And an *in simul computasset* with payment amounts to the general issue. Com. Dig. tit. Pleader, (2 G. 2).]

Raym. 449.
2 Jon. 158.
Case v.
Barber.

If the plaintiff declares upon an *indebitatus assumpsit* for 100 *l.* and upon an *in simul computasset* the same day for another 100 *l.* and the defendant pleads, that the said several sums of 100 *l.* are for one and the same cause of action, and for one sum of 100 *l.* only, and not for several sums; and that after the time of the said several promises made, the defendant, by order of the plaintiff, paid to one B. 30 *l.* in part of payment and satisfaction of the said money in the declaration mentioned, and in full payment and satisfaction of the residue of the said money, did become bound to the plaintiff in a bond of 120 *l.* conditioned for the payment of 65 *l.* to the plaintiff at a certain day in the condition specified, which 30 *l.* and bond the plaintiff accepted, &c.; this is a good plea; for though it is no plea to say the several *narr.* are for one sum only, and so to go no further, yet, when the defendant pleads over, that the very sum demanded is satisfied, this is a good plea; and if the several 100 *l.* were distinct sums, the plaintiff might have

have replied so, and taken issue thereupon: but, when he admits there was but 100*l.* due, and that satisfied, the plea is good.

In trespass for taking several goods, the defendant justified for several amerciaments assessed in a court-baron; but, because he did not shew an affectment by the assessors, judgment was given for the plaintiff.

3 Lev. 19.
Coniers v.
Frank.
[So, Ste-
2 Str. 847.]

In trespass for pulling down a gate, treading grass, &c., the defendant as to pulling down the gate justified, that time out of mind he had a passage *per & trans* the yard, and that a gate was erected upon the passage, so that he could not pass with his beasts, wherefore he broke and pulled down the gate, &c. And on demurrer to this plea, it was objected, that the defendant could not justify the pulling down and breaking of the gate, not having shewn that it was locked or nailed, so that he could not pass. *Sed per curiam*—Having pleaded that the gate was put there, so that he could not use the passage, it shall be intended that it was locked or nailed, or the way thereby straitened that he could not pass, and the plea therefore good.

3 Lev. 92.
Sprigg v.
Neal.

In debt upon an obligation the defendant pleads, that he delivered it as an escrow; & *hoc paratus est verificare*; this held a vicious plea, for he ought to shew to whom he delivered it; and also he ought to conclude his plea (a), *Et issint nient son fait*.

Vent. 9.

(a) *Vide*
1 Vent. 210.
Cro. Jac.

If in an action for the following words, *Thou art a bankrupt*, the defendant pleads, that such a day and year the plaintiff became a bankrupt, and so justifies, but does not allege that he continued a bankrupt; this is no good justification, for it shall not be presumed that he continued so.

371.
Upsher
v. Betts.

If in an action for these words, *She is a thief to you and to me, and hath stolen 20*l.* from me, and 40*l.* from you*, the defendant pleads, the plaintiff is a thief, and stole two hens from the defendant; this is no good plea; for it does not answer the particular charge in the declaration, and the last words are as material to be answered as the first.

Cro. Jac.
676.
2 Roll.
Rep. 414.
Hilden v.
Mercer.

If the plaintiff declares, that whereas she was a woman of good fame and reputation, &c., the defendant said of her, *She is a common whore*, &c. *per quod*, &c. and the defendant pleads, that at the time when the words were spoken the plaintiff was not of an honest reputation, as in the declaration is alleged; this is no good plea.

Style, 113.
Starchy's
case, ad-
judged upon
a demurrer
to the plea.

If the defendant pleads a proper plea, though it is not full, it is aided by the statute; and therefore in all cases where issue is taken upon an insufficient plea in bar, which would have been ill upon demurrer, it is held, that after a verdict the defendant shall not take advantage thereof.

5 Mod. 226.
said argu-
endo.

Therefore in trespass, where the defendant pleaded a concord in bar, but not with satisfaction, issue being taken upon the concord, the plea was held ill, for want of satisfaction being pleaded; yet it was not merely void, because concord was a good plea to such an action, though not so fully pleaded as it might*.

Cro. Eliz.
778. Roll.
Abr. 225.
Moor, 696.
5 Mod. 226.
cited.
* So ruled

on error being brought

Hob. 326.
Reynolds
v. Buckle.

So, in debt for rent upon a lease for years, entry is a proper plea, but not good, without saying he did expel and hold him out; yet, if issue be taken upon *non intravit*, and found for the defendant, he shall have judgment.

Cro. Jac.
678. Johns
v. Ridler.

In ejectment the defendant pleaded, that one *Ridler* was seised in fee, and made a lease to him for five years, by virtue whereof he was possessed, until the lessor of the plaintiff entered and disseised him, and made a lease to the plaintiff, that thereupon he re-entered and ejected him, *prout ei bene licuit*. The plaintiff replied, that the lessor was seised in fee, and leased to him, and the defendant ousted him, *absque hoc*, that he did disseise the defendant: Upon which issue was joined, and found for the plaintiff; and though this issue was vain, it being impossible that a lessee for years should be disseised; yet the defendant shall not take advantage of such an ill plea; but having confessed a lease made to the plaintiff, and it being found that he did not disseise the defendant, judgment shall be given for the plaintiff: but, if there had been a verdict for the defendant, he could not have judgment; for then the jury would have found against the law, that a termor was disseised.

3. Of general Pleading to avoid Prolixity; and therein, of affirmative and negative Pleas.

Co. Lit. 303.
8 Co. 133.
Plow. 323.
326. 329.
(a) Salk.
8. 5.
Keilw. 95.
40 E. 3. 30.

It seems, that formerly great certainty and exactness was required in setting forth all the particulars in a declaration, as likewise in pleading the performance of conditions and covenants; as, (a) in a bond for performance of covenants, it was held necessary to demand oyer of the condition, and likewise of the covenants, and to plead particularly the performance of each of them. This created great inconveniencies in overloading the proceedings with a recital of useless facts; and therefore this rule hath in the modern practice received a relaxation; and it is now settled, that where the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls may be incumbered in the length thereof, the pleading shall be general.

Raym. 400.
Aglionby v.
Towerfon,
adjudged.

As, if in an *assumpsit* the plaintiff declares, that whereas there was a certain discourse between the plaintiff and defendant, concerning a marriage to be had between the nephew of the plaintiff and the niece of the defendant, and thereupon the defendant, in consideration the plaintiff would do his endeavour and labour to persuade his nephew to marry the niece of the defendant, did assume and promise to pay the plaintiff, &c.; and avers, that such a day, and divers other days and times *omnibus modis quibus poterat conatus fuit & elaboravit suadere* his said nephew to marry the defendant's said niece, &c.; this is a good declaration, without shewing in particular how he did his endeavour; for if he should set forth his several speeches to his nephew in the praise of the young lady, or the advantages of a married life, &c., the record would be too long.

So, in an *assumpsit* the plaintiff declares, that in consideration the plaintiff would find and provide for a sick man all such necessities as he should want, the defendant assumed and promised to pay, &c.; and avers, that he had found him necessities, amounting to such a sum, &c.; this is a good declaration, without shewing in particular what those necessities were, for that would make the record too prolix.

3 Bels. 32.
Roll. Rep.
173. Cripps
v. Bainton.

In *assumpsit* for labour and medicines in curing the defendant of a distemper, &c. who pleaded, *infra etatem*; the plaintiff replied it was for necessities generally: And upon demurrer to this replication, it was objected, that the plaintiff had not assigned in certain how or in what manner the medicines were necessary; but it was adjudged, that the replication in this general form was good.

Carth. 220.
Huggins v.
Willemans,
& vide
tit. Infancy,
letter (1).

So, where trover was brought for a library of books*, it was held to be good without expressing what they were; because to set down the particular books would make the record too prolix; and in this case (a) *Plow.* was cited, where a man pleaded, that he was knight of the shire *per majorem numerum*, and held to be good.

Vent. 114.
Emery's
case.
(a) Bulkeley's
case
cited, also
Raym. 9.
* See *qu.*

de hoc? He might have declared of a certain number of books: but surely nothing can be more uncertain than the term *library*; as what may be a very proper library for a gentleman in one art or profession may be a very improper one for another, &c.

So, in an action on the case for setting an house on fire, *per quod*, amongst divers other goods, *ornatus pro equis amiss.* After verdict for the plaintiff, it was objected, that this was uncertain; but the objection was disallowed by the court. And in this case Justice *Windham* said, that if he had mentioned only *diversa bona* it had been well enough; as a man cannot be supposed to know the certainty of his goods when his house is burnt; and that, to avoid prolixity, the law will sometimes allow such a declaration.

Mich.
16 Car. 2.
in B. R.
Prior v.
Dawkes.
Keb. 825.
S. C.

[So, in an action on a bond entered into by the agent of a regiment conditioned to pay to the colonel, commissioned and non-commissioned officers, &c. all such sums as he should receive from the paymaster general, it is not necessary in assigning a breach to enter into the detail, and state the respective proportions each person was entitled to, and the various deductions out of the whole pay upon various accounts.]

Cornwallis
v. Savery.
2 Burr. 772.

As to general and particular pleading there are many distinctions, which may be reduced to this rule, that a certainty or generality in pleading is required, according to the nature of the subject-matter pleaded. And this has begotten the distinction between (b) negative and affirmative pleas; as, if a man is bound to perform all the covenants of an indenture, if they are all in the affirmative, he may plead performance thereof generally, and is not obliged to exhibit to the court a performance of each of them; for this would overload the proceedings with a recital of all the covenants, whereas one only might be in controversy between the parties.

Co. Lit. 303.
Leon. 136.
Keilw. 95.
Palm. 70.
Lev. 303.
Sid. 215.
2 Vent. 166.
(b) Mode,
and other
circumstances
of quality,
time, and
place, are
requisite in

affirmative pleas, none of which are necessary in negatives. *Show. Parl. Cases*, 97. and several authorities there cited.

But,

Co. Lit. 303. But, if some of the covenants are in the negative (a), the defendant must plead specially; for a negative cannot be performed; therefore, on a special demurrer the defendant's plea would be bad; *aliter*, on a general demurrer.

(a) But, if the negative covenants are all void and against law, and the affirmative good and lawful, he may plead performance generally, and the court shall take notice that the negative covenants are void and against law. Moor, 850. Godb. 212. Hob. 12.

Shew. Parl.
Ca. 9.
Arguendo.

Even in affirmatives our law allows of general pleading, where particulars would be many; as, in a bond for performance of covenants, upon an apprentice's indenture, for finding him meat, drink, washing, lodging, and other necessaries, held, that *invenit* meat, drink, washing, lodging, & *alias res necessarias*, is a good plea, though uncertain what or how much; and the reason is not only because it is in the words of the covenant; (for that reason doth not always hold; for many times you must shew how, and are forced to vary from the words of the covenant in a breach; as, in the case of quiet enjoyment, the breach must allege how, and by whom, and under what title the man was disturbed;) but there is another reason, because the particulars would be many.

Co. Lit. 303.
Palm. 70.
Cro. Elis.
560.
Leon. 311.

Where some of the covenants are in the disjunctive, there, the defendant cannot plead performance generally, because both the alternatives are not to be performed; and by pleading performance generally, he does not shew in certain what is performed by him; and therefore this is bad on a special demurrer, which shews the want of that certainty: but, where the plaintiff does not demur for want of such certainty, it shall be intended that the defendant performed one of them, and therefore good.

Savil, 120,
121.

If the condition of an obligation be to perform the award of *J. S.*, and he award the obligor to pay 100 *l.* or to procure a stranger to be bound in 200 *l.*, &c., the defendant may plead performance generally; because one part is void, and it will be intended that he pleads performance of that part which he was bound to perform, and not the other part.

Cro. Elis.
270. Waller
v. Crook.

If in debt upon an obligation, conditioned that if the obligee shall enjoy such lands till the full age of *J. S.*, and if *J. S.* within one month after his full age makes an assurance thereof to the obligee, then, &c. the defendant pleads, that *J. S.* is not yet of full age; this plea is not good, without shewing the obligee hath enjoyed the lands in the mean time; for the condition is in the copulative.

Dyer, 219.
Hob. 69.
170.

(b) If the condition be to convey an estate, in pleading it

Where the covenants are to do a matter of law, as to (b) convey, discharge an obligation, ratify, or to confirm, &c.; there, it must be pleaded specially; because, being a matter of law to be performed, it ought to be exhibited to the court, to see if it be well performed, who are judges of the law, and not a jury, who are judges of the fact only.

must be shewn by what manner of conveyance it was done. Leon. 72. 2 Leon. 39. 2 Mod. 240. Godb. 36. — So, if the condition be to shew a sufficient discharge of an annuity, in pleading performance it must appear what manner of discharge it was, that the court may adjudge whether sufficient or not. 9 Co. 25. Hob. 107. — In debt upon an obligation, conditioned to deliver all evidences concerning such lands, the defendant must plead, that he hath delivered such and such charters, which are all the charters concerning the land. Keilw. 95. But *per* Cro. Elis. 869. he may plead, that he hath delivered all, &c., and the contrary in some particulars ought to be shewn on the other side; *per curiam*.

Where

Where the covenants are matters of (a) record, the performance must be shewn specially; because it must appear to be done by the record, and is not to be tried by a jury on the general issue. Co. Lit. 303. b. (a) As to levy a fine. Cro. Jac. 560. 2 Roll. Rep. 159.

If in debt upon an obligation, conditioned that the plaintiff shall enjoy certain lands, discharged, or otherwise saved harmless (b) from all incumbrances, the defendant pleads, that the plaintiff had enjoyed the lands discharged and kept indemnified from all incumbrances; this plea is naught; for being in the affirmative it ought to have been shewn how: but, if he had pleaded in the negative, *non fuit damnificatus*, it had been otherwise. 2 Co. 4. Manser's case, and the like point in Winch, 9. Cro. Jac. 363, 364. Leon. 71. March, 127.

Kelw. 80. (b) If the condition be to save harmless from all bonds entered into for the obligor, *exoneratus & indem. conservatus* is no plea without shewing how. Cro. Eliz. 916. adjudged, but that he need not shew from what bonds he saved him harmless; and Cro. Eliz. 433. *per Gaudy*, there is a diversity when the condition is to discharge from a particular thing, and when from a multiplicity of things, for in the last case it is sufficient to plead generally. [If to debt upon bond conditioned to indemnify the plaintiff, the defendant plead *quod indemnum conservavit*, without saying how; this is well enough, if not shewn for cause of demurrer. *White v. Cleaver*, 2 Str. 681. *Sed vide Hillier v. Plympton*, 1 Str. 422.]

Where the bar is in the negative, it is impossible for the plaintiff to go to an issue, for a negative cannot be proved; and therefore the plaintiff must assign a breach, by replying in the affirmative, on which issue may be properly taken: as, if a condition of a bond is, that the defendant shall not deliver possession to any person but the lessor, or to such persons as shall lawfully evict them; the defendant pleads he did not deliver the possession to any but such as lawfully evicted him; here, it comes on the plaintiff's side to assign a breach, and shew that he delivered the possession to some person that had not lawfully evicted him; because, the condition being in the negative, the defendant's plea must necessarily be in the negative also, and the plaintiff, to assign a breach, must assign a fact directly opposite to such negative condition. Lev. 83. Pullen v. Nicholas.

So, if an obligation be to perform an award, and the defendant plead no award made, it is not sufficient for the plaintiff to shew an award made in his replication, unless he shews also a breach; because the defendant's plea is in the negative, and the plaintiff, by replying in the affirmative, does not shew the obligation to be broken; for the shewing such an award leaves it uncertain whether it was performed or not; and his having shewn that there was an award subsisting, does not make it appear that he was entitled to the money, unless he also shews that the award was broken. *Vide title Arbitrament.*

The condition of a bond was, that the obligor should render an account of the goods of *William Narril* deceased, which came to his hands, and make an equal dividend between him and the obligee; the defendant pleads, no goods came to his hands; the plaintiff must reply what goods came to his hands, and farther assign the breach that he did not account for them; because the plaintiff, by replying the goods came to the defendant's hands, leaves it on his own shewing indifferent to the court whether he be entitled to the penalty of the obligation or not, unless he goes farther, and shews that the defendant did neither account nor divide them. Sand. 102. Hayman v. Gerrard.

Cro. Jac.
359.
2 Bull. 267.
S. C. Halsey
v. Carpenter.

(a) If the condition be to surrender a copyhold, the defend-

ant must not plead generally, that he hath surrendered it, but must shew when the court was held. Winch, 11. adjudged.—If the condition be, that the obligee shall enjoy an office according to letters patent, the defendant must not plead in *hæc verbis*, but shew the effect of the letters patent, and the enjoyment accordingly. Hob. 295.

2 Mod. 33.
Duck v.
Vincent.

If in debt upon an obligation conditioned to perform covenants, one of which was for the payment of money upon the making an assurance, the defendant pleads that he paid the money such a day, but saith not when the assurance was made; this is naught; for it ought to appear, that the money was immediately paid pursuant to the covenant.

Cro. Eliz.
749. Mints
v. Bethel.

In debt upon an obligation, conditioned that the defendant at all times, upon request, should deliver to the plaintiff all the fat and tallow of the beasts which should be killed or dressed by the defendant, his servants, or assigns, before such a day; the defendant may plead, that upon every request to him made he did deliver to the plaintiff all the fat and tallow of all beasts, &c. without shewing how many beasts were killed or dressed, or what quantity of fat he delivered; for if the pleadings were not so contrived as to pursue the covenants, the defendant would be obliged to fill the pleadings with multitudes of useless deliveries, which might not be controverted by the plaintiff; whereas the plaintiff, by assigning a particular breach in the non-delivery at any one time, may bring the whole matter in question.

Cro. Eliz.
749. cited
between
Sands and
Maleverer.
* *Sed quæ*.
If he may
not say he
received
divers sums,
to the
amount of
such a sum
in gross, and
that he rendered an account thereof?

But here we must take notice of another distinction, *viz.* That when the condition consists of matters to be done that lie within his own knowledge, though they consist of great variety, yet the defendant cannot plead generally, but must shew the particular performance of all matters in his plea; as, if the condition be, that the defendant, bailiff of the plaintiff's manor, should render an account of all the rents of the manor he has received before such a day; if the defendant plead he has accounted for all the sums before such a day, it is ill; but he must shew the particular sums, because it lies within his own knowledge only*.

Sid. 215.
Woodcock's
case.
† *Quæ*. See
note preced-
ing. A
much shorter
issue might
be taken.
Suppose he
pleaded he
delivered

So, if the condition be, that the defendant shall deliver briefs to all churches within such a time, and shall collect the money given upon them, and shall deliver it over to the plaintiff; there, the defendant cannot plead generally, that he has delivered the briefs, collected the money, and delivered it over to the plaintiff; but he must particularly shew what briefs were delivered, what sums were collected, and that he delivered them over to the plaintiff, because such particular facts lie within his own knowledge only†.

briefs to all churches, collected all the money, amounting in the whole to so much, and no more, and that

that he delivered the same to the plaintiff. If not true in either of the particulars, it might easily be falsified by the plaintiff: he might say he did not deliver briefs to all churches, for that he omitted such a church; or that he did not collect the money, but omitted to collect such a sum; or that he collected more than alleged, to wit, so much, and did not deliver the whole to the plaintiff; or that he did not deliver the money collected to the plaintiff, or any part; or not all, only so much.

If the condition be, that the defendant pay the plaintiff all manner of costs and charges that *J. S.* shall charge the plaintiff with, for carrying on a suit; the defendant plead he did pay all manner of costs and charges; this is ill, because it relates to one single point, which may and ought to be shewn in certain, in order that the plaintiff may take issue upon it. Lutw. 419.

[If the condition of a bond be, that *A.* shall not embezzle any money that shall be intrusted to him, or that in any way shall come to his hands on account of his master, it is necessary to state in the breach, that a particular sum of money was embezzled, and how, or from whom it was received.] Jones v. Williams, Dougl. 213.

A bond to pay from time to time a moiety of all such monies as from time to time he should receive; payment of a moiety generally, without shewing the particulars in certain, was held a good plea, because it is of what he should receive from time to time; otherwise, if these words had been omitted, because in that case there would be a stuffing of the rolls with the multitude of particulars. Sid. 334. Church v. Brunswick.

In an action on the case against the defendant, who promised, that in consideration the plaintiff would discharge a third person then under arrest, that he would pay the money; it was alleged in *facto* that he *exoneravit*, &c.; this was held sufficient without shewing how; for that may be done by composition, &c., and without deed. Cro. Eliz. 913. King v. Hobbs.

So, in debt upon a bond conditioned to perform the award of *J. S.*, if it is awarded that a suit in Chancery by the defendant against the plaintiff shall cease, and the plaintiff stand acquitted *de quolibet materia in eadem contenta*, the defendant may plead *quod fletit inde quietatus*, without shewing how, or that he in *facto* discharged him; for it was not intended that an actual discharge should be given, but that by the arbitrament he should be acquitted. Cro. Jac. 339. Roll. Rep. 8. 2 Bull. 93. Freeman v. Sheen.

In debt upon a bond, the condition whereof was to free and keep harmless the plaintiff, of and from all costs and damages that may arise by reason of a law suit, &c., the defendant pleaded *non damnificatus* generally; and on demurrer to this plea it was held good*, because the condition was to save the plaintiff harmless from something that was uncertain at the time of making thereof, viz., from the costs and charges of the suit, that no costs might be recovered against him: but, if it had been to save harmless from a particular thing†, there, such a negative plea generally would not have done, because the defendant ought to shew how he had indemnified the other. 5 Mod. 243. Harris v. Pett.

* The particulars of the damnification should have been shewn by the plaintiff in his replication.
† *Vide infra.*

In case upon an agreement, in which the defendant promised to assign all the profits which accrued by a voyage made by a ship, &c., the breach assigned was, that the defendant *non performavit* agree-

agreementum predicti: upon a verdict and judgment in *C. B.* for the plaintiff, error was brought in *B. R.*, where it was insisted that the breach was too general and uncertain: but *per cur.* had this been even on demurrer, it would have been good, but being after a verdict it is beyond question, for the plaintiff would not have damages given if he had not proved a good breach; and, here, the agreement is single, *ff.* to assign; so the non-performance is in the non-assignment, and it being negative, and in the words of the agreement, the judgment was affirmed.

3 Mod. 252.
Mather v.
Mills.

In debt on a bond conditioned to acquit, discharge, and save harmless a parish from a bastard child, the defendant pleaded *non damnificatus* generally; and on demurrer it was held, that being in the negative he need not shew how, and it not appearing on the whole record that the parish was damnified, judgment was given for the defendant.

Stibbs v.
Clough,
1 Str. 227.

[In debt upon bond conditioned to perform articles, it appeared by the plea, that the articles were an agreement, that the plaintiff should furnish the defendant with ale and beer to be sold in his house at such prices, and that he should take it of nobody else, but might be at liberty to take any other liquors (malt liquors only excepted); and what should not be paid for at breaking up the trade, and were undrawn, should be taken back. The defendant pleaded performance. The plaintiff replied, that by the same articles it was further agreed, that what should be drawn should be paid for, and that there was such a quantity of liquors unpaid for. On demurrer by the defendant, it was said, that by the breach it does not appear the liquors unpaid for were malt liquors; and as other sorts are mentioned, the plaintiff should have been more particular; especially in the case of a bond, where he is to subject the defendant to a penalty. And of that opinion was the court, who cited the case of the *African Company v. Mason*. That was a bond, conditioned, reciting that the defendant was their receiver at *Bristol*, if therefore he do well and truly account for all sums by him received, then the bond to be void: the breach was, that he received so much money, and did not account for it; and because it appeared by the recital in the condition to be only about transactions of a particular nature, the general assignment of the breach was holden ill. So, is 2 *Saund.* 411.]

20 Mod.
227.
Gilb. Rep.
238. S. C.

4. Of Surplusage and Repugnancy in Pleading.

Co. Lit. 303.
Flew. 232.
502.
Co. 42.
19 H. 6. 30.
32.
Sand. 282.

If either party, plaintiff or defendant, allege more than is necessary to introduce new matter repugnant and contradictory to what went before, in any point not material, this will not vitiate the pleadings, according to the maxim *utile per inutile non vitiatur*; and such redundant or repugnant part shall be rejected, especially after a verdict: so, though there be a repugnancy in any material point, and this be not aided after verdict, yet, if it appear, that the verdict was given on a different part of the declaration, or, if the plaintiff release such repugnant part, judgment shall be given for him.

In debt on an obligation the defendant pleads payment of 50*l.*, Cro. Jac.
 14 Jun. 11 Jam. according to the condition; the plaintiff replies 549.
*quod non solvit 50*l.* prædict. 14 August, Ann. 11. Suprad. quas ad
 eundem diem solvisse debuisset; & hoc, &c.*, the verdict found *quod
 non solvit prædict. 14 Junii* prout the defendant had alleged: the ob-
 jection here was, that no issue was joined, because they do not meet
 in the time the money was paid; but the word *August* being plainly
 surplusage, (for when he said *quod non solvit prædict. 14 die*, it is a
 sufficient traverse without the word *August*, and *August* is plainly
 repugnant to the word *prædict.*, for *prædict.* refers to *June*.) such
 surplusage, being a repugnancy to what was before material, was
 idle and void.

In trespass the bill was filed *Hil. 18 Jac.*, setting forth that the
 defendant 2 *January 17 Jac.* beat the plaintiff's servant, *per quod*
 the plaintiff *servitium per magnum tempus, ff. a prædict. 20 Martii*
suprad. usque primum diem Martii extunc prox. sequen. perdidit; on a
nihil dixit a writ of inquiry was awarded, and 10*l.* damages; but
 the defendant had judgment, because the gist of the action is for
 the use of the plaintiff's service, and the battery is but induce-
 ment, and the loss of the service is not *ex necessitate rei* relative to
 the battery; for the servant might fall ill some time after the
 battery, and the plaintiff having laid a different month from the
 battery, there is nothing in the record to determine the court to
 the 20th of *January*, and to rectify the month of *March* as repug-
 nant; and if the loss or the service stands on the month of *March*
 17 *Jac.* until *March* following, it takes three months of the time
 elapsed after the time of the action brought, for which the jury
 was not authorized to give damages.

But, in debt upon a bond, conditioned, that if the plaintiff did
 not depart out of the defendant's service without his leave, &c.,
 then if he paid the plaintiff 100*l.* within 28 days upon demand,
 the bond should be void; the defendant pleaded that the plaintiff
 4 *Maii 30 Eliz.* departed out of his service, and without his leave;
 the plaintiff replied that 6 *Septemb.* in the same year she departed
 with leave, and that afterwards 4 *Octob.* she demanded the 100*l.*,
 which the defendant refused to pay, *absque hoc*, that she departed
 without leave; it happened that the demand was laid to be
 4 *Octob.* and the writ was tested 18 *Octob.*, so that there were not
 28 days between the demand and the action brought, yet the
 plaintiff had judgment; though upon her own shewing she brought
 the action 14 days too soon; for the issue was upon the departure,
 and the demand in the replication was altogether immaterial, and
 therefore was rejected as surplusage.

If in ejectment the plaintiff declares on a lease made to him the
 third of *May*, and that the defendant *possea*, ff. 1 *Maii* ejected him,
 this is good after verdict; for by the *possea* it appears that the
 defendant committed a tort on the plaintiff's title, and when he
 lays a repugnant day, it is as if he had laid none; and if no day be
 laid, it shall be intended after verdict that the tort was committed
 before the action; for it would be very foreign after verdict, to
 intend, that the action was brought by the spirit of prophecy for
 a wrong

Cro. Jac.
 618.
 Hanbury v.
 Ireland.

2 Leon.
 Monings v.
 Warley.

Yelv. 94.
 Carth. 288,
 289. & vide
 Lev. 194,
 195. Like
 point, &
 vide title
 Ejectment.

5. That the Pleading ought to be direct and not argumentative.

Co. Lit. (a) Every plea must be direct, and not by way of argument or rehearsal.

307. a. (a) A plea in bar, that destroys the plaintiff's action only argumentatively, is not good. Yelv. 223.

Dyer, 42. If a man be bound by obligation to warrant lands, and in an action on this bond the defendant plead, that the plaintiff *pacifice gavifus est*, &c. this is naught, being only argumentative; for he should have pleaded, that he did warrant the lands, & *non damnificatus*.

Dyer, 118. To say *quod indentura testatur quod dimisit* is an ill plea; for he ought to shew that he demised *de facto*.

2 And. 179. In a *formdon in reverter*, the demandant counts of a gift to baron and feme in tail, and that they are dead without issue, the defendant cannot plead, that the gift was to them in (b) fee, without traversing the gift in tail, being only argumentative.

(b) So, in a *quare impedit*, defendant cannot plead that *A.* is incumbent, and not *B.*, without a traverse that *B.* is incumbent, being only argumentative, *ff. A.* is incumbent, *ergo B.* is not. 2 And. 179. — In trespass against divers defendants, they plead, that one of the defendants was dead before the writ purchased; the plaintiff replies, that he was alive; this is naught, without adding *& sic nient morte*: so, if villenage be pleaded, replication, that he is frank-free, without adding *nient willis*, is naught. 19 H. 6. 4.

7 E. 4. 16. So, if a *sci. fa.* be brought against a parson for the arrears of an annuity recovered against him, and the defendant plead, that before the writ brought he had resigned into the hands of the ordinary, who accepted thereof; this is no good plea, for he ought to have pleaded, that he was not parson the day of the writ brought.

4 Mod. 405. In *assumpsit* the defendant pleaded, that the plaintiff was *alienigena in regno Franciæ sub ligeantia adversarii dom. regis*, &c. *oriundus*: And on demurrer to this plea, the exception to it was, that this was not a direct affirmative, that the plaintiff was *alienigena*, in that it should have been *natus*, and not *oriundus*; but some precedents being cited out of *Rassal*, where the word *natus* was supplied with *oriundus*, the plea was held good.

Lev. 121. A plea, that he is now a subject, intended a natural one, and that he was always so.

Lev. 124. In *assumpsit* against an executor, on the promise of his testator, he pleaded *non assumpsit*; and after verdict for the plaintiff, it was objected, that it did not appear by the plea (c) who did not assume: But *per cur.* — It shall be intended of the testator, for here is no charge of any assuming by the executor.

whom, where the law raises the promise, will be well enough, but not in the case of a special promise. Sid. 292. 2 Keb. 57. Cro. Elis. 703.

Latch. 125. So, in debt against an executor on the bond of his testator, the defendant pleaded *non est factum suum*; and it was adjudged, that *suum* should be intended testator.

2 Salk. 686. If a horse be taken as a stray, and the owner say, he demanded the horse *proferenda satisfactionem*; this is sufficient, and a direct affirmation, as in the case of *warrantizando vendidit*.

Hewley v. Walsh.

If a man plead, that he entered *come* or as heir to such a one; H. 7. 1, 2. Dyet, 132. this is positive enough: So, if a man justify as bailiff or servant; this is not barely argumentative, but as positive and direct, as if he had alleged that he was heir, bailiff, or servant.

If the condition of a bond be to stand to the award of *J. S.* so that the award be made on or before the 16th of *March*, and no award be pleaded, and the plaintiff reply, that after the making the bond, and before the action brought, *J. pradiet. 16 die Martii*, they made an award; the (a) *scilicet* is a direct affirmation that the award was made within the time limited by the condition, and may therefore be traversed. Sand. 169. (a) The word *scilicet* is not a bare implicative, but is an express averment. 3 Leon. 67. Plow. 127. Lev. 194.

— *Et quod* is an affirmative: so is *et quia*, *quod cum*, &c. and may be traversed. 1 Sand. 117.

6. Negative Pregnant.

It has been laid down as a rule, that every plea ought to be direct, and not by way of argument; and that therefore issue cannot be joined on a negative pregnant, or an affirmative pregnant with a negative, *i. e.* such a negative as supposes or implies an affirmative, or such an affirmative as implies a negative; as *ne dona pas per le fait* implies a gift by parol, and therefore the issue ought to have been *ne dona pas modo & forma*. And this kind of pleading is held to be ill on a (b) demurrer; because the plea, &c. is not a certain affirmative or negative of any single point in question; but, being only an error in phrase, it is aided after verdict. Co. Lit. 126. a. 303. a. Doct. pl. 256. 2 Leon. 197. Leon. 136. Stile, 309. Bro. tit. Negative Pregnant, 12. Fitz. Issue. 88. [There seems to be this sort of

affinity between an argumentative plea and a negative pregnant; that as the latter is a negative pregnant with an affirmative, so is the former an affirmative pregnant with a negative; and the cure for both is, in most cases, to add, or, at least, to substitute, a direct denial of the substance and gist of the plea or declaration which is to be answered. 3 Revue's Hist. 435.] (b) There must be a special demurrer to a negative pregnant, that is, a negative plea which doth also contain in it an affirmative; and to an argumentative plea, that is, a plea which concludes nothing directly, but only by way of argument or reasoning; for the court will intend every plea good, till the contrary appears. Lit. Reg. 437.

In trespass for cutting his trees, the defendant pleads, that it was by the command of the lessor to give them to a stranger; the plaintiff replies, that he did not cut the trees by his command; this was held a negative pregnant, and that he should have pleaded *ne commanda pas*. 21 H. 6. 46, 47. Doct. pl. 256.

After issue joined the defendant pleaded a release of the plaintiff *puis darrein continuance*; the plaintiff replied, that it is not his deed *puis darrein continuance*; this is a negative pregnant, because it implies the deed to be his, though not executed at the time alleged by the defendant. 21 H. 6. 9. Doct. pl. 256.

In case against an host, for that the plaintiff's goods were embezzled by his default, he pleaded, that they were not lost by his default; this is a negative pregnant, and he should have pleaded the special matter (c). 22 H. 6. 18, 39. Doct. pl. 256.

[(c) More properly the general issue.]

In case for burning the plaintiff's house by the negligent keeping of his fire, the defendant pleaded, that the house was not burnt by the negligent keeping of his fire; this is a negative pregnant. 28 H. 6, 7. Doct. pl. 256. 2 Barr.

5 H. 7. 9.
Doct. pl.
257.

If a defendant plead, that the cattle died in a pound overt by the default of the plaintiff, and the plaintiff reply, that they did not die by his default generally; this is a good plea: but if he say, that they did not die in a pound overt, this is a negative pregnant.

3 H. 6. 37.
38.
Doct. pl.
257.

In trespass the issue joined was, that *J. N.* the defendant did not disseise the plaintiff to the use of *W. P.* &c., and held a negative pregnant; but had he pleaded *non disseisvit modo & forma*, it had been good to all intents and purposes.

36 H. 6. 22.
Doct. pl.
257.

In a writ of entry *sine assensu capituli*, *ne alien pars* is a negative pregnant: so, of an entry for the alienation of tenant for life.

22 H. 6. 38.
Doct. pl.
237.

In trespass the defendant justifies, by reason that the particular tenant aliened the reversion in fee to him; the plaintiff traverses, that he did not alien in fee: this is no good issue, but a negative pregnant; for if he aliened but for another's life, his entry is lawful.

2 Lil. Reg.
212.

He in reversion brings a writ of entry *in casu proviso*, upon an alienation made by the tenant for life, supposing that he has aliened in fee, which is a forfeiture of his estate; the tenant comes and pleads, that he hath not aliened in fee: this is a negative, wherein is included an affirmative; for though it be true that he hath not aliened in fee, yet it may be he hath aliened in tail, which is also a forfeiture of his estate.

Carter, 221.
Warcup v.
Symonds
adjudged.
(a) Where
a plea, that
a house, &c.

If an executor pleads several judgments, and that he hath not assets *ultra*; and the plaintiff replies, they are kept on foot by fraud; and the defendant rejoins, they are not kept on foot by fraud, &c. but doth not say, nor any or either of them; the rejoinder is naught, for (a) there is a negative pregnant.

was not burnt for want of good custody of his fire, is a negative pregnant. Bro. tit. Negative Pregnant, 3. Fitz. Issue, 88.——Saying that you accepted not the obligation in satisfaction, implies that he gave you the obligation, which is a negative pregnant. Stile, 309.

Cro. Jac. 87.
Min. v. Cole.

If an action of trespass be brought for entering into a man's house, and the defendant plead, that the daughter licenced him to enter, by which he entered; the plaintiff reply, *quod non intravit per licentiam suam*; though this replication be a negative pregnant, (for it seems rather to confess the licence than to deny it,) yet the verdict having found the licence, the dubiousness of phrase is now removed, and the truth appears by the verdict.

Cro. Car.
312. Gill
v. Glais.

So, in debt for rent on a lease, the defendant pleads *quod nihil habuit in tenementia tempore dimissionis*; and the plaintiff replies, *quod habuit in tenementis*, without shewing what estate; though this had been bad on a demurrer, because, by not shewing what estate he had, it is pregnant of this negative, that he had not such an estate by which he had power to demise, yet after verdict it is good, where the truth appears that he had such an estate that he could demise.

Lev. 83.
Pullen v.
Nicholas.

In debt on an obligation to perform covenants in an indenture of lease made by the plaintiff to the defendant, whereby the defendant covenanted, that he would not deliver the possession to any

any but the lessor, or to such persons as should lawfully evict him; the defendant pleads, that he did not deliver the possession to any but such as lawfully evicted him: And on demurrer to this plea it was objected, that the same was ill, and a negative pregnant; and that he ought to have said, that such a one lawfully evicted him, to whom he delivered the possession; or that he did not deliver the possession to any: But the court held the plea pursuing the words of the covenant good, being in the negative; and that the plaintiff ought to have replied, and assigned a breach; and therefore judgment was given against him.

7. That Things must be pleaded according to their Operation in Law.

The grant or conveyance of one jointenant to his companion must be pleaded as a release; for one jointenant cannot enfeoff his companion, because they are already both seised *per mie et per tout*; and this manner of conveyance passing by livery cannot operate so as to give him what he already has: but, though a release be the proper conveyance from one jointenant to another, yet, if the jury find, that the one jointenant did grant or convey to another, this amounts to a release; for they having found the substantial part, the court is to apply the words according to the operation they have in law: but every such conveyance must be pleaded as a release.

Co. Lit.
193. b.
200. b.
Sid. 452.
2 Sand. 96.
Vent. 78.
Raym. 187.

So, if tenant for life grant his estate to him in reversion; this is a surrender, and must be pleaded accordingly, being the operation it hath in law.

4 Mod. 151.
Comb. 190.

If J. S. plead the grant of a rent from his father in this manner, *viz.* that in consideration of love and affection, and *5 l.*, he *concessit & assignavit*, &c., and there is neither attornment nor enrolment of the deed; this cannot pass as a grant at common law, nor as a bargain and sale for want of enrolment; and though it (a) amount to a covenant to stand seised, being in consideration of love and affection, yet it ought to have been (b) so pleaded, being the operation it hath in law.

2 Vent. 149.
260. 266.
Lade v.
Baker and
March.
4 Mod. 149.
3 Lev. 241.
S. C.

his son, but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of a bargain and sale; yet if it hath not, and the consideration of love and affection is expressed, it will amount to a covenant to stand seised. 7 Co. 40. Bedel's case. 2 Co. 24. Cro. Elis. 374. and vide Vent. 137. Lev. 56. Mod. 173. Croft v. Scudamore. (b) The word *dedi* or *concessi* may amount to a grant, to a feoffment, to a gift, lease, release, confirmation, or surrender; and it is in the election of the party to use it to which of these purposes is most agreeable to his interest, and therefore he may plead it as either. Co. Lit. 301. b. 4 Mod. 150. cited.

(a) A man
may bargain
and sell to

All necessary circumstances implied by law in a plea need not be expressed; as, in pleading a feoffment, livery and attornment are implied; *scilicet*, in a grant.

Co. Lit.
303.
Yelv. 135.
Plow. 149, 150.

In pleading a countermand to a submission to arbitration, it need not be alleged, that the party gave notice to the arbitrators, for without that it is no countermand; and therefore if no notice be given, issue may be joined upon the point, *quod non revocavit*.

8 Co. 82.

Co. Lit.
353. b.

If a disseisee plead, that he could not enter for fear, he must shew some just cause of fear, that the court may judge of the reasonableness of an apprehension of danger to his person; but in a special verdict, if the jurors find, that the disseisee did not enter for fear of corporal hurt, it is sufficient, and it shall be intended that they had evidence for what they find.

Comb. 403.
Ld. Raym.
154.
2 Salk. 676.
pl. 3.
Carth. 411.
Trygarn v.
Fletcher.

The defendant made confession as bailiff to *Jane Griffith*, that *Robert Griffith* was seised in fee, and devised to *Thomas Griffith* in tail, and that a common recovery was suffered against him, to the intent that *Jane* should have a rent of 40 l. per ann. after the death of *Thomas*; and that there was a deed for the recovery declaring the uses, &c., which was held to be ill pleaded; for he should not have set forth the deed, but have pleaded according to the construction of law, that the recovery was to such uses at the time.

4 Co. 22.
(a) That he
was seised
secundum
consuetudinem
manc. ii. d. 12.
not necesse
sarily import
a copyhold.

The admittance of a copyholder, as well upon a descent as surrender, may be pleaded as a grant, to avoid the inconvenience which would follow, if the copyholder should be forced in pleading to shew the first grant; for that was either before the time of memory, and so not pleadable, or within the time of memory, and (a) then the custom fails.

3 Bull. 230. Roll. Rep. 211. 2 Vent. 144.

4 Co. 22. b.

So, he may allege the admittance of his ancestor as a grant, and shew the descent to him, and that he entered, without shewing any admittance of himself.

4 Co. 22.
(b) Without
shewing of
whose grant,
Cro. Jac.
103. ad-
judged

But he cannot plead, that his father was (b) seised in fee at the will of the lord by copy of court-roll of such a manor, according to the custom of the manor, and that he died seised, and it descended to him; for in truth his interest in judgment of law is but a particular interest at will.

naught upon a general demurrer, Cro. Car. 190. per totam curiam; though the son had there shewn, that after the descent he was admitted: But by three Judges, it is but a fault in form, and the issue being taken upon a collateral matter, and found for the plaintiff, it is helped by the statute of jeofails. — But, if *A.* pleads the grant of the reversion of a copyhold after the death of *B.* tenant for life, he need not shew the beginning of the estate of *B.*, nor by whom granted; for it is not the title of *A.*, but matter of inducement only. Cro. Jac. 51. 2 Vent. 182.

Hard. 366.
2 Lev. 194.
vide title
Licenses.

If one license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such, though it may be also pleaded as a licence; and if it be pleaded as a lease for years, and traversed, the lessee may give the licence in evidence to prove it.

And. 307.
Cro. Eliz.
352. Roll.
Abr. 939.
Dowie v.
Jeffries.

If an obligee in a bond covenants not to sue the obligor, this amounts to a release, and may be pleaded as such: but, if the covenant is that he will not sue him before such a day; this rests only in covenant, and the party, if sued, can only have an action of covenant.

Noy, 5.
Show. 322.
9. C. cited.

A. having a rent-charge issuing out of three acres, *B.* purchased two acres thereof, and *A.* covenanted and granted to and with *B.* not to distrain in these two acres for the rent. *Glanvil*, contrary to *Anderson*, held it a release; and the court held, that if it be a release, the tenant of the other acre may plead it, for thereby the rent was extinct.

If two are bound in an obligation, and the obligee releases to one of them, provided the other shall not take benefit of this release, the proviso is void, and the other shall take advantage of the release, if he can get it to shew.

Lit. Rep.
190.
Everard v.
Heme.

If two are jointly and severally bound in an obligation, and the obligee by a deed covenants and agrees not to sue one of them, this seems to be no release, but that he may sue the other.

Cro. Car.
551.
March, 95.
Dennis v. Pain.

If the obligee covenants and grants to and with the obligor, that during ninety-nine years he will not put the bond in suit; this is only a covenant, upon which an action will lie, but it cannot be pleaded in bar of the bond: but where the covenant is, that the obligee will not at any time hereafter put the bond in suit; such covenant is pleadable in bar as a release; and in the argument of this case it was allowed by all, that if a letter of licence contains the following words, viz. that if the creditor sues within such a time his debt shall be forfeited, such licence is pleadable in bar.

Carth. 63,
64.
2 Salk. 573.
pl. 1.
Show. 46.
A. Joffe v.
Scrimshire.
[1 Term
Rep. 416.]

8. Of Colour in Pleading.

Colour is a feigned matter, which the defendant or tenant useth in his bar when an action of trespass or an assise is brought against him, in which he gives the demandant or plaintiff a shew that he hath a good cause of action, whereas in truth he hath not, but only a colour and face of a cause; and it is used to the end that the determination of the action should be by the judges, and not by the jury, and therefore colour ought to be matter of law, or doubtful to the *lay gents*.

2 Lil. Reg.
273. Vide
10 Co. 91.
in Dr. Ley-
field's case.
[See
3 Reeve's
Hist. 418.]

In an assise, when the defendant pleaded only a colourable bar, that is, such a bar as shewed some title in the demandant, they proceeded to take the assise at large, which was in this manner: the assise shewing no title in the plaintiff, the defendant would shew his own enfeoffment or investiture, but because such enfeoffment was only evidence that there was no disseisin, it would amount to the general issue without colour; and therefore the defendant urged, that the plaintiff obtained by virtue of an investiture, on which the ceremony of livery had never passed, and the validity of such investiture, being a question of law, was not to be answered by the jury, and therefore the plea of his own investiture, which alone would have been only evidence of no disseisin, joined to the plaintiff's title, which turned on a question of law, drew the cause from the jury to the court; and this obliged the plaintiff to shew by what investiture he claimed, and then the assise was taken at large on the title of the plaintiff; which was done, that the plaintiff's title might appear on record, and the plaintiff be confined to give evidence touching that title, that the jury might not wander from that evidence; and that, if they did, they might the more easily be convicted in an attainder.

2 Inst. 411.
Booth, 214.
10 Co. 90.
Doct. pl.
72. &c.
10 Co. 91.

In an assise, if the tenant pleads, that he demised the lands to the demandant for years, this is no good plea; because the

Kelw. 103;

plaint is of a disseisin of a freehold, and the tenant gives the demandant no colour to have an assise.

Keilw. 103. If in an assise the tenant pleads in bar, that his father was seised and died, and that he as son and heir entered, and gives colour to the demandant; and he replies, that he himself was seised, till by the father of the tenant disseised, and that he made continual claim, and after the death of the father re-entered, and was seised, till, &c., it is a good replication, and yet his title is founded on his own possession only.

Co. Ent. 652. Doct. pl. 73. In trespass, if the defendant justifies the taking of the cattle damage feasant, he need not give any other colour to the plaintiff; for by this justification he acknowledges the property to be in him.

Dyer, 365. Co. Ent. 79. Raft. Ent. 254. In ejectment the plaintiff's title in his declaration must be answered; and it is not sufficient barely to give colour, as in trespass, or an assise *.

* In ejectments the modern practice is, to plead the general issue, the defendant entering into a rule to confess lease, entry, and ouster, by which means the title only is in question between the parties.

20 Co. 88. Colour ought to have the following qualities: 1st, It ought to be a matter doubtful to the jury; as, where the defendant says, that the plaintiff comes by colour of a deed of feoffment, where nothing passed by the deed; this is a good colour, being a doubt to the *lay gents* whether the land passed by this feoffment without livery. 2^{dly}, It ought to have continuance, though it wants effect; as, where the defendant gives colour by colour of a deed of demise to the plaintiff for the life of J. S., who, before the trespass, was dead; this is not any colour, for this doth not continue; but he ought to say, that he claims by virtue of a deed of demise made to him for his life where nothing passed by that. 3^{dly}, It ought to be such colour, as, if it were effectual, would maintain the nature of the action, as, in assise, to give colour of freehold, &c.

Raft. Ent. 277. Co. Ent. 673. 20 Co. 90. In trespass if the defendant pleads a fine *sur consueance de droit*, levied by the ancestor of the demandant, he shall not give colour although this be but executory: otherwise, if he pleads, that his ancestor granted the reversion after an estate for life or years.

20 Co. 90. Doct. pl. 77. The reason why colour shall be given in a writ of entry, *sur disseisin*, writ of entry in nature of an assise, in assise, trespass, &c., is to make a certain issue: but when the special matter of the plea totally bars the plaintiff, no colour is necessary: and therefore in pleading a warranty, an estoppel, or fine with proclamations, no colour is necessary.

23 H. 6. 50. When a man pleads to the writ, or to the action of the writ, no colour shall be given.

Doct. pl. 77. Where the defendant entitles himself by act of parliament, no colour is to be given.

20 Co. 90. Doct. pl. 77. Where letters patent are pleaded, the defendant ought to plead colour by former letters patent in this form, *scilicet colore quarundam literarum patentium facti. predicti*, the plaintiff, &c., *ubi nil transivit*, and not that the plaintiff claims *colore concessione sine dimissionis*, &c.

He who justifies for wreck, waifs, strays, need not give colour. Doct. pl. 78.
 So, he who justifies for tithes shall not give colour; for although 20 Co. 91.
 any person severs them from the nine parts, yet they belong to the parson.

In trespass, if the defendant pleads, that the freehold is in *J. S.*, or that *J. S.* is seised in fee as of his demesne, and that he by the command of *J. S.* &c., he need not give colour; for though the fee or the freehold be in *J. S.*, yet the plaintiff might have an interest for years, as, a lease in the premises. But, where the defendant makes a special justification in him, in whose right as servant, &c., there, he ought to give colour: as, if he pleads that *J. S.* was seised, and enfeoffed him, in whose right, &c., there, he ought to give colour; for in this case it cannot be presumed that the plaintiff has any interest in the land. 22 H. 6. 50.
 18 E. 4. 3.
 10 Co. 89.
 b. That if in trespass the defendant justifies as servant to *J. S.* he need not give colour. Lutw. 1343.
 & vide Cro. Eliz. 76.
 Raft. Ent. 62.
 21 H. 6. 39.

In forcible entry the defendant may plead, that he was seised until disseised by the plaintiff, and this is good without giving colour. Dyer, 246.

In assise the defendant justifies by virtue of a lease for years, he need not give colour, inasmuch as he does not plead in bar of the assise, nor does he take the freehold on himself.

In trespass the defendant pleads, that the plaintiff claims *colore ffeoffamenti*, by which nothing passed, this is not good colour, for he ought to have pleaded *colore charte ffeoffamenti*. 2 Roll. Rep. 140.

Where the defendant derived a title to himself by divers mesne conveyances, and gave colour to the plaintiff by one who was last named in the conveyance, this was held naught; and that he should have given colour by him who was first named in the conveyance. 2 Roll. Rep. 140.

In trespass for entering the plaintiff's house, and taking and carrying away his goods, the defendant pleaded, that before the trespass supposed one *A.* was possessed of the said goods, and the said goods being in the house of the plaintiff, the said *A.* sold them to the defendant, by force whereof he was possessed, and being so possessed came to the plaintiff's house, &c. and by assent and licence of the plaintiff's wife he entered into the house, and carried away the goods; and this plea was held naught, there being no colour given the plaintiff, and the licence given by the wife not material, nor sufficient for justifying an entry: but in this case it was held, that the want of colour is but matter of form, which must be taken advantage of on demurrer. 3 Leon. 266.
 Taylor v. Fisher.

In trespass for taking and carrying away a hundred loads of wood the defendant justifies, for that *J. S.* was possessed of them *ex de bonis propriis*, and the plaintiff claiming them by colour of a deed of gift afterwards made, took them; and the defendant retook them; and it was thereupon demurred, because the colour given to the plaintiff is a good title for the plaintiff, and confesseth the interest in him; for colour ought to be such a thing, which is good colour of title, and yet is not any title; as, a deed of a lease for life, because it hath not the ceremony of livery; so, the grant of the reversion is not good without attornment; but Cro. Jac. 122.
 Radford v. Harbys.

but a deed of goods and chattels, without other act or ceremony, is good; so, of colour by a lease for years, or by letters patent.

9. Of pleading Non-tenure and Disclaiming.

Doct. pl. The plea of *non-tenure*, or that the defendant holdeth not the
129. Bridg. lands mentioned in the plaintiff's count or declaration, is chiefly
72, 73. used in (a) real actions, and is said to be general or special: Ge-
Dyer, 227. neral, where the party denies ever to have been tenant to the lands
 (a) So, in in question; special, where he alleges, that he was not tenant at
 debt: on a the time of the writ purchased.
 lease, *non-tenure* is a
 good plea. **4 H. 6. 5. Doct. pl. 129.**

(b) 56 H. 6. 6. Mod. 181. At (b) common law, if the tenant had pleaded *non-tenure* as to part, it would have abated all the writ; but by the statute of 25 E. 3. c. 16. it is enacted, that by the exception of *non-tenure* of parcel, no writ shall be abated, but only of that parcel whereof *non-tenure* was alleged.

Doct. pl. When the tenant pleads *non-tenure* to the whole lands demand-
128. ed, he need not set forth who is tenant; but when he pleads
(c) Pleading *non-tenure* as to part, he must set forth who is tenant of the other
non-tenure at the time of the writ purchased
 is sufficient, without adding *nec unquam possea*, **Doct. pl. 128.**—with what certainty, **Mod. 181.**

Cro. Eliz. If issue be joined on a plea of *non-tenure*, and it be found by
233. verdict, that before the writ purchased the tenant enfeoffed di-
Leonard vers persons with an intent to defraud him who had cause of ac-
v. Bacon. tion, and notwithstanding still took the profits; this finding is
 (d) For sufficient to entitle the demandant, the scoffment being void by
 which *vide* the (d) statute 13 Eliz. c. 5.

Mod. 181. If a formedon be brought of 140 acres lying in three vills, and
Fowle v. the tenant plead *non-tenure* of 100 acres, he need not set forth in
Doble. which of the vills the 100 acres lie.

6 Co. 10. a. If on a plea of *non-tenure* for the whole the writ abate, the de-
Doct. pl. mandant shall not have a new writ by journies accounts, other-
129. wise, if it abate only on a plea of *non-tenure* for part.

33 H. 6. 2. In a *præcipe*, after jointenancy pleaded, the defendant, to ano-
Doct. pl. ther writ, cannot plead *non-tenure*, for by his former plea he hath
128. affirmed himself to be tenant: but, had the first writ been brought
 against a husband, and the second against the husband and wife,
 she might have pleaded *non-tenure*, being a stranger to the first
 action.

Doct. pl. In a writ of entry in the nature of an assise against husband and
129. wife, the husband says, that the wife was not tenant of the land
10 H. 6. 22. the day of the writ purchased, *nec unquam possea*, and held a good
 plea.

Mod. 150. As to *non-tenure's* being a plea in bar or in abatement, this dif-
 ference hath been taken, viz. That *non-tenure*, which goes to the
tenure, as, when the tenant denies that he holds of the demandant,
 but says that he holds of some other person, is in bar; but *non-tenure*

tenure, that goes to the *tenancy* of the land, as, where he pleads that he is not tenant of the land, goes in abatement only.

A general *non-tenure* is not a good plea to a *scire facias* upon a judgment in a personal action, because it falsifies the plaintiff's return; but in a *scire facias* to have execution of a judgment in a real action one may plead *non-tenure* against the return of the sheriff, because of the high regard the law has to the freehold.

2 Roll. Rep. 54.
Roll. Rep. 302.
Cro. Eliz. 872.
6 Mod. 226.
2 Ld. Raym. 679. pl. 7.
854. Salk. 40. pl. 9. 2 Salk. 679. pl. 7.

But a special *non-tenure* may be pleaded to a *scire facias* upon a judgment in a personal action; as, to a *scire facias* on a judgment for debt or damages against tenant for years, he may plead that he has only a term for years.

In a formedon in reverter, if the tenant pleads *non-tenure* generally, the demandant may maintain his writ, that he is tenant, though he can recover no damages; adjudged by all the court, and that (a) *Lit. and Co.* were not to be intended of a simple plea of *non-tenure*, but of *non-tenure* with a disclaimer, as the pleadings were usually in *Littleton's* time; for upon the simple plea of *non-tenure*, supposing the tenant hath no freehold but a reversion in fee, the demandant shall not be restored to the fee, for nothing is disowned by the simple plea of *non-tenure* but only the freehold, which may be true, and yet he may have the reversion in fee; but when the tenant disclaims, or pleads *non-tenure* and disclaims, the demandant shall be restored to the whole, because he hath disclaimed the whole.

Owen, 134.
3 Lev. 205.

3 Lev. 330.
Hunlock v. Peter.

(a) Co. Lit. 102. 361.

10. Pleading *Hors de son Fee*.

Hors de son fee is an exception to avoid an action brought for rent-services, &c. issuing out of lands by him who pretends to be the lord; for if the defendant can prove that the land is without the compass of his fee, the action falls.

If the writ comprehends certainty of title, as in *Mortd'ancestor*, formedon in the descender or remainder, *hors de son fee* is no plea; otherwise, in a writ of entry *sur disseisin*; or in an assise of rent; but in an assise, if the party makes title, *hors de son fee* is no plea.

In trespass or rescue *hors de son fee* is no plea, without shewing of whom the land is held.

In a cessavit *hors de son fee* is no good plea, because the tenure is traversable.

If a stranger claims a seignior, and distrains and avows for the services, the tenant may plead that the tenancy is *extra feodum*, &c. of him, that is, out of the seignior, or not holden of him; but he cannot plead *extra feodum*, &c. unless he takes the tenancy upon himself.

intended in cases of an assise, and so were all the books cited in Co. Lit. for proof of this opinion.

In an avowry the tenant cannot plead *ne unques seise* of such services generally, because he leaves no remedy for the lord either by avowry, or by writ of customs or services; and therefore, if he is a tenant

Doct. pl. 216. Bro. tit. *Hors de son Fee*. And. 237.

Bro. *Hors de son Fee*, pl. 9. 5 E. 4. 6. 27 H. 8. 7. Dyer, 311.

6 E. 4. 4. Doct. pl. 216.

2 Inst. 296.

Co. Lit. 1. b. 1 Mod. 104. cited, and there said by the Ch. J. that this rule is to be

9 Co. 34. b.

a tenant in fee-simple, he ought either to disclaim or plead *hors de son fee*.

2 Mod. 103,
104.

Sherrard
v. Smith.

(a) So, in
an avowry,
a stranger
may plead
generally
hors de son

fee, and so may tenant for years. 2 Mod. 104. *per cur.*

If in (a) trespass for taking goods the defendant justifies by command of the lord of the manor, of whom the plaintiff held by fealty and rent, and that for non-payment of the rent he took them *nomine distractionis*; the plaintiff may reply, that the *locus in quo est extra, absque hoc, quod est infra feodum*, &c.; adjudged upon a special demurrer, it being shewn for cause that the plaintiff had not taken the tenancy on himself.

11. Estoppels in Pleading.

Co. Lit.
351. a.

There are three several kinds of estoppels, by matter of record, by matter in writing, and by matter in *pais*. 1st, By matter of record, *viz.* by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance. 2^{ds}, By matter in writing, as by deed indented, by making an acquittance by indenture or deed poll, by defeasance by indenture or deed poll. 3^{ds}, By matter in *pais*, as by livery, by entry, by acceptance of rent, by partition, by acceptance of an estate.

Co. Lit. 352.

Every estoppel
ought to
be a precise

affirmation of that which makes the estoppel. Co. Lit. 305.—Estoppels are odious in law; and although all parties to an indenture are bound by the words thereof, because they agree to it, yet that must be intended of material words, and not of all minute and descriptive words and circumstances.—A matter alleged that is not traversable shall not estop. Co. Lit. 352. a.—An estoppel is not taken notice of unless relied on in pleading. Mod. 201.—An estoppel cannot be pleaded with a traverse. 2 Mod. 37.

9 H. 6. 60.

(b) If a deed
be enrolled
of record,

the party is estopped to say that it is not his deed, or that it was not acknowledged by him. Leon. 184. 3 Leon. 84. Comb. 248. & *vide* title Bargain and Sale. (c) If one of my name levies a fine of my land, I may confels and avoid the fine by shewing the special matter which stands with the fine. Cro. Elis. 531. & *vide* tit. Fines.—Where one shall be estopped to say, that a writ issued after the *teste*. Lutw. 334.—But whether it may not be so found by verdict, *vide* Lev. 173. Sid. 271. 1 Keb. 930. 2 Keb. 32. Bailey v. Bunning. [In the case of Combe and Pitt, it is settled that the actual day of suing out the writ may be shewn in pleading. 3 Burr. 1423. &c.]—Whether the defendant shall be estopped to say, that the plaintiff's testator was dead when a writ was sued out in his name. Lutw. 254.—Where one shall be estopped by praying *oyer* of a record or deed. Lutw. 1644. Salk. 7. pl. 17.

Co. Lit.
352. b.

When the truth is apparent in the same record, the adverse party shall not be estopped to take advantage thereof, for he cannot be estopped to allege the truth when it appears of record.

Stile, 395.
Bayle v.
Scarbo-
rough.

If A. B. is outlawed by the name of A. B. Esq. and comes in *gratis*, and reverses it for want of proclamations, he shall not be estopped to say afterwards that he was a knight and no esquire.

(d) 7 Mod.
38. Salk.
3. pl. 7.
S. C.

If one puts in bail by a wrong name (d), he shall be concluded thereby, as was agreed *per cur.* in the case of (e) *Smith v. Villars*; and in a civil action he need not join in the recognizance; and in

(e) But then
it must be

the

the case of the Earl of *Banbury*, who was indicted by the name of *George Knowles*, Esq. though by the course of the court he ought to have joined in the recognizance; yet, because if he had entered into one by the name of *G. K.* it would have been an estoppel upon him, he was indulged to bring others who gave bail for him by the name of *G. K. Esq.* for their act could not conclude him.

pleaded as an appearance. Salk. 8. pl. 19.

Where one brought a writ of error upon judgment in dower against him, and assigned for error that he was within age *, and appeared by attorney, and issue being joined upon the nonage, and found for the plaintiff in error, the defendant therein would have staid judgment, because in the assignment of error it was alleged that 7 Sept. 20 Car. 2. he was of the age of fourteen & non amplius, and the writ of error was brought 4 July 26 Car. 2. and in Michaelmas term following, and error assigned by attorney, when he could not be of the age of twenty-one, according to his own allegation; but the substance of the issue being whether he was within age, and the viz. no material part of the issue, it was held no estoppel.

2 Jon. 176. Skin. 10. pl. 10. Raym. 456. Morgan v. Vaughan. * If infant plaintiff appears by attorney and has verdict, judgment not to be reversed. 21 Jac. 1. c. 13. Co. Lit. 452. † If plaintiff is nonsuit, is he not in the same situation as if he had

Matters alleged by way of supposals in counts shall not conclude or estop, otherwise it is after judgment given; and though after nonsuit the supposal in the count shall not conclude, yet the bar, title, replication, or other pleading of either party, which is precisely alleged, shall conclude after nonsuit †.

never instituted the suit; and does not a plaintiff frequently submit to a nonsuit for the purpose of bringing another action, in which the former record cannot be given in evidence? — Lord Coke can only mean in those cases where a nonsuit is peremptory, which are very few, as in appeals in *feov. vira*, &c. &c. and in attain, &c. after appearance.

Regularly, a stranger shall not be bound by nor take advantage of an estoppel.

Co. Lit. 352. a.

Privies in blood, as heir, privies in estate, as the feoffee, lessee, &c., privies in law, as lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law or in the *post*, shall be bound by and take advantage of estoppels.

Co. Lit. 352. a.

Where the record of the estoppel runs to the disability or legitimization of the party, there, all strangers shall take benefit of that record, as, outlawry, excommungement, profession, attainder of *premunire*, bastardy, muliertry, and it shall conclude the party, though they be strangers to the record.

Co. Lit. 352. a. Keilw. 120.

But of a record concerning the name of the person, quality or condition, no stranger shall take advantage, because he shall not be bound by it.

Co. Lit. 352. a. Keilw. 98. 120.

If *A.* leases by indenture to *B.*, to begin after the expiration of a lease to *D.*, in covenant brought by *B.* against *A.*, he is estopped to say there is no such *D.*; and though the common rule is, that a recital is not an estoppel, yet, where the recital is material, as here, it is otherwise.

2 Leon. 127. vide Vent. 84. Vaugh. 22.

If by indenture between *A.* and *B.* reciting that *A.* was seised in fee of certain lands, *A.*, in consideration of a marriage to be had between

Allen, 79. Newton v. Weeks.

Hans and Pleadings.

... *James* ... *J.* ... a rent out of those lands to *B.* to be ...
 ... *James* ... *J.* ... and covenants to pay it; in an action
 ... *James* ... *J.* ... the covenant the cannot plead that she had no
 ... *James* ... *J.* ... the time of the covenant, but that a stranger
 ... *James* ... *J.* ... because she was estopped by the deed, and
 ... *James* ... *J.* ... as an entirety.

... *James* ... *J.* ... a lease for years makes an under-lease to *B.* by in
 ... *James* ... *J.* ... covenants with *A.* to perform all the covenants in
 ... *James* ... *J.* ... to be performed by *A.* his executors, &c., in all
 ... *James* ... *J.* ... *B.* will be estopped to say there are no
 ... *James* ... *J.* ... covenants in the original lease. *

If the condition of an obligation be to perform all covenants
 contained in such an indenture, in debt upon the obligation, the
 defendant cannot say that there is no such indenture, because
 he is estopped.

... *James* ... *J.* ... there are no covenants, Mod. 15. — But then he will confess
 ... *James* ... *J.* ... the plaintiff upon demurrer shall have judgment. Lev. 3. adjudged, &c.

If the condition of an obligation hath reference to a particular
 thing, in which a generality is to be done, the obligor shall
 be estopped to say, that there is no such particular thing;
 as if the condition of an obligation be to release all the right
 and interest in life in *Black Acre*, he shall be estopped to say,
 that he hath not any right for life in *Black Acre*, because this con-
 dition is particular.

But if the condition of an obligation contains (b) a generality,
 a man shall not be concluded to say, that there is no such thing;
 as if the condition of an obligation, of which the condition is to per-
 form all agreements now set down by *J. S.*, the defendant may
 say that the agreement was then set down by *J. S.* because this
 comprehends a generality.

... *James* ... *J.* ... Co. Jac. 375. Dal. 28. Show. 59.

If the condition of an obligation be to pay (c) all sums of mo-
 ney which *T. S.* stands bound by his deed obligatory to *T. H.*
 or any of the children of *W. S.* according to the
 will of *T. S.*, he shall be estopped to say, that *T. S.* never stood
 bound by any deed obligatory for the use of the children of
T. S.

... *James* ... *J.* ... according to Moor, 23. pl. 79. but in Dal. 28. it is a *quæstio* being

If the condition of an obligation be to pay (d) all legacies that *J. S.*
 bequeath by his will, the defendant shall be estopped to say, that
J. S. made no will; but he may say that *J. S.* gave no legacy by
 his will.

... *James* ... *J.* ... the power bequeathed to him by his father, the defendant shall be estopped to
 ... *James* ... *J.* ... Co. Jac. 177.

If the condition of an obligation be for payment of 37 ¹/₂
 the rent reserved on a demise of copyhold lands for 40 years
 according

According to such articles indented, the defendant shall be estopped to say he had nothing in the lands demised; though objected, if he had nothing in the land, then he ought not to be paid the rent.

Moor, 405.
Owen, 110.
S. C. Stroud
v. Willis.

In an action upon a bond conditioned to pay 10*d.* weekly for keeping a bastard, according to an order made by the justices, the defendant is estopped to say, there is no such order.

Noy, 79.
Latch, 125.
Germin v.
Randall.

In debt upon a bond conditioned that (a) whereas *A.* had commenced several suits in the *K. B.* against *B.* if *B.* should appear, and make answer thereto, then, &c. the defendant cannot say that *B.* appeared, and was ready to answer, but there was no action there depending against him, for he is estopped so to say.

Cro. Eliz.
756. Dyer,
196. S. C.
in margin,
Willoughby
v. Brook.

It was recited that *J. S.* claimed to have a lease, and the condition was to save harmless from all claims of *J. S.* the defendant could not plead *J. S.* had no lease. 3 Leon. 118.

(a) Where

In debt upon a bond, conditioned that whereas the plaintiff had carried 12,000 billets for the defendant to *D.* if the defendant should pay the plaintiff after the rate of 17*s.* per 1000, then, &c. the defendant cannot plead that the plaintiff did not carry 12,000 billets to *D.* for he is estopped to deny it.

Allen, 52.
Stile, 103.
S. C. Hart
v. Buck-
minster.

If in an action upon a bond against one as executor of *Edmund Shephard*, upon *oyer* prayed it appears that the words are *me Edwardum* * *S. teneri*, &c. and that he subscribed it by the name of *Edm. S.* (which was his true name), and upon *non est factum testatoris* pleaded, it is found to be the deed of the said *Edm. S.*, yet the plaintiff shall not have judgment, the truth appearing on the record; for *Edward* and *Edmund* are two distinct names, and the (b) subscription by the name of *Edm.* being no part of the bond, is not material.

Cro. Jac.
640. Godb.
283. S. C.
Maby v.
Shephard.
* The de-
claration
might have
been with
an *alias*, or
that *Ed-
mund*, by the
a man binds
Moor, 897.

name of *Edwardum*, bound himself, or he may be estopped. *Vide infra.* (b) That if himself by a wrong name, he shall be estopped to avoid it. *Vide Dyer*, 279. Leon. 322. Cro. Jac. 261. 558. Lutw. 894. & title Misnomer.

If *A.* gives a bond by the name of *B.* and is sued by the name of *B.* and pleads the misnomer, the plaintiff may reply that he made the bond by the name of *B.* and estop him by demanding judgment if against his own deed he shall be admitted to say his name is *A.*

Salk. 7.
pl. 17.
Linch v.
Hook.

If *A.* enters into a bond to *B.* conditioned that *A.* shall use and maintain *C.* his wife; in an action upon this bond *A.* shall not be estopped to say that *B.* was married to *D.* (who is yet living) before she married *A.*, and so *A.* cannot use and maintain her as his wife, for he confesses and avoids, because she might notwithstanding be called in common speech or named his wife in writing.

Mich.
39 Eliz.
Prat v.
Phanner.

If in an action for 5*l.* by the lessor upon a covenant to pay so much for every acre of meadow ploughed, he lays the ploughing of an acre of lands called *Lane's Meadows* (there being other meadows leased) the defendant may plead that the lands in the indenture leased, there called *Lane's Meadows*, are not meadow, but time out of mind arable; for though all parties to an indenture are bound by the words thereof, yet it must be intended of material

Mich.
11 G. 1.
in B. R.
Skipwith
v. Green.

material words, and not such as are descriptive only; and if the closes had been leased as containing 500 acres, yet the defendant would not have been estopped to say there were not so many.

Lev. 43.
Sid. 44.
Raym. 21.
S. C.

If one gives an acquittance under his (a) hand and seal for rent due at a day, he shall be estopped thereby to demand rent due at a day before.

Palmer v. Stannage, and 3 Co. 65. Dyer, 271. And. 14. Bendl. 186. Moor, 87. L. P. (a) If not under his hand and seal it is no estoppel, but evidence only. Comb. 59.

Lev. 43.
(b) May
have cove-
nant after.

But yet if one avows for rent due at a day, he shall not be estopped to (b) avow for rent due at a day after.

Comb. 59, 60.

Comb. 446.
ruled by
Holt at
Guildhall.

If upon a writ of error it be assigned for error, that the plaintiff died before the trial, and issue thereupon taken, the plaintiff in error, by his pleading to the action, is estopped to give in evidence that the plaintiff died before the action brought; but the defendant in error pleading *quod adhuc in plenâ vitâ existit, & hoc*, &c. lets the plaintiff loose from the estoppel.

12. Pleading with a *Profert*, and demanding Oyer: And herein;

1. In what Cases there must be a *Profert* or *Monstrans de fait*.

[(c) The general rule was understood to be as here stated, that a deed could not be pleaded without a *profert*. But it hath lately been

Where the plaintiff declares upon a deed, or the defendant pleads a deed, it must regularly be with a *profert in curia* (c), to the end the adverse party may at his own charge have a copy of it, without which he is not bound to answer. And the (d) reason why deeds must be shewn or produced to the court is, because it is the proper office of the court to judge of the sufficiency of them, to see that they are duly executed, and without rasure or interlineation, and whether they are absolute, conditional, or revocable.

adjudged, that an instrument may be pleaded, as lost by time or accident, or as destroyed by fire, or the like, without *profert*; for *lex non cogit ad impossibilia*, and no human prudence can render deeds of perpetual existence. 1 Term Rep. 151.] 1 Lil. Reg. 210. 382. (d) 6 Co. 36. 10 Co. 93. Hob. 233. Style, 459. 2 Salk. 498. pl. 5. 2 Ld. Raym. 1076. Salk. 76. pl. 18. 6 Mod. 244.

6 Co. 36.
Bellamy's
case, Bull.
119. Cro.
Car. 123.

(e) But, though a thing will pass without deed, yet, if the party pleads a

A deed therefore that is (e) requisite *ex institutione legis* must be shewn in court, though it concerns a thing collateral, and conveys or transfers nothing; as, in case of attornment by a corporation, which must be by deed, there, the deed must be shewn: *scilicet*, where it is *ex provisione hominis*; as, where the condition of a lease is, that the lessee shall not assign but by deed, and not by parol, there, he may plead the assignment, without shewing the deed; an assignment by parol being sufficient, had it not been provided against by covenant.

deed, and makes title thereby, he must come with a *profert*. 2 Mod. 64.

Style, 459.
per Glin,
C. J.

In (f) all cases, where a thing cannot be demanded but by deed, the deed must be produced.

(f) But in a motion for a prohibition granted on letters patent, the suggestion need not be with a *profert*. a Show 33.

But of things executed, or estates determined, a deed need not be shewn; as, a licence which is executed, though of its own nature it cannot be without deed.

So, if in trespass against a balliff, he justifies by virtue of a warrant, without any *profert* thereof, this is sufficient; for the warrant, being executed and returned to the sheriff, is determined: but it is said to be otherwise in a justification for a rent-charge or such things as have continuance.

So, the grantee of the next avoidance to a church, having presented, need not shew the deed of grant to him, being a matter executed.

Dodderidge, & vide Dyer, 29. pl. 194.

So, where in replevin the defendant justified by a condemnation before the justices of peace upon the statute of excise, for the non-entry of strong waters, and a warrant made thereupon to levy 20s. set for a fine; and exception was taken thereto; because there was no *profert hic in curia* of the warrant; the court said, the statute does not require that the warrant be under hand and seal, but only in writing, and no writing is to be pleaded, unless it be a deed: and they held further, that this being executed need not be shewn.

Also a person, who comes in by act or operation of law, need not produce the deed, or plead with a *profert in curia*; as, tenant in dower: so, of tenant by statute-staple or merchant, who may take advantage of a rent-charge without shewing the deed.

So, if a guardian in chivalry in right of the heir had entered for a condition broken, he might have pleaded the estate to have been on condition, without shewing any deed; because his interest was created by law.

But the lord by escheat, though his estate be created by law, shall not plead a condition to defeat a freehold, without shewing it; because the deed belongs to him.

So, tenant by the curtesy shall not plead a condition made by his wife, and a re-entry for a condition broken, without shewing the deed; for though his estate be created by law, yet the law presumes that he (a) had the possession of the deeds and evidences belonging to his wife.

In debt upon an obligation assigned by the commissioners of bankrupts, without shewing the obligation; upon which there was a demurrer; it was adjudged to be good enough, because the party came in by act in law, and had no means to obtain it without shewing the obligation in court.

[For the same reason, the indorse of a promissory note indorsed over by an administrator, need not make a *profert* of the letters of administration.

In replevin, the defendant avowed for rent devised to him in mortmain by the custom of London by testament. Fulthorp demanded oyer of the testament. *Per Strange*—It belongs to the executor; as a feme, who demands dower of the rent granted to her baron, shall not shew the deed, for it belongs to the heir.]

6 Co. 38.
Cro. Jac.
102.
3 Lev. 205.
Cro. Jac.
372.
Bateman
Woodcock,
Roll. Rep.
221. S. C.

Roll. Rep.
221. per
Coke and
Like point.

3 Lev. 205.
Ailbury
v. Harvey.

Co. Lit. 223.
Jenk. 305.
Cro. Car.
209.
5 Co. 75.

Co. Lit.
225. b.

Co. Lit.
226. a.

Co. Lit.
226. a.
(a) 20 Co.
94. S. P.
and may de-
tain them
for his life.
Cro. Car.
209. Gray
v. Fielder.

3 Will. 1.

Br. Oy. de
Rec. pl. 10.

1. *See* 2. *See*
3. *See* 4. *See*
5. *See* 6. *See*
7. *See* 8. *See*
9. *See* 10. *See*
11. *See* 12. *See*
13. *See* 14. *See*
15. *See* 16. *See*
17. *See* 18. *See*
19. *See* 20. *See*
21. *See* 22. *See*
23. *See* 24. *See*
25. *See* 26. *See*
27. *See* 28. *See*
29. *See* 30. *See*
31. *See* 32. *See*
33. *See* 34. *See*
35. *See* 36. *See*
37. *See* 38. *See*
39. *See* 40. *See*
41. *See* 42. *See*
43. *See* 44. *See*
45. *See* 46. *See*
47. *See* 48. *See*
49. *See* 50. *See*
51. *See* 52. *See*
53. *See* 54. *See*
55. *See* 56. *See*
57. *See* 58. *See*
59. *See* 60. *See*
61. *See* 62. *See*
63. *See* 64. *See*
65. *See* 66. *See*
67. *See* 68. *See*
69. *See* 70. *See*
71. *See* 72. *See*
73. *See* 74. *See*
75. *See* 76. *See*
77. *See* 78. *See*
79. *See* 80. *See*
81. *See* 82. *See*
83. *See* 84. *See*
85. *See* 86. *See*
87. *See* 88. *See*
89. *See* 90. *See*
91. *See* 92. *See*
93. *See* 94. *See*
95. *See* 96. *See*
97. *See* 98. *See*
99. *See* 100. *See*

Where a man is a (a) stranger to the deed, and doth not claim any thing comprised in the grant, nor any thing out of it, or claim any thing in right of the grantee, as bailiff or servant, there, he shall plead the patent or deed, without shewing it.

1. *See* 2. *See* 3. *See* 4. *See* 5. *See* 6. *See* 7. *See* 8. *See* 9. *See* 10. *See* 11. *See* 12. *See* 13. *See* 14. *See* 15. *See* 16. *See* 17. *See* 18. *See* 19. *See* 20. *See* 21. *See* 22. *See* 23. *See* 24. *See* 25. *See* 26. *See* 27. *See* 28. *See* 29. *See* 30. *See* 31. *See* 32. *See* 33. *See* 34. *See* 35. *See* 36. *See* 37. *See* 38. *See* 39. *See* 40. *See* 41. *See* 42. *See* 43. *See* 44. *See* 45. *See* 46. *See* 47. *See* 48. *See* 49. *See* 50. *See* 51. *See* 52. *See* 53. *See* 54. *See* 55. *See* 56. *See* 57. *See* 58. *See* 59. *See* 60. *See* 61. *See* 62. *See* 63. *See* 64. *See* 65. *See* 66. *See* 67. *See* 68. *See* 69. *See* 70. *See* 71. *See* 72. *See* 73. *See* 74. *See* 75. *See* 76. *See* 77. *See* 78. *See* 79. *See* 80. *See* 81. *See* 82. *See* 83. *See* 84. *See* 85. *See* 86. *See* 87. *See* 88. *See* 89. *See* 90. *See* 91. *See* 92. *See* 93. *See* 94. *See* 95. *See* 96. *See* 97. *See* 98. *See* 99. *See* 100. *See*

Grantee of the next presentation was outlawed, and the church became vacant; the lord of the manor, who was entitled to the goods and chattels of persons outlawed, brought a *quare impedit* and it was resolved, that the plaintiff being in *in le poſſe*, and not (b) privy to the grant in any wise, need not shew the deed of grant to the person outlawed.

cannot plead a deed without shewing it. Bro. Monstraas, pl. 61. Co. Lit. 267. 317.

Where a person pleads, that he claims by virtue of a feoffment to uses, or that *J. S.* being seised in fee, covenanted with *A.* and *B.* to stand seised to the use of such and such persons, and that the lands came and belong to him by virtue of such covenant, he need not produce the deed; for the deed doth not belong to him, though he claims thereby, but to the covenantees also, he is in by force of the statute of uses, by operation of law as tenant in dower, tenant by statute-staple, &c. are.

1. *See* 2. *See* 3. *See* 4. *See* 5. *See* 6. *See* 7. *See* 8. *See* 9. *See* 10. *See* 11. *See* 12. *See* 13. *See* 14. *See* 15. *See* 16. *See* 17. *See* 18. *See* 19. *See* 20. *See* 21. *See* 22. *See* 23. *See* 24. *See* 25. *See* 26. *See* 27. *See* 28. *See* 29. *See* 30. *See* 31. *See* 32. *See* 33. *See* 34. *See* 35. *See* 36. *See* 37. *See* 38. *See* 39. *See* 40. *See* 41. *See* 42. *See* 43. *See* 44. *See* 45. *See* 46. *See* 47. *See* 48. *See* 49. *See* 50. *See* 51. *See* 52. *See* 53. *See* 54. *See* 55. *See* 56. *See* 57. *See* 58. *See* 59. *See* 60. *See* 61. *See* 62. *See* 63. *See* 64. *See* 65. *See* 66. *See* 67. *See* 68. *See* 69. *See* 70. *See* 71. *See* 72. *See* 73. *See* 74. *See* 75. *See* 76. *See* 77. *See* 78. *See* 79. *See* 80. *See* 81. *See* 82. *See* 83. *See* 84. *See* 85. *See* 86. *See* 87. *See* 88. *See* 89. *See* 90. *See* 91. *See* 92. *See* 93. *See* 94. *See* 95. *See* 96. *See* 97. *See* 98. *See* 99. *See* 100. *See*

In debt against an executrix for 10 *l.* the plaintiff declared upon an obligation, conditioned to pay 5 *l.* to *A.* to the use of *M.* his daughter, at a time limited in a certain indenture; the defendant pleads, that the indenture was made between her testator and one *J. S.*, by which the plaintiff enfeoffed *J. S.*, to the use of the testator, and his heirs, and that the testator covenanted to pay 5 *l.* to the plaintiff within two months after the death of *W. R.*, which *W. R.* is yet alive; the plaintiff demurred; because the defendant did not produce the indenture: But the court held, that the plea was good without it, because the defendant was a stranger to the deed; and it does not belong to her, but belongs to the feoffees, and she has no means to enforce them to produce it, and the court will not impose an impossibility: that she was still more entitled to favour, being an executrix.

Where a man justifies under a deed only as servant, and claims no title himself, nor hath any interest therein, but the title and interest is his master's; yet he ought to shew the deed, for it is the substance of the title, and without shewing it he cannot justify.

So, where the defendant justified as a servant to the queen's patentee for years, and by his command, but did not bring into court the patent; the plea was held naught; for that he deriving his title from the patentee, not by act in law, but by his command, he ought to shew the patent, as well as he who claims under the patent by assignment;

assignment; but he who claims interest under an act in law (because he had no means to compel the patentee to shew it) may justify without shewing it.

So, where a servant justifies for tithes by lease, yet, coming in by title and privity, he ought to shew it, as well as his master; and he cannot plead the entry into another's soil without making a good title there, which ought to be by shewing the lease.

In an assise the tenant pleads a feoffment of the ancestor of the plaintiff unto him, &c. and the plaintiff saith, the feoffment was on condition, &c. and that the condition was broken, and pleads a re-entry, and that the tenant entered and (a) took away the chest, in which the deed was, and yet detains the same; he shall not in this case be enforced to shew the deed.

move the court, and the court will order him the deed, or a copy of it. Sid. 50.

Cro. Jac.
360. a Lil.
Reg. 202.

Co. Lit.
226. a.
(a) If the party who would plead the deed, has it not, he ought to

In debt upon a bond, conditioned for the performance of the covenants in an indenture, the (b) defendant ought to shew the indenture; and the entry always supposes it to be brought into court by him, though the court will sometimes (c) compel the plaintiff to give a copy thereof to the defendant, if he swears he never had a part thereof, or hath lost it; but this is done *ex gratia curie*, and not *ex debito justitie*. But where in such action, after oyer of the bond and condition, it was entered upon the roll, that the defendant prays oyer of the indenture, & *ei legitur*, This indenture, &c. and the defendant pleaded, &c.; it was adjudged upon a general demurrer, that this manner of pleading was good in substance, though not formal; for it shall be intended the true indenture, and that it was in court, though by the record it did not appear to be so. But *per curiam*, If it had been on a special demurrer, it had been naught.

to, otherwise they will grant an imparlance. Cro. Jac. 426. Sid. 386.

Sand. 8, 9.
Jevons v. Harridge.
(b) He cannot plead performance without shewing it. Allen, 72. Vent. 37. Mod. 266.
(c) That if it be lost, the court will compel the party to shew his counterpart, and he to plead there- 2 Keb. 450.

When one is bound by bond to perform covenants in an indenture, in an action upon the bond, the defendant, in order to discharge himself, ought to shew the deed to the court, that they may see what the covenants are; for he cannot shew that he has performed all, without shewing what he was to perform; and therefore he ought to recite the indenture, whereof he is supposed to have a counterpart, in his plea; but if he never had a counterpart, or had lost it, upon oath thereof the court will compel the plaintiff to give him a counterpart, in order to set it out for his defence.

6 Mod. 237.
per curiam.

But, where an action was brought upon a special agreement contained in a note, and a rule was made to shew cause why the plaintiff should not give the defendant a copy; upon cause shewn the rule was discharged; because the contract, upon which the action was founded, was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copy*.

Salk. 215.
pl. 3. Hill v. Aland.
• But nevertheless if there was good reason to suspect a forgery, the court might

make a rule compelling plaintiff or his attorney to leave it with the Master for inspection, or to produce it to defendant and his witnesses, that they might inspect it.

Defendant may, if he pleases, plead without demanding oyer of it; and if he once plead, he cannot after demand his plea and demand oyer. 2 Lil. Reg. 226. — Where there ought to be oyer, the party, if he demanded it, is not bound to plead without it. 6 Mod. 28. [2 Str. 1186. 1 Wils. 16. Where a deed is in the hands of a third person, the court will oblige him to give oyer, and produce it. 1198.]

If a man (a) enters into an obligation by a wrong name, no advantage can be taken thereof, without demanding oyer of the deed. 6 Mod. 303. (a) If the defendant would take

advantage of a wrong original, he must demand oyer of it. 4 Mod. 246. [But it is now settled, that the defendant demand oyer of the original writ, the plaintiff is not bound to attend to it, but may plead as if no such demand had been made. Boats v. Edwards, Dougl. 227. Ford v. Bornham, 108, 340.]

Articles of agreement indented were pleaded, and replication as, that in the said articles it is further covenanted, without demanding oyer of the deed; and the court held it ill pleading, and gave judgment *nisi*. Keb. 513. For according to Hutt. 33. they cannot plead and shew the counterpart.

In trespass the defendant justifies for common, and sets forth letters patent of the king *hic in curia prolat.*; which plea the plaintiff accepts, without demanding oyer of the letters patent, but after he demanded oyer of them; but denied *per curiam*; and the prothonotaries said, that he is not obliged to shew them, if not required at the acceptance of the plea. to give oyer of letters patent. 1 Term Rep. 149.]

Oyer of the deed cannot be demanded but during the time it is in court, and that is all the term wherein it is produced, and then it may be entered in *hec verba*; and there may be a demurrer or issue upon it: but it cannot be done of another term, because the deed is then out of the court (b).

For in that case, the law doth adjudge it to be in the custody of the party to whom it belongs: but if it be destroyed, then it shall remain in court until the plea is determined, and if it eventually turn out not to be the plaintiff's deed, it shall be destroyed. See the above authorities and Co. lit. 231. b. But letters testamentary, or of administration, are not supposed to remain in court all the term; for the plaintiff may have occasion to produce them elsewhere. 2 Salk. 497. 12 Mod. 590. S. C.]

If the defendant pleads a former action depending in the same court in abatement, and the plaintiff craves oyer of the record, if it is not given in convenient time, *viz.* the next day, the plaintiff may sign judgment. Carth. 451. Ld. Raym. 347. Theobald v. Long, and Carth. 517. S. C. where this is said to be the quickest method of proceeding.

[If the defendant plead a judgment or other matter of record in the same court, he must give a note in writing of the term and number-roll whereon such judgment or matter of record is entered and filed; or, in default thereof, the plea is not to be received. But in strictness oyer is not demandable of a record. And, it seems, not of an act of parliament. Keilw. 96. Carth. 454. Ld. Raym. 347. 550. 2 Str. 823. R. T. 5 & 6 G. 2. B. R. Dougl. 476. 1 Term Rep. 149.]

The time allowed for the defendant to give oyer of a deed, &c. to the plaintiff, is two days exclusive after it is demanded. If it be not given in that time, the plaintiff may sign judgment as for want of a plea (c). If given, the plaintiff shall have the same time to reply after it is given, as he had at the time it was demanded (d). Carth. 454. 2 Term Rep. 40. (c) 6 Mod. 122. (d) R. T. 5 & 6 G. 2. B. R.

If in debt on a bond for performance of an award the defendant pleads no award, and the plaintiff sets forth an award, with a *profect hic in curia*, and the defendant craves oyer, and then de-

Marygold,
adjouged,
& wife
Style, 459.
See 12 Mod.
534.

murs for variance between the award set out in the replication and the oyer, and the variance appears material, the defendant must have judgment: otherwise, if the variance had been as to those parts in which the award was void. And though in debt on an award the plaintiff need not set forth more than makes for him, yet it is otherwise in debt on a bond; for there the plaintiff must reply the whole award; and if such replication be without a *profer*, the defendant may reply *nul tiel agard*.

Lil. Reg.
267. 6 Mod.
27. 233.
2 Show. 370.
pl. 321.

After imparlance oyer cannot be demanded, because the imparlance is to another term: but, if it be by bill in *B. R.* (a) it may, though not in the Common Pleas.

[(a) This must be understood of a *special* imparlance to another day in the same term.]

Sid. 308.
(b) 2 Lutw.
2644. contr.

When oyer of a deed is prayed, it is intended that the deed is in court, and the *ei legitur*, or reading of it (b), is the act of the court.

3 Salk. 119.
pl. 2.
(c) When
upon oyer of
the deed it
is entered,
the whole
case appears
to the court
as fully as

When a deed is pleaded with a *profer hic in curia*, the very deed itself is by intendment of law immediately in the possession of the court; and therefore when oyer is craved, it is of the court, and not of the party; and (c) after oyer is craved the deed becomes parcel of the record, and the court must judge upon the whole (d); and the demand of oyer is a kind of plea (e), and may be counterpleaded.

If the deed had been in the plea. Hob. 217. Show. Parl. Cs. 221.

[(d) And this, though it were not strictly demandable at the time of granting it. Dougl. 460. (e) As it is a kind of plea, it should regularly be made before the time for pleading is expired. Fowler v. Dyer, Mich. 20 G. 3. Tidd's Pr. 347.]

Carth. 513.

If the defendant prays oyer of the bond and condition, and it is entered *in hac verba*, the condition becomes parcel of the plaintiff's declaration, and it is not part of the defendant's plea.

Tide.
29 Car.
in B. R.
Mayor and
Common-
alty of
London
v. Gorse.
2 Lev. 142.
1 Kob. 491.
S. C.
[(f) It
denies, how-
ever, that
the plaintiff,
if he would
contest the
oyer, may
either counter-
plead it, or
strike out the
rest of the
pleading and
demur; on
which the
judgment of
the court is,
either that
the defendant
have oyer,
or that he
answer without
it; on the
latter judgment
the defendant
may have a
writ of error;
for to deny
oyer where
it ought to be
granted is error,
but not a
converso. 2
Salk. 497. 2
Ld. Raym.
970. 2 Str.
1186. 1
Willf. 16.]

Debt for the duty of scavage, and declares upon a patent of *Ed. IV.*, defendant imparls, and after demands oyer of the letters patent; upon which the plaintiff demurs. *Per cur.*—The demurrer is ill; for the defendant having demanded oyer, &c., he ought either to have it, or to be ousted of it by the rule of court; but there cannot be a demurrer upon the demand; he ought to have counterpleaded the demand of the oyer, and the judgment of the court would have been, that he should answer *sine auditu*, &c., and it was resembled to an *aid prier*, in which the plaintiff cannot demur, but must counterplead (f).

Weavers'
Company
v. Barlett,
& Nip. 1842.
Himminds
v. Parmenter,
1 Willf.
97. Wallace

[It hath been said, that the defendant is not bound to set forth the oyer in his plea; and that if he do not, the plaintiff may pray an enrolment, and so make it part of his replication. But it is now holden, that if the defendant after praying oyer of a deed, do not set forth the whole of it, the plaintiff may sign judgment as for want of a plea, or the court will quash it, for that by craving oyer

oyer the defendant undertakes to set out the whole *verbatim*; and if he do not so, the plea is bad.

v. Duchaes of Cumberland,

4 Term Rep. 370. Slater v. Horne, E. 34 G. 3. B. R. Tidd's Pr. 309. S. P. See also Barnes, 327. S. P.

Where the defendant in an action on a bond, after craving oyer, and setting it out truly, pleaded payment, on which the plaintiff took issue, and served the defendant's attorney with a rule to abide, &c., and gave notice of trial; and afterwards the defendant returned the paper book, setting out a false oyer of the bond, and pleading as before, on which the plaintiff enrolled the true condition, and demurred; the court ordered all the proceedings to be struck out, that the plaintiff should have judgment and the defendant's attorney should pay all the costs.]

Ferguson v. Mackreth, Hil. 24 G. 3. B. R. cited in 4 Term Rep. 371. note.

13. Pleading a Recovery in a former Action.

It is a maxim in law, *quod nemo bis vexari debet si constat curia quod sit pro una & eadem causa*; so that regularly a bar in a real or personal action by judgment, confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or like nature.

6 Co. 7. Hob. 4. 5. Vent. 170.

But herein there is a diversity between real and personal actions; for though in the latter, as debt, account, &c., the bar is perpetual; yet in real actions there is this distinction, that a bar in one real action is not a bar to an action of a higher nature; and therefore if a man is barred in an assise of *novel disseisin* he may have a *monstrans de droit*, *assise de mortd'ancestor*, *ayel*, *beafail*, *entry sur disseisin a son ancestor*; and this is said to be in favour of inheritances.

6 Co. 7. & vide tit. Ejectment.

So, if a man is barred in a *formedon in descender*, he may bring a *formedon in remainder* or *reverter*.

5 Co. 33. a. 2 Mod. 43.

If a man is barred in an action of trespass for the taking of goods, this cannot be pleaded in an appeal of robbery, being of a higher nature.

Bro. Eftoppel, 217. 4 Co 43.

Where *A.* robbed *B.* of 3000 *l.* of money in bags, for which he was afterwards indicted and convicted, and afterwards *B.* brought trespass against *A.* for taking the said monies, who pleaded the indictment, by the *procurement* of the plaintiff, and the conviction in bar, but did not shew that the plaintiff had given evidence for the conviction; for this reason the bar was held insufficient; for otherwise he shall not have restitution, and the allegation of *procurement* is not sufficient; & *ea de causa* judgment was given for the plaintiff, and not for the matter in law, for that was against him.

Noy, 82. Lane, 144. Markham v. Cobb.

If a man grants a rent to another, payable at a certain day, and covenants to pay the rent accordingly, if the grantee afterwards recovers in an action of covenant for the non-payment of the rent (*a*), this will be a bar for any action after for the rent (*b*); for in the action of (*c*) covenant he shall recover all the rent in damages.

Roll. Abr. 353. Strong v. Watts. (a) So, a recovery or bar in an *assumpsit* will

be a good bar in debt for the same thing. 4 Co. 94. Yelv. 84. Cro. Jac. 110. Cro. Eliz. 240. (b) But in *assumpsit* the defendant cannot plead an account brought for the same money to which he had rendered his law; because damages are recovered in *assumpsit*, but not in an account. Moor, 458. But *quere*; & vide Cro. Jac. 110. (c) So, where an action is brought upon a special *assumpsit* to pay Cro. Car. 425. Cro. Eliz. 57.

JUDGMENT AND PLEADING

...the execution of A. being debt upon a bond, that before the purchase of this writ, the defendant B. brought debt upon the same bond. When then pleaded, that B. made executors, and the plaintiff then replied, that admission to the execution is *homo possidetis* between the executor and the defendant then demurred; and it was found for the plaintiff. And to now pleads this matter by way of estoppel, and judgment if, as executor, he shall have an action upon the bond against the same defendant; this is no good plea. For the first judgment the plaintiff was only barred as to the writ, viz. to have one as administrator; but this is no bar or estoppel to bring his true action. It is a bar to the right, not where the action is only misperceived. — 2 Mod. 319. — So, where judgment is given upon the plea of a man who brings trespass for taking his horse, and the defendant pleads that he got the horse into his possession, the defendant is without remedy; the property is still in the plaintiff. — 2 Mod. 319. per cur.

...the defendant pleads that the plaintiff had already brought his action for the same plate against J. S., and judgment to recover 20*l.* damages, and (a) had J. S. in execution for the same, and avers it to be the same conversion, &c., the plaintiff cannot set aside the judgment the damages which were already recovered are reduced to a certainty, and therefore he shall not maintain the uncertainty again; and by the judgment the property is in the plaintiff's hands.

...And where and how the defendant may enforce the judgment, vide *Latch*, 216.

...debt against one obligor, upon a joint and several bond, and the body taken in execution, is no plea to the action against the other obligor.

...C. B. upon an obligation, he shall have judgment in action of debt upon the same obligation, and the judgment remains in force; for by this judgment the property is turned into a matter of record.

...the county court by *judices*, for that court not having jurisdiction, upon the same obligation, have debt in a county court.

...vide *Roll. Abr.* 555. and title *Custom of London*.

...the plaintiff of an action in an inferior court be brought in one of the courts at *Westminster*.

...the defendant pleads, that the plaintiff had already brought his action upon the same bond, to which the plaintiff replied, that the defendant was *quod querens nil capiat per breve*, and it was found for him; and the defendant should recover the costs of the plaintiff, *et quod eat inde sine die*, this is no good plea. For the judgment was not *quod querens nil capiat per breve*.

ver, and so no judgment was given so as to bar the plaintiff in another suit.

If in debt against executors they plead a judgment obtained against one of them as administrator, this is a good bar; for though he might have pleaded in abatement to the first action, yet he was not obliged so to do, and this recovery against him was upon the right of the debt.

If in action upon the case the declaration is insufficient, and the defendant pleads an ill plea, but judgment is given against the plaintiff upon the insufficiency of declaration, but by mistake entered *quia placit. predict.*, &c., *bonum & sufficiens in lege existit*, &c., *ideo consideratum*, &c., *quod querens nil capiat per billam (a)*, whereas it ought to have been entered *quod defendens eat inde de die*, and the plaintiff brings a new action, and declares aright, and the defendant pleads the former judgment, reciting the record *certatum*, this is no good plea; for, without question, the plaintiff having only committed a mistake in his declaration, he may set it right in a second action.

de die, and shall have reference to the nature or matter of the plea, and so be taken to go in writ. Co. Lit. 363. 8 Co. 68.

But, if a declaration be faulty, and the defendant take no advantage thereof, but plead a plea in bar, upon which the plaintiff takes issue, and the right of the matter be found for the defendant, the plaintiff shall have no other action, for he is estopped by the verdict. So, if a declaration be faulty, and the plaintiff demur to the plea in bar, by which he confesses the fact, if well pleaded, he is estopped thereby, and shall have no other action. But, if the plea is not good, it can be no estoppel, but the plaintiff may have another action.

And plea, conceiving it to be bad, the court will, before judgment, give him leave to withdraw his demurrer, on payment of costs, and take issue on the plea.

If in trover for certain sheep the plaintiff declares that the 25th day of *March* in the year, &c. he was possessed thereof, and lost them, and that the same the last day of *April* in the same year came to the hands of the defendant, who the same day converted, &c., and the defendant pleads, that the plaintiff had before brought trespass against the defendant, and *J. S. quare ceperunt & induerunt* the said sheep, and thereupon counted of a taking the 14th of *April* in the same year, to which the defendants then pleaded a judgment against *J. N.* who was possessed of the said sheep, and that by virtue of a *fieri facias* thereupon, the said sheep were sold to the defendant, &c.; whereupon issue being joined it was found for the plaintiff, and 2*d.* damages given, upon which the plaintiff had judgment for the said 2*d.* damages and 6*l.* costs, and avers the taking and driving, for which the said recovery in trespass was had, and the conversion in this action to be all one, &c.; and to this plea the plaintiff replies and confesses the said action, and recovery of the 2*d.* damages, &c., but says the said 2*d.* damage was not given for the value or conversion of the said sheep, *absque hoc*, that the said taking and driving, whereupon the said

Lev. 262.
Parker v.
Amys.

Mod. 20.
Leppin v.
Kedgwin.
(a) Where
judgment is
given for the
tenant or
defendant
upon a plea
in bar, or on
the writ, &c.
the judg-
ment is all
one, viz.
quod eat inde
in bar, or on

Mod. 207.
per cur.
Skin. 220.
pl. 15. S. P.
In some
cases where
the merits
are really
with the
plaintiff, and
he hastily
demurs to a

Cro. Car. 35.
Laicon v.
Bernard,
Hutton, 81.
S. C. ad-
judged by
three Judges
against Yel-
verton.

said judgment was had, is the same trespass *quoad* the conversion of the said sheep of which the plaintiff now declares; this is a good replication, and the plaintiff shall recover; for the damage being so small, cannot be presumed to be given for the value of the said sheep; for if so, the plaintiff must for 2*d.* only lose his property in the said sheep; therefore it shall be presumed, and may be averred, that this damage was given for the chasing and driving, and that the plaintiff had the sheep again, and after lost them, &c., and the rather, because in time the conversion is supposed so long after the chasing and driving.

Style, 3, 4.
201.
Watson v.
Norbury.

If in an action upon the case the plaintiff declares against the defendant, that he falsely and maliciously did procure a commission of bankrupt to issue out against the plaintiff, &c., by virtue whereof the defendant broke his shop, and took away his goods and shop-books, whereby he was discredited and lost his trade, to his damage, &c.; and the defendant pleads, that the plaintiff had brought an action of trespass for breaking his shop, taking his goods, &c., and upon that action had recovered damages, &c.; this is no good plea, for this action is not brought for the same thing as the former was, in which no damages could be recovered for the scandal, upon which this action is grounded.

Raym. 47.
3 Mod. 1, 2.
2 Mod. 318.
Put v.
Rawstern.

If in trover for certain goods the defendant pleads, that the plaintiff had brought trespass *vi & armis* for the same goods, and upon not guilty pleaded a verdict and judgment was thereupon given for the defendant, &c.; this is no good plea, because this action will in many cases lie where trespass will not; and so it may be very well presumed, that the plaintiff at first only mistook his action, and brought trespass where his evidence would serve in trover only.

2 Vent. 169.
Letchmere
v. Toplady,
1 Show. 146.
S. C.

But it hath been since held, that if in trover for certain goods the defendant pleads, that the plaintiff had before brought an action of trespass *quare vi & armis ceperunt & asportaverunt* against the same defendants for the same goods, to which the defendants then pleaded not guilty; and upon a special verdict, which the defendants in their plea set forth *verbatim*, the court then gave judgment, that the plaintiff *nil capiat per billam*, and that the defendants *irent inde sine die*, and avers the goods in both declarations to be the same; and the taking and carrying away, &c. supposed in the said action of trespass, and the coming to the hands of the defendant, &c. in this declaration, to be the same, and the cause of action the same, &c.; this is a good plea; for though trover will lie in many cases where trespass will not, yet upon the matter here disclosed in pleading it appears the plaintiff was before barred, not by mistake of his action, but upon the rights and merits of the cause.

Kitchen v.
Campbell,
2 Bl. Rep.
827. 3 Will.
304. S. C.
(a) 2 Ld.
Raym.
1216. That

[So, to an action of *indebitatus assumpsit* for the value of goods, a judgment for the defendant in trover for the same goods may be pleaded in bar, provided it appear by proper averments in the plea, that the question between the parties was the same in both actions. So, *e converso* (a), a recovery in *indebitatus assumpsit* for the value of the goods, may be pleaded in bar to an action of trover for

for the same goods. In these cases the principal consideration is, whether it be precisely the same cause of action in both, which may appear either by proper averments in a plea, or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is, that the same evidence will maintain both the actions.]

a former recovery may be given in evidence on the general issue to an action on the case.

2 Str. 733. 3 Burr. 1353. 1 Show. 146. Secds, to debt *qui tenet*, 1 Str. 701-2. or on bond.

If *A.* says *B.* is perjured, and thereupon *B.* brings his action, and *A.* justifies, and issue is thereupon taken and found for the defendant, and judgment thereupon given, and after *A.* again publishes the same words of *B.*, and thereupon *B.* brings another action, and *A.* pleads the first judgment in bar, this is a good plea.

2 Brownl. 49. Stiles v. Baxter.

If an alderman of *N.* brings an action for these words, *he is a rascally alderman, a factious alderman, a lampooner*, and avers, that a lampooner is there understood of a libeller, and the defendant pleads a former action brought for the same words, and laid in the same manner, (saying only that in the first action no interpretation is given to the word *lampooner*,) in which action the plaintiff was barred, this is a good plea; for the plaintiff having been once barred shall not entitle himself to a new action by a new interpretation of the same words.

3 Lev. 248. Gardner v. Helria.

In case for erecting a nuisance *2 die Feb.* the defendant pleaded a prior action brought for erecting a nuisance *20 die Martii*, and a recovery thereupon, and avers these to be the same nuisance and erection; plaintiff demurred, and judgment against him, for he may have an action for the continuing of the same nuisance, but can never have a new action for the same erection.

Salk. 10. pl. 3. Ld. Raym. 370. Johnson v. Long. Carth. 456. S. C. adjudged, be-

cause the plaintiff had not laid any continuance of the nuisance in his declaration.

But, though an action will lie for continuing a nuisance, yet it hath been held, that in assault, battery, and maihem, if the plaintiff in his declaration recites a judgment in a former action for the same battery, and shews that he has since sustained consequential damages by a piece of his skull's coming out; yet this will not entitle him to a new action; for *per Holt, C. J.*, every new dropping is a nuisance; but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages which the jury must be supposed to have considered at the trial.

Salk. 11. pl. 5. Fettes v. Beale. Ld. Raym. 339. 692. 12 Mod. 542.

(K) Duplicity in Pleading: And herein,

1. The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.

THE plea, says my Lord *Coke*, that contains duplicity or multiplicity of distinct matter to one and the same thing, whereunto several answers (admitting each of them to be good) are required, is not allowable in law; and this rule, says he, extends to pleas

Co. Lit. 304. a. Doct. pl. 135. [Duplicity is, where

pleas

distinct matters, not being part of one entire defence, are attempted to be put in issue.

But this does not preclude a party from introducing several matters into his plea, if they are constituent parts of the same entire defence. For though it be true, that issue must be taken upon a single point; yet it is not necessary that such single point should consist only of a single fact.

For instance, the point of the plea may be, that the defendant is entitled to common: but to establish this point several facts may be necessary, as, that the cattle with which he is to use the common must be his own cattle, must be levant and couchant, &c. *Robinson v. Rayley*, 1 Burr. 316.]—(a) But, where the defendant pleaded ten outlawries on mesne process in disability, to which the plaintiff demurred for duplicity, it was held, that the plea was naught; and the diversity between a plea in bar and abatement as to duplicity being urged, it was answered by the court, that there was a difference between a plea of an outlawry in disability and other pleas in abatement; and that this plea was ill for duplicity, because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required. *Carth. 8, 9.*

5 H. 7. 7.
Doct. pl.
135.
Plow. 194.
Yelv. 13.
Roll. Rep.
112.
Vent. 47-8.

The reasons why duplicity in pleading is a fault are, that the party being effectually barred by one single point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take issue on any one point, yet must he be at a loss which the material point is, so as to traverse the same, and thereby put an end to the cause; whereas the party pleading such double matter must be presumed confident of his own strength, and therefore ought to put his defence on that single point, which will put an end to it. Besides, the jury ought not to be charged with multiplicity of things, when finding any one of them contrary to their evidence lays them liable to the severity of an attainder.

Vide under
the division
Demurrer;
& vide
11 Co. 52.

Also, from the expence and vexatiousness attending it, a person is no more allowed to plead and demur to the same fact, than he is to plead double; for the duplicity herein draws the matter to a different *examen*, since the demurrer is to be tried by the court, and the fact by a jury.

* Vent. 212.
3 Mod. 318.
Co. Ent.
504.
2 Roll.
Rep. 306.
Lutw. 4.
3 Mod. 251.
Ld. Raym.
332.
Comb. 65.

So, where one confesses and avoids, and likewise traverses the same point, this is in nature of a double plea, and therefore naught.

But, though duplicity in pleading be a fault, yet must the same be taken advantage of on a special demurrer, that is, the party must shew wherein the doubleness consists; and it is not sufficient to demur *quia duplex & caret forma*, &c., but he must lay his finger on the very point that is so.

Poph. 113. Lev. 76. Salk. 219. pl. 5. 2 Ld. Raym. 798. 2 Salk. 678. pl. 5. 7 Mod. 71. & vide title Demurrer more authorities to this purpose.

If a plea is pleaded which is double, and the adverse party demurs not for the doubleness, he is obliged to answer both parts. 1 Vent. 272.

2. What shall be said Duplicity in Pleading.

In trespass for assault and battery, defendant justifies by a *molli-ter manus imposuit* for due correction of the defendant as his servant, and pleads over, that since that time the plaintiff *exoneravit & relaxavit* (without saying *per scriptum*) to the defendant the said matter; to this plea it was demurred for doubleness specially; and the opinion of the court was, that it was double; for though the release be not sufficiently pleaded, yet it is pleaded so as issue may be taken upon it, which will be expensive and vexatious to the plaintiff: but, had it been really no plea at all, or such a one on which no issue could be taken, then, it had been only (a) surplusage, and, consequently, could not amount to a double plea.

Sid. 175.
Keb. 661.
Bleke v.
Grove.

(a) Matter of surplusage shall never make a plea double.
1 H. 7. 16.
Dyer, 42. b.
Doct. pl.
138. S. P.

In an action of false imprisonment the defendant justifies by force of a *latitat* out of *B. R.* by force of which he took him; the plaintiff replies that he did it *de injuriâ suâ propriâ*, &c. it was moved that this was naught after a verdict, and not helped; but the court held it well after a verdict, but that upon a demurrer it would be naught, as being multifarious, jumbling (b) matters of record and matters of fact together, and putting both into the mouths of the *lay gents*.

Raym. 50.
Keb. 125.
164. *Bodley*
v. Walker.

(b) For this vide Hob.
244.
Hutt. 20.
Sid. 314.
5 H. 7. 7.
Dyer, 242.
a. Doct.
pl. 136.

In debt on an obligation the defendant pleaded, it was on condition that he stood to the award of certain persons, so that it were delivered in writing, and said that no award was made or delivered in writing; and this plea was held naught for duplicity, for the award might be made in one county, and might be delivered in another, and so the same jury not proper judges of both these facts.

In debt upon an obligation, if the defendant says that the obligation was made by durefs of imprisonment, and by menace of imprisonment, this is a double plea.

Plow. 140.
19 E. 4. 4.
But, if an
executor

pleas *admiravit*, and so *riens in mains*, this is not double, being only an inference necessarily following from his plea. 1 H. 7. 15. 18 H. 8. 4. Dyer, 243.—In debt for rent *nihil debet* and *nihil habuit in tenementis* held to be double and repugnant. Vide 4 Mod. 254.

In a *scire facias* on a fine, as heir to two parceners, the tenant pleaded in bar a fine levied by the two parceners with warranty, and he relied on the warranty; and that plea was held double, and he forced to rely on the warranty of one.

Co. Lit. 304.
Hob. 29.

So, if one have divers warranties, and they fall by descent on one person, heir to both, yet he must be vouched as heir to one only; for as to the demandant, the voucher is a kind of plea in bar, and ought to be single; for the demandant may counterplead the possession of the vouchee and his ancestors, which he cannot do if they be divers; and as to the vouchee, the voucher is a kind of demand or suit, and ought to be single; for the vouchee may counterplead the lien, which he cannot do if they be divers.

Co. Lit. 304.
Hob. 29.

2 Vent. 198.
222.
Saund. 338.

In debt on a penal bill of 7 l. for the payment of 10 shillings at one day and 10 shillings at another, and so till the whole was paid; the plaintiff assigns the breach, that the defendant did not pay on the said several days, &c., the defendant pleads an insufficient plea, the plaintiff replies, and the defendant demurs generally: in this case it was held, that no exception could be taken on the general demurrer to the declaration for the doubleness, but judgment should go against the defendant for the insufficiency of his plea.

Lev. 79.

In covenant on a lease, wherein the lessee covenanted to pay his rent yearly by equal portions at *Michaelmas* and *Lady-day*, the breach assigned was, that he did not pay the rent due at the afore-said several feasts during the term; and though it was objected, that the breach was not well assigned, but ought to have been so particularly; yet it was resolved to be well enough, for perhaps it was never paid at any of the days; and this differs from the case last abovementioned, for there, the assignment of non-payment at any one of the days was sufficient to entitle him to the penalty of the bill.

2 Saund. 48,
49.
Tretthewy
v. Ackland.
Lev. 281.

& vide
1 Mod. 33.
2 Mod. 36.
2 Keb. 591.
2 Sand. 336.
4 Mod. 54.
63.
Carth. 195.
(a) This is called an anomalous case against the rules of law, which condemn double pleading;

In debt against an executor who pleads several judgments had against him, &c. the plaintiff replies to each severally, that it was had by fraud to bar him of his debt: The replication is clearly double, because if he had avoided any one of the judgments he should have had a general judgment against the defendant, his plea being entire (a); yet in this particular case this pleading is allowed, for he may be mistaken in one; and in this case he has it in his election to plead fraud to them all severally, or to any of them, omitting the others; and if payment of several obligations had been alleged, the plaintiff might traverse the payment of each severally, or any of them; and though he mistake some of the sums to which he pleaded *non solvit*, yet it shall not hurt; for it is no more than if he had said nothing to them; and in the case of several judgments the plaintiff may reply, that one was obtained by fraud, that satisfaction is acknowledged on record on another, and so avoid each by a different plea.

but in this case it hath several times been allowed. 2 Sand. 48. Comb. 444. Ld. Raym. 263.
Salk. 298. pl. 10. Carth. 419. 12 Mod. 153.

Flow. 194.
Doct. pl.
136.

If a man pleads two things where he is compellable to shew both, this does not make his plea double.

1 Lev. 82.
Vent. 236.

As, where to a plea in abatement in trover that another action depends by B. and C. for the same cause, the plaintiff replied that they are both dead; this replication is not double, for he must shew the death of both to enable him to bring the action alone.

Keilw. 68.
Stile, 82.

(b) For this vide Sid. 5.
Skin. 583.
and title Escape.

If there are three in execution jointly at the suit of A. and all escape, the plaintiff may declare for the escape of all, and it will not be double, though the escape of any one of them will be (b) sufficient to entitle him to the action.

In detinue by Dame *Audley* the defendant pleads, that after bailment of the goods to him by the plaintiff the married Lord *Audley*, and that during such marriage the Lord *Audley* released to him all actions, &c. It was objected that this plea was double, viz. property in the husband by the intermarriage, and a release by him; but it was resolved not double, because he could not plead the release without shewing the marriage.

Moor, 25.
pl. 85.
Dame Aud-
ley's case.
Dalif. 30.
pl. 9. S. C.

3. Of pleading double by Leave of the Court.

This depends on the statute 4 & 5 Ann. c. 16. for amendment of the law, by which it is enacted, "That any defendant or tenant in any action or suit, or any plaintiff in replevin in any court of record may, with leave of the same court, plead as many several matters thereto as he shall think necessary for his defence; and if any such matter shall on demurrer joined be judged insufficient, costs shall be given at the discretion of the court; or if a verdict be found upon any issue in the said cause for the plaintiff or demandant, costs shall also be given in like manner, unless the judge who tried the said issue shall certify that the said defendant, or tenant, or plaintiff in replevin had a probable cause to plead such matter, which upon the said issue shall be found against him."

In the construction of this branch of the statute the following opinions have been holden :

That a person cannot plead and demur to the same part of the declaration : also, that pleading double is at the peril of the pleader; and if the court give him leave in cases where they have no power by the act so to do, the other party may demur*.

Cases in Law
and Equity,
281. 327.

* *Qu.* If the
proper me-
thod is not to move the court to discharge the rule.

It is held, that these double pleas must be to the plaintiff's declaration, and that therefore the defendant cannot rejoin two several matters to the plaintiff's replication.

T. 5 G. 2.
in B. R.
Warren v.
Ives. 2 Str.

108. S. C.—Whether to a writ of error to reverse a common recovery the defendant may plead double.

plead double.

It was moved, that an executor being likewise heir at law might have leave to plead double, viz. *solvit ad diem*, and *riens per descent*, to an action of debt upon a bond; but the court refused the motion, without an affidavit that he had *riens per descent*, and said, that there is the same law in case of an administrator, who shall not be allowed to plead *plene administravit*, and no assets, without affidavit †.

T. 2 G. 1.
in B. R.
Carrington
v. Warren.

† The com-
mon plea of
*plene admi-
nistravit*, as
now used,
includes an

allegation that the defendant hath not, nor at the commencement of the suit had, any assets, and the whole makes but one plea, and is not double.

So, in covenant for non-payment of rent, as assignee of several terms, the plaintiff set out his title under several deeds, and the defendant moved to plead eight pleas; but, because he had not an affidavit to prove them material to the merits of the cause, the motion was denied. And here the court observed, that this statute

H. 7 G. 2.
in B. R. Sir
Charles
Peers v.
Whale.

was

was not designed to put the plaintiffs under unnecessary difficulties in proving issues foreign to the merits of the matter in question: and though they are to allow any person that asks the favour of pleading double, to use the benefit of the act, yet are they to see the design of it is not abused in multiplying fruitless and impertinent issues.

It hath been frequently insisted upon, that a defendant could not within this act plead contradictory and inconsistent pleas; as *non assumpsit* and the statute of limitations, &c. But the court observing, that if the benefit of the statute was to be confined to such pleas as are consistent, it would hardly be possible to plead a special plea and a general issue, the one always denying the charge, the other generally confessing and avoiding it; and as the statute itself makes no distinction herein, hence it hath been held,

H. 8 G. 1. That in debt for rent the defendant may plead a tender and
in B. R. eviction.
Cary v.

Jenkins. 1 Str. 496. S. C.

Isaac and Sir So, an action upon articles under hand and seal relating to *South-*
William Sea stock, defendant had leave to plead *non est factum*, *non obtulit*,
Gordon in *non dedit notitiam secundum the proviso* in the deed, and that the
Scacc. deed was not registered.

M. 2 G. 2. So, not guilty and *son assault demesne* was pleaded by leave of the
in B. R. court *.
Smith v.

Smallwood. * And is now the common practice, without exception.

T. 3 G. 2. So, in debt upon a bond, the defendant was permitted to plead
in B. R. *non est factum* and bankruptcy.
Atkinson

v. Atkinson, 2 Str. 871. S. C. and M. 8 G. 2. S. P. between Phillips and Wood. 2 Str. 1000. S. C.

H. 4 G. 2. In an action on the case against the post-master-general, it was
in B. R. allowed him to plead *non culp.* & *non culp. infra sex annos.*
Decosta v.

Carteret, 2 Str. 889. S. C. Fitzgib. 189. S. C. Barnard. K. B. 407. S. C.

T. 5 G. 2. In trespass the defendant had leave to plead a licence and justify
in B. R. the cutting down some boughs, because they hung over his gar-
Bohun v. dens; though it was objected, that these pleas were inconsistent,
Morgan. the licence being a tacit or implied acknowledgment, that he had
no right to cut the boughs, whereas the justification asserts one.

T. 5 G. 2. In debt upon a bond given by a woman, conditioned that she
in B. R. should marry the plaintiff, if he requested, within ten days after
Dun v. Vau- his return from sea, leave was given to plead *non est factum*, and
acher, 2 Str. that she was never requested.
908. S. C.

M. 6 G. 2. In debt for rent upon a parol demise, defendant had leave to
in B. R. plead *nil habuit in tenementis* & *non dimisit*.
Semining v.

Bygrove.

Macellan [A defendant shall not be allowed to plead *non assumpsit*, or *non*
v. Howard, *est factum*, to the whole declaration, and a tender as to part; for
4 Term one of these pleas goes to deny that the plaintiff had any cause of
Rep. 194. action, and the other partially admits it.
Jenkins v.

Edwards, 5 Term Rep 97.

Neither

Neither shall he be allowed to plead several matters, which require different trials, as, in dower, *ne unques accoup'e en loyal matrimoine*, and a mortgage, or *ne unques seifie que dower*; for the first matter is triable by the bishop, and the others by a jury; and if the former be found against the defendant, the judge cannot certify, that he had a probable cause of pleading it.

Anderson v. Anderson, 2 Bl. Rep. 1157.
Hillier v. Fletcher, Id. 1207.
Robins v. Crutchley, 2 Willf. 118. Semb. *contr.*

This statute of the 4 & 5 Ann. does not extend to any action, or information, upon a penal statute.]

Morgan v. Luckup, Ca. temp. Barnes, 365.

Hardw. 262. 2 Str. 1044. S. C. *Law v. Crowther*, 2 Willf. 21. *Lookup v. Frederick*, *Heyrick v. Foster*, 4 Term Rep. 701.

(L) Departure in Pleading.

A Departure in pleading is, when the second plea contains matter not (a) pursuant to the former, and which does not fortify the same; and when the rejoinder contains matter subsequent to the bar, and not fortifying the same, this is regularly a departure.

2 E. 4. 12.
Plow. 105.
Co. Lit. 304.
Doct. pl. 119.
(a) But, where a man

pleads any thing which he could not have shewed at first, it shall never be reckoned a departure: so, where he fortifies it in the same manner that he pleaded it; but, if he fortifies it in another manner, as, by a special custom, it will be a departure. For this *vide* Yelv. 14. *Dyer*, 253. *Style*, 260. *Jon.* 262. *Leon.* 156. 2 *Leon.* 199. 3 *Leon.* 3. 203. *Cro. Car.* 257. *Finch*, 392.

In an assise the tenant pleads a descent from his father, and gives colour, the demandant entitles himself by a feoffment from the tenant himself, the tenant cannot say that the feoffment was on condition, and shew the condition broken; for that were a departure, as containing new matter, and subsequent to the matter of his bar; but in assise, if the tenant plead in bar, that *J. S.* was seised, and enfeoffed him; the plaintiff shews, that he himself was seised in fee till *J. S.* disseised him, who enfeoffed the tenant; the tenant may plead a release of the plaintiff to *J. S.*, for this fortifies his bar.

Doct. pl. 120.
Plow. 104.

If a man plead an estate generally, as, a feoffment in fee, he, without a departure, cannot maintain it in his second plea by matter tantamount; as, by a disseisin and release, or by a lease and release, or a gift in tail and a recovery in value; nor, when a man pleads an estate made by the common law, can he make it good by an act of parliament in his second plea.

Co. Lit. 304.

So, when a matter is pleaded as at common law, he cannot maintain it in his replication by custom; as, in covenant on indenture of apprenticeship to serve seven years, and breach assigned, that he did not serve, &c., the defendant pleads infancy; the plaintiff replies the custom of *London*; and adjudged a departure.

Lev. 81.
Keb. 376.
469. 512.

Nor can action at common law be made good in the replication by statute; as, in trespass for taking his beasts, the defendant justifies as damage-feasant; the plaintiff replies he drove them out of the county; and adjudged a departure; for driving out of the

3 Lev. 48.

county, was not prohibited by the common law, but by the statute of *Marl.* (52 H. 3.) and 1 & 2 Ph. & M. c. 12.

Lev. 81. But, if one pleads a statute, the other says it is repealed, he may reply that it is revived by another; for this fortifies the first matter.

Co. Lit.
394. 2.

If a man pleads performance of covenants, the plaintiff replies, he did not do such an act according to the covenant; the defendant says, he offered to do it, and he refused; this is a departure, it being one thing to do a thing, and another, that he offered to do it, but he refused.

Vent. 121.
2 Lev. 5.

Debt against a clerk upon an obligation conditioned to perform covenants, one of which was to account for all money he should receive; the defendant pleads performance; the plaintiff replies, that such a day such a sum came to his hands, which he had not accounted for; the defendant rejoins, that he accounted *modo sequente*, viz. that thieves broke into the counting-house and stole it, and that he acquainted the plaintiff, & *hoc paratus est*, &c. And on demurrer it was resolved, that the rejoinder was no departure, for though it contained new matter, yet it was pursuant to the former; for shewing that he was robbed, amounted to giving an account. 2dly, That the rejoinder, though an express affirmative, viz., that he did account, in contradiction to what was said in the replication, viz. that he did not account, was yet good with an averment, without concluding to the country; for new matter being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a sur-rejoinder and answer it, viz. by traversing the robbery.

Lev. 67.

Debt on an obligation for performance of covenants, one of which was, to return certain goods from D., the defendant pleads performance; the plaintiff assigns a breach in not returning such goods; the defendant rejoins he had no order; and held a departure, for there was no mention of order in the covenant: but, it seems, had the covenant been to return them on order, the plea had been good; for then the covenant was not to be performed without order, and *performavit omnia* may be taken, that he performed all that he ought to perform, he not having orders.

Lev. 85.
127. 133.
300.
Mod. 289.
Roberts v.
Marriot.

In debt upon an obligation for performance of an award, the defendant pleads no award; the plaintiff replies, and shews the award and breach; if the defendant rejoin, and shew that it is void, either because that there was an award of mutual releases to the time of the award, or that the award was all on one side, or that it was not made of all matters submitted, and whereof the arbitrators had notice, or the like, in all such cases the rejoinder is a departure; for no award pleaded is no award at all, either in fact or in law, which is not to be maintained by shewing the award to be void, but he should at first plead the award, and also the matter whereby it was void.

3 Lev. 239.
241.

In debt for not performing an award, the defendant pleads no award, the plaintiff replies, and shews one, but does not shew where it was made; the defendant demurs; and resolved that

that could not be objected after no award pleaded, for that were a departure.

In debt on a bond, conditioned to save a parish harmless concerning a bastard-child which the obligor was forced to father, he pleads *non damnificat*; they reply, that the child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l*., defendant rejoins, that he was ready to repay the money and save the parish harmless: Upon this they demurred, and had judgment, because the rejoinder is a departure; for the defendant ought to have taken issue upon the child's being ready to starve; if the plaintiffs had once being at any expence about the child, and were thereupon actually damnified, the defendant being ready to repay the money will not save the condition of the bond.

2 Saund. 30.
Sid. 444.
Mod. 43.
2 Keb. 612.
629.
Richards
v. Hodges.

In debt on a bond for performance of an award the defendant pleads no award; the plaintiff replies and shews it, and the breach; the defendant pleads, that it was not tendered: this is a departure; for though both be necessary by the condition of the bond to charge the defendant, *viz.* that an award be made, and that it be also tendered, yet he ought to rely on either one or other, either being sufficient to bar the plaintiff; then, when he chooses one in his plea, *viz.* that no award was made, he cannot after waive that in his rejoinder, and have recourse to the other, *viz.* that the award was not tendered.

2 Sand. 189.
Sid. 104.

In trespass for breaking his house and carrying away his goods, the defendant justified as a distress damage-feasant; the plaintiff replied, that after the distress, *viz.* the same day, the defendant converted them to his own use; and on demurrer the replication was held no departure; for he who abuses a distress is a trespasser *ab initio*, and the converting is a trespass or trover, at election; and the bringing trespass determines his election, and the matter in the replication makes good that election; for it proves it a trespass as well as trover.

Salk. 221.
pl. 1.
Gargrave
v. Smith.

In covenant for further assurances, &c., the defendant by protestation says, that the plaintiff's counsel did not advise, &c., and for plea saith, that he was not required; the plaintiff replies, that J. S. his counsel, advised a release, and that he required the defendant to seal it, which he refused; the defendant rejoins, that he did not refuse; this is a departure.

Dyer, 31.
b. Doct.
pl. 120.

The defendant pleads in bar a lease for fifty years made by a corporation, and after in the rejoinder pleads the proviso in the statute 31 H. 8. c. 13. which makes such leases good for 21 years; it was held, that the pleading the proviso was a departure, as not enforcing that which went before in the bar.

Dyer, 102.
Doct. pl.
121.

If it be pleaded, that the parties to a fine *nihil habuerunt*, which is denied, and the defendant rejoin, that the party had only a use in the land; this is a departure.

Dyer, 291.
Doct. pl.
121.

If in bar to an action on a bond, conditioned to save the plaintiff harmless, the defendant pleads, that he did save harmless; and the plaintiff in his replication shews a damnification; to which

Sand. 117.
Lev. 194.

the defendant rejoins, that he had not notice thereof ; this rejoinder is a departure.

6 Mod. 115.
per Holt,
C. J.

[(a) This
part of the
doctrine in
the text is

nothing more than a loose *dictum* of my Lord Holt, and is contradicted by authorities. For, if the time laid in the declaration is immaterial, there, though it becomes material by the defendant's plea, yet the plaintiff in his replication may depart from it ; as, in trespass, Co. Lit. 282. a. b. 1 Salk. 222. 2 Ld. Raym. 1013., or trover, Cro. Car. 245. 333. 1 Salk. 222., or upon a general *indebitatus assumpsit*, 1 Str. 22. 2 Str. 806. 1 Lev. 110. 1 Keb. 566. 578. 10 Mod. 251. Fort. 375., where the time becomes material by the defendant's plea of a release, tender, or the statute of limitations, &c. And in actions for a transitory trespass, where the defendant pleads a local justification, the plaintiff, in his replication, may vary from the place laid in the declaration. 1 Ld. Raym. 120.] (b) For this *vide* Cro. Car. 229. 2 Mod. 31. 1 Salk. 222. 3 Lev. 348. title Traverse. — And that a departure in such case may be cured by pleading over and verdict. Lev. 110. Raym. 86. Keb. 566.

Carth. 306.
The King
v. Larwood.
Ld. Raym.
29. 4 Mod.
269. Salk.
167. pl. 1.
Skin. 574.

To an information exhibited against the defendant, for not taking upon him the office of sheriff of *Norwich*, the defendant pleaded the statute of 13 Car. 2. (*§. 2. c. 1. § 12.*) by which it is enacted, that a person elected into any office in a corporation shall be such as within one year before hath taken the sacrament according to the church of *England*, else the election shall be void, and averred, that he had not taken the sacrament, &c. at any time within one year next before the election of him to be sheriff, &c., wherefore the election was void: the Attorney-General replied, and set forth that part of the act of uniformity, by which every person is obliged to take the sacrament three times a year according to the liturgy, &c. The defendant rejoined, and set forth the act of parliament for tolerating dissenters ; to which there was a demurrer ; and it was held, that the defendant's rejoinder was a departure from his plea.

Mich.
6 G. 2.
in C. B.
Owen v.
Reynolds.
See 2 Bar-
nard, K. B.
193.

In debt upon a bond, conditioned to indemnify the plaintiff from all tonnage of certain coals bought of the defendant due to *W. B.*, the defendant pleaded *non damnificat.*; to which the plaintiff replied, that for 5*l.* for tonnage of coals bought of the defendant the day of the date of the bond, his barge was distrained, and that the defendant had not paid the said 5*l.*: the defendant rejoined, that no tonnage was due for the coals ; to which the plaintiff demurred, supposing the rejoinder to be a departure from the plea ; for the defendant having pleaded generally, that the plaintiff was not damaged, and the plaintiff having assigned a breach, the matter of the rejoinder is only by way of excuse, confessing and avoiding the breach, which ought to have been done at first, and not after a general plea of indemnity ; for rejoinders, it was insisted, should strengthen the bar, whereas this is a plain retraction of the plea, that denying the plaintiff has suffered any damage, this confessing and excusing it. On the other side it was insisted, that it was not necessary for the defendant to set out all his case at first ; and it suffices, that his bar is supported and strengthened by his rejoinder, which it was urged had been done

in this case; for the plea being only to enforce the plaintiff to assign a breach, the defendant may come afterwards and shew the breach assigned is not within the meaning of the condition; as, here, the condition is to save the plaintiff harmless from all tonnage due to *W. B.*, plaintiff replies, his barge was distrained for tonnage, but does not aver it was due; then the defendant rejoins, there was no tonnage due, which being confessed by the demurrer, it is certain the plaintiff could not be prejudiced within the tenor of the condition, by which the defendant is obliged only to indemnify the plaintiff against such tonnage, so the plea is directly confirmed by the rejoinder; and of this opinion was the court. Another point was made in this case by defendant's counsel, *viz.* admitting there was a departure, yet, if the plaintiff has assigned for a breach of the condition what is really no breach, whereby it appears he has no cause of action, judgment shall be entered for the defendant; as, in this case, plaintiff has instanced a distress of his barge for tonnage of coals bought of the defendant the day of the date of the bond, and has not ascertained what the coals were, so that they do not appear to be the same coals as are mentioned in the condition, which the court cannot intend, though they are said to be bought upon the day of the date of the condition; for he might buy other coals for what appears to the contrary; and of this opinion also was the court.

(M) Repleader: And herein,

1. Of the Nature of a Repleader, and Manner of awarding it.

WHEN issue is joined on an immaterial point, or such a point as after trial thereof the court cannot give judgment, as being impertinent or uncertain, and not determining the right (a), the court regularly awards a repleader, or gives (b) judgment *quod partes replacent*; in which case the parties must begin again at the first fault which occasioned the immaterial issue. And herein it hath been held, that, (c) if the declaration be ill, the bar ill, and the replication ill, the parties must begin *de novo*; but, if the bar be good, and the replication ill, at the replication; and, if the bar and replication be both bad, and the repleader is awarded, it must be as to both.

"right:" for, if the court see, that by the verdict, as found, substantial justice hath been done, or, if they see that the party's case itself cannot be amended, or would be at all material, if put in any shape whatever, in neither of these cases shall there be a repleader. For in no case will a repleader be awarded, but where complete justice may be answered. *Vide* Rex v. Philips, 1 Burr. 292. Rex v. Philips, 1 Str. 394. Symmers v. Regem, Cowp. 510. Taylor v. Whitehead, Dougl. 730. (b) The judgment to replead was, *quia videtur curiæ quod placitum prædictum et exitum superinde junctum est minus sufficienti in legi, ideo dictum est partibus quod replacent*: and it was objected, that it was not any judgment, but that it ought to have been *ideo consideratum est*, &c. But the court held it a sufficient award to replead, and that this was the form agreeable to the course of the court. Cro. Jac. 6. (c) For this *vide* Uyer, 117. 5 E. 4. 108. 19 E. 4. 1. Doct. pl. 311. Dal. 17 pl. 8. 76 pl. 2. And. 11. Raym. 458. 3 Keb. 664. Ld. Raym. 707. Salk. 173. pl. 2. 216. 2 Salk. 579. 6 Mod. 2. Comp. 510.

22 H. 6. 18.
Doct. pl.
311.
2 And. 6, 7.
24-5.
4 Leon. 19.
Skin. 570.
2 Lutw.
1622.
[(a) Note:
The materiality of these words, "not deter-
mining the

If a repleader be denied where it should be granted, or granted where it should be denied, it is error. 2 Salk. 579. 6 Mod. 2.

Roll. Rep.
287. Bishop
of Bristol v.
Sir Stephen
Proctor.
Dallif. 15.
pl. 6. Like
point.—
But I take
it to be now

Upon an issue joined in Chancery, on a *scire facies* upon a recognizance, the whole record was removed into B. R., and, after a trial had there, the judgment was arrested, by reason of mis-awarding the *venire*; and the parties being desirous to replead, the question was, Whether the repleader should be in Chancery or B. R.? And it was held by the judges of B. R. that it should be in that court.

the settled rule, not to suffer the court of King's Bench to alter or amend any issue directed out of Chancery, but that for any irregularity herein application must be made to the court of Chancery. *Vide* under title Courts, Jurisdiction of the Court of Chancery.

2 Vent. 196.
2 Salk. 579.
(a) 6 Mod.
3.

It is held, that there can be no costs to either party on a repleader (a), because it is a judgment of the court upon the pleading, and therefore differs from an amendment, which cannot regularly be without payment of costs.

2 Barr. 304.

[But, since the practice of setting aside verdicts has prevailed, repleaders have been rarely granted, so that under the modern practice, the courts can direct the costs to be paid by the party to whom the mistake in the pleadings is imputable.]

2. A Repleader in what Cases to be awarded.

Cro. Elis.
227. Doct.
pl. 312.
2 Mod. 137.
140. Lev.
32.—

Where issue
is joined
upon a mat-
ter not
triable.

Raym. 458.

Cro. Elis.

131.—

Where the

time is immaterial,

and yet made part of the issue.

Latch, 92.

2 Sand. 318.

2 Lev. 12.

Hard. 49.

—For an issue on an immaterial traverse,

Moor, 693.

pl. 959.

Cro. Elis. 456.

Winch, 76.

Cro.

Elis. 228.

Goulf. 39.

pl. 15.

Savil, 78.

1 Sand. 22.

(b) If the plea on which the issue is joined

have no colourable pretence in it to bar the plaintiff, or if it be against an express rule in the law; then,

the issue is immaterial, and so as if there was no issue, and therefore it is not aided by the statute; but,

if it have the countenance of a legal plea, though it want necessary matter to make it sufficient, there

shall be no repleader, because it is helped after verdict.

Moor, 867.

pl. 945.

Et vide Lev. 32.

Carth. 371.—

Diversity where an issue is misjoined, and where there is no issue.

Herein the general rule is, that if there be an immaterial issue, and thereupon a verdict, upon which the court cannot know for whom to give judgment, whether for the plaintiff or the defendant, a repleader is regularly to be awarded; for such immaterial issue is not aided after verdict by 32 H. 8. c. 30. or any of the statutes of jeofail; for, if what is material in the pleadings be not put in issue, it is not made necessary to be proved on the trial: or, if it be alleged and proved, yet, if it appear insufficient, so as not to be decisive between the parties, the verdict will be no good foundation for the judgment. But an (b) informal issue is helped by the verdict.

Cro. Jac. 5.
Cox v.
Cropwell.

In trover against baron and feme upon a finding of the goods by the feme during coverture, and a conversion to her use, they pleaded *quod ipsi non sunt culpabiles*; which was held ill, because there was no tort supposed in the husband, and therefore a repleader was awarded, and the plea made *quod ipsa non est inde culpabilis*.

Owen, 53.
Houfe and
Elkin v.
Grindon,
S. P. said to

If in debt upon an obligation by the sheriffs of London against J. S. he pleads, that he being arrested by precept out of B. R., appeared at the day according to the condition of the bond, and thereupon issue is joined; in this case there shall be a repleader;

for

for the appearance being entered of record, as it ought to be, the same is triable by the record, and not by a jury.

have been adjudged between

Bret v. Shepherd, the same term. Leon. 904

In trover for divers trees, the defendant pleads, that Queen Mary was seised in fee of the manor of D., where those trees were growing, and that she granted it to the defendant in tail, whereby he was seised thereof, and that J. S. cut the said trees, and granted them to the plaintiff, who lost them, and the defendant found them, and converted them, &c., the plaintiff replies, *de injuriâ suâ propriâ*, &c., and thereupon issue is joined: it was held, that pleading *de injuriâ suâ propriâ* was ill, where the defendant makes justification by claiming an interest in the freehold to himself; but that where one claims not any interest, but justifies by command or authority derived from another, it is otherwise; wherefore a replender was awarded.

Cro. Elis. 539. Archb. Bishop of Canterbury v. Kemp.

In battery the baron justifies, for that the plaintiff assaulted his feme, in aid of whom, &c. the feme by herself pleads and justifies *de son assault demesne*; the plaintiff saith, *de injuriâ suâ propriâ absque tali causâ*; and both issues found for the plaintiff, and damages entirely given; and now alleged in arrest of judgment, that the trial was ill; for the feme by herself cannot plead, and the damages being entirely assented, all was ill; and of that opinion was the court, and awarded that they should replead.

Cro. Jac. 239. Watson v. Thorpe and his wife.

If in debt upon a bond, conditioned for the payment of 60*l.* upon the 25th of June, the defendant pleads payment of the said 60*l.* upon the 20th day of June *secundum formam & effectum conditionis*; and thereupon issue is joined and a verdict found, that he did not pay the said 60*l.* upon the 20th of June; the plaintiff shall not have judgment, for the issue is taken *dehors* the matter of the condition, and so void; and it might not be paid the 20th, and yet might be paid the 25th; but it is held, that if it had been found for the defendant, viz. that the money was paid the said 20th day, perhaps the verdict would have made it good.

Cro. Jac. 435. Holmes v. Brockett.

[A bond was conditioned for the payment of money on or before the 5th of December. Plea of payment on the 5th of December. Replication, issue, and verdict for the plaintiff. This was holden to be an immaterial issue, and a replender was therefore awarded; though it would have been exclusive, if found for the defendant; but did not conclude, when found for the plaintiff. And though this was a slip of the defendant, yet, as it did not determine the question, a replender was awarded.]

Tryon v. Carter, 2 Str. 994. 1 Burr. 302. It was said by Buller, J. to be a rule, to which he could find no case of tendering it.

any exception, never to grant a replender, when the issue is found against the party Dougl. 396.

In an action of debt upon a simple contract, payment was pleaded at A.: plaintiff traverses, that the payment was at A.: and a verdict, that the defendant did not pay at A. It was moved in a writ of error, that there ought to have been a replender; otherwise, if the verdict had been found for the defendant: but the court affirmed the judgment.

Keb. 662. Lucas v. Harlow. Q.

If in debt upon a single bill the defendant pleads payment without an acquittance, and thereupon issue is joined, and found for the

5 Co. 43. Nichol's case.

• See the
Stat. 4 Ann.
c. 16. § 12.
Lev. 32.
Sergeant v.
Fairfax.

the plaintiff, he shall have judgment; for though payment without an acquittance is no plea to a single bill, yet, because issue was joined upon an affirmative and a negative, and a verdict for the plaintiff, he shall have judgment*.

Debt for rent against lessee for years, defendant pleads, that before any rent due he assigned the term to another, of which plaintiff had notice; issue upon the notice, and verdict for the defendant, but no judgment was given, but a repleader awarded, in regard the issue was joined on a thing not material.

2 Mod. 139.
Read v.
Dawson.

In debt on a bond against the defendant as executor, issue was joined, whether the defendant had assets or not, on the 30th day of November, which was the day on which he had the first notice of the plaintiff's original writ; and it was found for the defendant, that then he had not assets; and this being held an immaterial issue, (for though he had not assets then, yet, if he had any afterwards, he is liable to the plaintiff's action,) a repleader was awarded.

Cro. Car.
78.
Purchase
v. Jegon.
Jon. 140.
Litch, 158.
Noy, 85.
S. C.

If in debt upon an obligation, conditioned for the payment of 100*l.* upon the 31st day of September following, the defendant pleads payment the said 31st day according to the condition; and thereupon issue is joined, and found, that the money was not paid upon the said day, the plaintiff shall have judgment; for though the issue is upon an impossibility, there being no such day, yet the jury finding it not paid at the day, or at any time before, in effect find it was never paid, which is a good verdict.

2 Lev. 164.
Masters v.
Wood.

Trespass for battery and false imprisonment such a day and place; the defendant justified at another day and place by virtue of a writ and warrant from the sheriff, *absque hoc*, that he is guilty *aliter vel alio modo*, vel at any other place; the plaintiff replied, that he is guilty *aliter & alio modo*, and at another place; whereupon issue was joined, and verdict for the plaintiff; but for the badness and uncertainty of the issue, upon motion in arrest, judgment was staid, and a repleader awarded.

2 Vent. 196.

In *assumpsit* against an administratrix, the defendant pleaded *quod ipsa non assumpsit* instead of the intestate; and after verdict a repleader was awarded.

Roll. Abr.
200. Yelv.
65. Cro.
Jac. 67.
S. C. and
Cro. Eliz.
752. Style,
167. Palm.
524. L. P.

But, if on an issue tendered by the plaintiff the defendant joins the *similiter* by the plaintiff's name, or the plaintiff joins the *similiter* by the defendant's to an issue tendered by the defendant; this shall be amended, there being a negative and affirmative before between the plaintiff and defendant, which is the pattern from whence the joining of that issue is to be taken; and this being a plain mistake, as appears from the nature of the thing, of one man's name for another.

Vent. 122.
Reynell v.
Heal,
2 Keb. 788.
S. C.
† 24. As to
the law in

In an action upon a penal statute the defendant pleaded *non debet* to the informer, & *de hoc ponit se super patriam*; and issue was joined, & *predict.* the informer *similiter*, without mentioning the king; and after a verdict for the plaintiff a repleader was awarded†.

this case, the King not being a party to the suit, but the informer the only plaintiff, though he sue for the King and himself?

If the jury do not find assets to a certain value, the verdict is insufficient, and a repleader shall be granted, and the issue tried by another inquest. 40 E. 3. 15. Doct. pl. 313. 6 Mod. 3.

3. Repleader at what Time to be awarded.

It seems, that at common law, a repleader was as well allowed before, as after, trial, because a verdict did not cure an immaterial issue; but, (a) it seems, to be now settled, that no repleader ought to be allowed before trial, because the fault of the issue may be helped by the trial by the statute of jeofails. Salk. 579. (a) 3 Keb. 664. 6 Mod. 2. S. P. and that it is discretionary

in the court, but not advisable, since the verdict may cure immaterial or informal issues.

It is held by a multitude of authorities, that after a demurrer the repleader is not to be admitted, because by the demurrer the parties have put themselves on the judgment of the court. 5 Co. 52. Ridgeway's case. Doct. pl. 311.

Poph. 42. Savil, 89. Latch, 148. Leon. 79. Moor, 461. pl. 644. 867. pl. 925. Roll. Rep. 271. And. 168. Lev. 142. 6 Mod. 102. — But in 3 Lev. 20. there is an instance of a repleader after a demurrer; and in 3 Lev. 440. it is said, that there was a repleader after demurrer and solemn argument; but these cases have of late been denied to be law. Roll. Rep. 271.

It is said to have been usual in ancient times to award a repleader upon a writ of error in B. R. but it seems to be now agreed, that there can be no repleader upon a writ of error. 2 Sand. 319. 2 Lev. 12. 2 Keb. 789. 6 Mod. 102.

It is held, that no repleader can be awarded after a default. 2 Salk. 579. 6 Mod. 3.

No repleader after a discontinuance. Comb. 323. Ld. Raym. 30. Salk. 219. pl. 4.

(N) Demurrer: And herein,

1. The Definition and Nature of a Demurrer.

A (b) Demurrer in (c) pleading is an admission by the adverse party of the fact charged in the count or declaration, plea, replication, &c. (d), and refers the law arising on such fact to the judgment of the court. Doct. pl. 115. Finch, c. 40. (b) Comes, says my Lord Coke,

from the Latin word *demorari*, to abide, in law. Co. Lit. 71. b. (c) As there may be a demurrer upon counts and pleas, so there may be of aid prior, voucher, receipt, waging of law, and the like. Co. Lit. 72. a. — For demurring on evidence, *vide infra*. (d) May be taken to the rejoinder, &c. and to a special as well as a general plea; for all parts of pleading to issue ought to be according to the rules of law; and if any part fail, the whole is naught, and may therefore be demurred unto. Co. Lit. 72. a. Lil. Reg. 435.

It is termed in some books an issue in law, and therefore in a declaration, plea, &c. there may be two independent issues, *viz.* a demurrer, which is the issue in law, determined by the court; and an issue in fact, determinable by the jury. But this must be understood as to distinct parts of the same declaration, plea, &c., for it is never allowed the defendant to plead and demur to the same fact, this being a duplicity that would draw the matter to different judicatures, and would be vexatious and expensive, were it admitted; for in such case the party would demur specially 5 Co. Lit. 71. 72. Doct. pl. 115. Lil. Reg. 438. 5 Co. 104. Dyer, 21. a. 87. b.

to form, and if he was over-ruled there, then he would deny the fact.

Cases in L.
and Eq. 460.
Halsey v.
Jeffries.

* But the
defendant
may demur
to one count,
and plead to
another, for

separate counts are as several declarations. [And when there are several counts in a declaration, some of which are good in point of law, and the rest bad, the defendant can only demur to the latter; for if he were to demur generally, to the whole declaration, the court would give judgment against him. 1 Saund. 226. 2 Saund. 180. 1 Will. 248. But, if a plea or replication, which is entire, be bad in part, it is bad for the whole. 2 Saund. 124. 1 Salk. 312. 1 Term Rep. 40. 3 Term Rep. 374.]

Co. Lit. 72.
a. 225. b.
Doct. pl.
326. Palm.
517. S. P.
because the

jury can then assess the damages on the whole.—[In practice, it is usual and advisable to determine the issue in law first, for the following reasons: first, that the determination of an issue in law is generally more expeditious, and less expensive, than the trial of an issue in fact: secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact be first tried, and found for the plaintiff, he must still proceed to the determination of the issue in law, and if that be found against him, he will not be allowed his costs of the trial of the issue in fact: and lastly, that whether the demurrer goes to the whole, or part of the cause of action, if the plaintiff proceed to argue it first, and the court should be of opinion against him, he may amend as at common law; but, after the cause has been carried down to trial, he cannot amend any farther than is allowable by the statutes of amendment. Tidd's Pr. 476, 7.]

Salk. 219.
pl. 6. per
cur.

If there be a demurrer to part, and an issue upon other part, and judgment be given for the plaintiff upon the demurrer, he may enter a *non pros* as to the issue, and proceed to a writ of inquiry on the demurrer: but without a *non pros* he cannot have a writ of inquiry, because on the trial of the issue the same jury will ascertain the damages for that part to which the demurrer was.

2. The Manner and Form of demurring; and therein, of joining in Demurrer, and waiving thereof.

Co. Lit.
7. b.
Yelv. 5, 6.
Where the
substantial
part of the
demurrer
was in,
though ill
in form,
the court
held it a demurrer. Vide 5 Mod. 132.

Co. Lit.
72. b.

The words of a demurrer, when to the declaration, are *quia narratio, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c.*; and to a plea are *quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit iudicium, &c.*; to which the adverse party replies, *quod narratio, or placitum predictum, &c. materiaque in eodem contenta bon. & sufficiens in lege existunt, &c. & petit iudicium*, and thereupon the demurrer is said to be joined.

In some cases a man shall allege special matter, and conclude with a demurrer; as, in an action of trespass brought by J. S. for the taking of his horse, the defendant pleads, that he himself was possessed of the horse until he was by one J. S. dispossessed, who

who gave him to the plaintiff, &c., the plaintiff saith, that J. S. named in the bar, and J. S. the plaintiff, are all one person and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law; and the court held the plea and demurrer good, and that without the matter thus alleged he could not demur.

In a *quare impedit* the patron pleaded one plea in bar, and the incumbent the same plea by himself; the Queen demurred thus, *Quod separalia placita per def. separatim placitata. dicta domina regina necesse non habet nec per legem terra tenetur respondere; Et per cur.*; the demurrer ought to have been several on each plea by itself.

If a defendant demur in abatement, the court will notwithstanding give a final judgment, because there cannot be a demurrer in abatement; for, if the matter of abatement be extrinsic, the defendant must plead it; if intrinsic, the court will take notice of it themselves.

After the plaintiff and defendant have joined in the issue, which is to be tried betwixt them, neither of them (a) can demur without the consent of the other; for by joining in the issue they have admitted the pleadings to be good, and sufficient to try the issue.

It hath been received after issue joined. Cro. Elis. 196. — But it hath been adjudged, that a demurrer to an indictment ought not to be received after verdict. Sid. 208.

So, it hath been resolved, that after a demurrer there cannot be a replader; for the parties, by their mutual consent, having put themselves on the judgment of the court, cannot without leave of the court replead.

There cannot be (b) a demurrer to a demurrer; and if there be, it makes a discontinuance, for there is no difference between pleading over when issue is offered, and not joining in demurrer, but pleading over, both are alike, and make a discontinuance.

to a demurrer for the doubleness of it, for a demurrer ought to have formality and certainty in it to avoid barbarism, and inveigling of the court; but, if one that might demur do not demur to it, but join in the demurrer, he cannot demur afterwards, for he hath slipped his advantage. Lil. Reg. 438. — And in case of a demurrer to a plea in abatement, it is said, one may demur upon that demurrer. But per Holt, C. J. that is, where the demurrer is not apposite; but, if the demurrer be proper and apposite, you may join. Comm. 306.

It is said, that there are the same rules for joining in demurrer as there are in pleading; and that in criminal cases, not capital, the course is to allow the party four days to join in demurrer; but it hath been held, that in capital cases the party must join in demurrer *instantèr*.

If a demurrer be entered it cannot be waived, except both the plaintiff and defendant consent unto it, nor then without leave of the court; because by the demurrer both parties have submitted the matters in law in question betwixt them to the judgment of the court.

A demurrer is not to be allowed unless it be signed by counsel.

A demurrer upon a challenge to a jury is good without a counsel's or serjeant's hand; and as soon as it is moved on at the bar, the same is to be entered up without further circumstances. 3 Leon. 222.

Leon. 139.
The Queen
v. Arch-
bishop of
Canterbury
and others.

Salk. 220.
pl. 7. Doc-
minique v.
Davenant.
Vide
2 Hawk.
P. C. c. 32.
Show. 213.
Lil. Reg.
437.
(a) A de-
murrer to
an appeal

Cro. Elis.
62. 318.
3 Co. 52. b.

Salk. 219.
pl. 4. Id.
Raym. 20.
(b) It is
said that one
may demur

Skin. 217.
pl. 1. Vide
Layser's trial,
State Trials,
6 V. 229.

Cro. Car.
513.
Jenk. 128.
5 Mod. 18.

Lil. Reg.
436. But

3. What Facts are admitted by a Demurrer.

Ca. Lit. It is laid down as a general and uncontested rule, that a demurrer admits all such matters of fact as are sufficiently pleaded.
 72. 2.
 Dyer, 21.
 5 Co. 69. Doct. pl. 119. Hob. 81. Sand. 353. Carth. 31

34 H. 6. 5. And therefore if in waste the defendant demurs to the declaration, and it is adjudged against him, there shall issue no writ of waste, this being admitted by the demurrer; but a writ shall issue to inquire of the damages.
 Doct. pl. 117.

Hob. 56. But matters not sufficiently pleaded are not admitted by a demurrer: so, in a demurrer upon a matter in law, says my Lord Hobart, though the parties will join upon some one point, upon which, if it stood alone, judgment should be given for the one party, yet, if upon the whole record matter in law appears why judgment should be given against the said party, the court must determine so; for it is the office of the court to determine the law upon the whole record, and the consent of parties cannot prejudice their opinions, nor discharge them of their office in that point.

a Sand. 379, 380. (a) In answer for several things, and among the rest *de duobus fulcris*, the defendant demurred, and Holt, Ch. J. refused to give judgment *quod nil capiat*, saying, the plaintiff may take several damages, and release as to this, and then take judgment as to the rest, and all would be well. Salk. 218. pl. 1.

4. How far a Judgment on a Demurrer is peremptory.

(b) So, It seems to be agreed as a general rule, that a (b) judgment on a demurrer is as conclusive and binding, as if the same had been after a verdict, &c.

where a statute enacts, that a person convicted of such an offence shall forfeit so and so, a conviction on a demurrer hath been held sufficient. 11 Co. 58. Roll. Rep. 89.

Jenk. 306. But upon a plea to the jurisdiction, person, writ, aid prior, [Gib. C. P. view, esoin (c), voucher, and demurrer joined upon such plea or 53. 1 Ed. prayer, and ruled against him who demurs, there is only judgment Raym. 351. to answer over. 30. Rep. 46. 2 Will. 368.] (c) Dyer, 69. pl. 35. 341. pl. 5.—If after a demurrer a person shall have the advantage of his age, *quare* 3 H. 6. 46. Doct. pl. 116.

Tidd's Pr. [But in other cases, the judgment is interlocutory or final, according to the nature of the action: if the action be for damages, 478, 9. in *assumpsit*, &c. it is interlocutory, and should be signed, on treble-penny stamped paper, with the judgments, after which the damages should be assessed, on a writ of inquiry, or reference to the Master: but in *debt*, &c. for a sum certain, the judgment is final, and there being no necessity for a rule for judgment (d), the plaintiff may immediately tax his costs, and take out execution.]

(d) 1 Str. 425.

It seems to be the better opinion, that a general demurrer, concluding in bar of an appeal or indictment, or a demurrer to a plea in bar which admits the fact, or to a replication to such a plea, is peremptory and conclusive; so that if the indictment be good, judgment and execution shall go against the prisoner.

Vide
2 Hawk.
P. C. c. 32.

But it hath been adjudged, that if an appellee demur in law to an appeal by reason of the insufficiency of the declaration, or generally demur to the declaration, with a conclusion *et petit judicium de narratione illa, & quod narratio illa cassetur*, &c., such demurrer shall not conclude him from pleading over to the felony, either at the same time with the demurrer, or after it shall be adjudged against him.

Dyer, 38.
Cro. Elis.
196.

But in criminal cases, not capital, if the defendant demur to an indictment, &c., whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment; for it seems, that in such cases there can be no demurrer properly in abatement, except it be to a plea in abatement, or to a replication to such a plea.

Cro. Elis.
196. Raft.
Ent. 160.

5. Of the Difference between a general and special Demurrer.

A demurrer is said to be general or special (a); general, where no particular cause is alleged; special, where the particular thing objected to is pointed out, and insisted upon as the cause of demurrer. And herein it is said (b), that as a general demurrer confesseth all such matters of fact as are sufficiently pleaded, so, he that demurs specially can take no advantage of any other matter of form than what he hath expressed in his demurrer; but he may of any other matter of substance.

Co. Lit.
72. a.
(a) The words of a general demurrer are, *quod brevis vel narratio vel placitum, &c. materia que in codem*

demur. minus sufficiens in lege existit, &c. — A demurrer, because *incerta & caret forma*, is a general demurrer. Show. 2; 2. Comb. 277. (b) 10 Co. 88.

And herein it is said, that the ancient practice was, to demur specially, and that the way was, when the pleadings were drawn at the bar, to make the exception immediately, and the other party might mend if he pleased, or might demur if he durst venture it; and Hale says, that though now they are put in paper, yet such a course should be observed, that persons may not be caught by demurrers contrary to the original intention of them.

Vent. 240.
— Good rule to be observed in demurrers, always to shew the cause of demurrer.

2 Bulst. 267. per Coke.

But, as the law requires regularity in the proceeding, and that all parts of pleading should be according to approved precedents, it seems an established rule, not to admit the party to amend after a demurrer entered of record; though it hath been held, that if the plaintiff declares and the defendant pleads, and the plaintiff replies and the defendant demurs, and the plaintiff joins in demurrer, yet the plaintiff may move to amend on payment of costs, if the cause be still in paper: [Indeed, the very intent of requiring mistakes, in point of law, to be shewn for cause of demurrer, was, to give the party an opportunity of amending. And even where the proceedings are entered on record, and the demurrer has been argued,

Yelv. 38.
Cro. Jac. 13.
Bulst. 204.
2 Vent. 142.
3 Lev. 39.
6 Mod. 263.
3 Mod. 235.
2 Salk. 520.
Gillb. C. P.
114. 15.
2 Str. 846.
1 Barnard.
K. B. 213.
220
2 Saund.
402.

2 Str. 735.
954. 976.
Ca. temp.
Hardw. 42.
2 Burr. 321.
Dougl. 330.
Barnes, 9.
21. 25.
2 Burr. 756.

Tidd's Pr.
450. Dougl.
385. 452.

Robinson
v. Rayley,
2 Burr. 321.

Sand. 285.
Dupper v.
Mayo.

argued, the court will give leave to amend, where the justice of the case requires it, and there is any thing to amend by. The court, however, will always take care, that if one party obtain leave to amend, the other party shall not be prejudiced or delayed thereby.] So, a party may withdraw a demurrer not entered of record, and move to amend.

[And leave hath been sometimes given to a party to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits. Thus, after a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause, why the plaintiff should not have leave to withdraw his demurrer, and reply to the plea; which rule, no cause being shewn, was afterwards made absolute. But this is altogether discretionary in the court. Therefore, where to an action of debt on a bail-bond the defendant pleaded there was no bill of *Middlesex*, and the plaintiff demurred, the court, after delivering their opinion in favour of the defendant, refused to give the plaintiff leave to withdraw his demurrer, and amend: And by *Wright, J.*—It is not usual to amend, after a demurrer has been argued, and the opinion of the court is known: and it is certainly improper to give leave in the present case, it being an action against bail, whom the court is always inclined to favour.—So, where the defendant rejoined to several replications in trespass, and demurred to others, and a verdict was found for him upon the issues in fact, and contingent damages were assessed upon the demurrers, which were afterwards over-ruled, the court refused to let the defendant withdraw his demurrers and plead to issue: And by *Dennison, J.*—Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; as in the case of *Giddins v. Giddins* (*Say. Rep.* 316.): But this is an attempt to amend issues in law, after a verdict has been found on the issues in fact, and contingent damages assessed, of which there never was an instance. And we do not know where it would end, nor how the cause could be again carried down to trial. The court cannot help seeing that this is upon record: here are verdicts, and contingent damages found. The cases of amendment cited are, where the whole is supposed to be in paper; else the court could not have done it. We have no authority to do this, after it is plainly upon record.]

Also, where a person hath good cause of demurrer at the time of his demurring, no act of the other party afterwards will make it naught; as, if in debt for rent, the plaintiff declares for more than appears by his own shewing to be due to him, and for which the defendant demurs, the plaintiff cannot afterwards enter a *re-mittitur* for the overplus; for by this means the defendant, by relying on his demurrer, might be tricked in his defence.

But, for the better understanding the difference between a general and special demurrer, we shall briefly consider,

6. What Things are good on a general Demurrer, that would be otherwise on a special one.

Herein the established distinction is, that matters of substance, that is, the omission of such material things as are necessary to shew a right in the plaintiff, or material for the defendant in his plea, may be taken advantage of on a general demurrer; but matters of form merely must be specially alleged, and assigned as causes of demurrer. For the law, says my Lord (a) *Hobart*, requires in pleading two things; 1st, That it be in matter sufficient: 2^{dly}, That it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting it is cause of demurrer, with this distinction, which seems to be founded on the common law, and is fully explained and confirmed by the statutes 27 *Eliz. c. 5.* & 4 *Ann. c. 16.*

For this distinction vide 10 Co. 88. Dr. Leyfield's case. Doct. pl. 128. Style, 41. Latch, 189. Roll. Rep. 122. Co. Lit. 72. a. Hob. 127. 164. Hutt. 15. Savil, 78. 87. 5 Mod. 18. 678. pl. 5.

By the 27 *Eliz. c. 5. § 1.* reciting, "That excessive charges and expences, and great delay and hindrance of justice hath grown in actions and suits between the subjects of this realm, by reason that, upon some small mistaking, or want of form in pleading, judgments are often reversed by writs of error; and oftentimes upon demurrers in law, given otherwise than the matter in law and very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else after long time, and great trouble and expences, to renew again their suits; for remedy whereof it is enacted; that after demurrer joined, and entered in an action or suit in any court of record within this realm, the Judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, and that no judgment to be given shall be reversed by any writ of error for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted."

And § 2. it is further enacted, "That after demurrer joined and entered, the court, where the same shall be, shall and may, by virtue of this act, from time to time amend all and every such imperfections, defects, and wants of form, as is before mentioned, other than those only which the party demurring shall specially and particularly express and set down, together with his demurrer, as is aforesaid."

There is a proviso in this act, that it shall not extend to criminal proceedings.

It hath been frequently adjudged, that if a plea be double no advantage can be taken thereof on a general demurrer; but the party

Co. Lit. 72. Roll. Rep. 112.

Lutw. 4.
(a) In demurrer for duplicity,

party must shew (a) specially in what the doubleness consists, being only matter of form, and clearly within the above-mentioned statute 27 *Eliz. c. 5*.
it is not sufficient to demur *quia duplex est*, or *duplicem habet materiam*, but the party must shew wherein; for the statute, by requiring to shew cause, intended to oblige the party to lay his finger upon the very point. Salk. 219. pl. 5. 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. pl. 5. *per Holt, Ch. J.*

Roll. Rep.
112.
Saunders v.
Crawley.

As, in debt upon an obligation for performance of articles, which was to pay so much at two days in certain, the defendant said he paid accordingly, the plaintiff replied that he had not, this was held a double plea, because it went to both days, yet aided on a general demurrer.

10 Co. 94. a.
Doct. pl.
116.
Hob. 127.
Jenk. 306.

So, if the defendant pleads a plea which amounts to the general issue, this is but matter of form, and must be taken advantage of on a special demurrer: also, at common law, if a defendant had pleaded a plea which amounted to the general issue, and the plaintiff had demurred thereupon; if the defendant had refused to plead the general issue, but instead thereof joined in demurrer, the court determined it against him.

5 Mod. 18.

Also, it is held, that if a special matter is pleaded, which looks like the colour of a plea, but amounts to the general issue, it is no cause of demurrer; as, if in debt you plead a release, though you might have given it in evidence on *nil debet*, yet it is no cause of demurrer: so, in debt for rent, if you plead entry and expulsion, it is no cause of demurrer, though it may be given in evidence on *nil debet*.

Lil. Reg.
436.

But, where an act of parliament gives the party privilege to plead the general issue, and he pleads specially, if such special plea be faulty the plaintiff may demur to it; for though he needed not to have pleaded specially, yet having done so, his plea must be agreeable to the rules of law.

Lil. Reg.
437.

There must be a special demurrer to a negative pregnant, that is, a negative plea, which doth also contain in it an affirmative: so, to an argumentative plea, that is, a plea which concludes nothing directly, but only by way of argument or reasoning; for the court will intend every plea to be good till the contrary doth appear.

Cro. Eliz.
Oglethorp
v. Hyde;
& vide
Hob. 13.
Moor, 856.
Co. Lit. 303.

In debt upon an obligation to perform covenants, the defendant pleaded generally performance of covenants, where some were in the negative, and some in the affirmative; and this was held to be but matter of form, and aided by the statute 27 *Eliz. c. 5*, except the party sheweth for cause of his demurrer, that some of the covenants are in the negative, and some in the affirmative, for the court shall adjudge according to the truth of the matter: but, if any of the covenants are in the disjunctive it is otherwise, for the court cannot know which of them in the disjunctive he hath performed.

Comb. 297.
Gibbs v.
Cope.

In debt upon a bond for performance of covenants in an indenture of apprenticeship, several breaches were assigned, and the defendant demurred generally; and *per Holt, C. J.* you could not take advantage of the assignment of several breaches even at common law, without shewing it for cause; and though in this case there

there were the words *incerta & caret forma*, yet it was held but a general demurrer, and therefore ill.

But, though matters of form are aided upon a general demurrer, *Hob. 233.* yet there must be sufficient appear to the court to ground their judgments upon; and it is not enough that the party hath right, but such right must be disclosed to the judges in the record so as to enable them to pronounce upon it.

And therefore it hath been held, that if an executor or administrator brought an action of debt, and did not produce their probate or administration, that this was not aided. *Hob. 233.* But this is now aided by the express words of 4 & 5 Ann. c. 16. which *vide* this Amendment, letter (B).

So, if a man plead a conveyance of a rent, or the like, that cannot pass without deed, without (a) producing the deed in his plea it is not aided; for it is not enough for the party to say that he is executor, or that the rent was granted to him, but the court must see and judge of it, else the right appears not; and the adverse party may cause the deed to be enrolled, which makes it a part of the plea, whereupon the court shall judge whether it maintain the plea or not. *Hob. 233.* 10 Co. 88. Cro. Jac. 178. 613. (a) That the omission of *proferri in cur.* the deed pleaded, is only matter of

form, which the party demurring cannot take advantage of upon a general demurrer, and that when oyer of the deed is demanded, it is presumed that the deed is in court, and that *ei legatur*; the reading is the act of the court. *Sid. 3c8.*

So, if the means be wanting whereby the right should be made to appear, it is incurable: as, if a man bring an action of debt upon an obligation and produce it, but say it was made beyond sea, or do not allege a place * where it was made, a general demurrer serves; and for the same reason two affirmatives without a traverse is not aided, because it admits no trial, without which the court cannot see the right. *Hob. 233.* * Supposing a bond made in and dated at Fort St. George, in the East Indies, it is usual to allege it made there, under a *scilicet*, at Westminster, or wherever the venue is laid.

legit it made there, under a *scilicet*, at Westminster, or wherever the venue is laid.

So, if in debt upon an obligation, conditioned for the performance of an award, the defendant pleads *nullum fecerunt arbitrium*, and the plaintiff replies and shews the award, he must also shew the breach, without which he hath no cause of action, or it is ill on a general demurrer; for though the defendant can make no answer to the breach, yet it ought to appear to the court that the plaintiff hath cause of action. *Hob. 233.* Yeiv. 152. Cro. Jac. 220. Sand. 102.

But, if in debt on an obligation conditioned for the performance of an award, so as, &c., the defendant pleads no award made, and the plaintiff replies, that *ante exhibitionem billa, scilicet* the 24th of June, (which was a day within the submission,) the arbitrators made an award, &c., and the defendant demurs generally, the plaintiff shall have judgment; for though the plaintiff ought to have replied, that the arbitrators made their award before the day limited to them, yet this is form only, and helped on a general demurrer. *Sid. 370.*

If in debt on a bond for performance of an award, the defendant pleads no award, and the plaintiff sets forth an award with a *proferri in cur.* and the defendant craves oyer, and then demurs. *Salk. 72.* pl. 9. Foreland v. Marygold.

demurs for variance between the award set out in the replication and the oyer, and the variances appear material, the defendant must have judgment; otherwise, if the variance had been as to those parts in which the award was void.

Carth. 66.
cent.
Sid. 253.

It hath been held, that a declaration in trespass, not concluding *contra pacem domini regis* was ill on a general demurrer; but this is now helped by the forementioned statute 4 & 5 Ann. c. 16. which enacts, "That no advantage or exception shall be taken of or for an immaterial traverse, or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever mentioned in the declaration, or other pleading, or of or for the default of alleging of the bringing into court letters testamentary or letters of administration, or of or for the omission of *vi & armis & contra pacem*, or either of them, or of or for the want of averment of *hoc paratus est verificare per recordum*, or of or for not alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer."

7. Demurrer to Evidence.

Co. Lit. 72.
Allen, 18.
Godb. 10.
Raym. 404.
2 Jon. 146.
Doct. pl.
218. [The reason for demurring to evidence is, that the jury, if they please, may refuse to find a special verdict, and then the facts never

Demurrer to evidence is an admission of the truth of the fact alleged by the adverse party, or an acknowledgment, that the evidence produced by him at the trial of the cause is true, but a denial of its operation and effect in law, whereupon the party demurs, and prays the judgment of the court; for, the fact being agreed on, the judges are the proper expositors of the law, and are to determine the same, and not the jury. But, if a matter of evidence, which is thought material, be offered, and the court disallow or over-rule it, this is a proper matter for a (a) bill of exceptions, which the judges are compellable to sign. Also (b), if the court over-rules one who offers to demur upon evidence, this is a proper case for a bill of exceptions, and the remedy which the statute in that case provides.

appear on the record. Per Buller, J. Doug. 134.] (a) For this vide title Bill of Exceptions. (b) 9 Co. 13. 2 Inst. 426. and Cro. Car. 341. Cort and The Bishop of St. David's adjudged. — Jon. 331. S. C. by which it appears, that a bill of exceptions was tendered and signed.

5 Co. 104.
2. Baker's case. Cro. Eliz. 751-2.
S. C. adjudged, because there

If in ejectment, or any other action, the plaintiff give in evidence any matter in writing or record, or a sentence in the spiritual court, and the defendant offer to demur thereupon, the plaintiff cannot refuse joining in demurrer, but must do the same, or waive his evidence.

cannot be any variance of a matter in writing.

5 Co. 104.
Cro. Eliz.
752. S. C.
—Where it

Also, if the plaintiff produce witnesses to prove any matter of fact, upon which any question of law arises, and the defendant admit their testimony to be true, in such case likewise the defend-

ant may demur: so, the plaintiff may demur upon the evidence offered by the defendant *mutatis mutandis*.

to demur upon any evidence given by witnesses, the other, unless he pleaseth, shall not be compelled to join; because the credit of their testimony is to be examined by a jury; and the evidence is uncertain, and may be enforced more or less, but both parties may agree to join in demurrer upon such evidence. — Also it is said, that in a demurrer upon evidence the party demurred unto may demand judgment of the court, whether he ought to join in the demurrer; for if there be not a colourable matter to ground the demurrer upon, the court will not force the party to join in it, but will over-rule it, that justice may not be frivolously delayed. Lil. Reg. 437.

But in the case of the king, he by his prerogative is not obliged to join in any demurrer; but in case any doubt arises, the court may direct the jury to find the matter special, and thereupon determine what the law is.

The king by his prerogative may waive his issue and demur in law, &c. *cont.* Flow. 85. a. 236.

He that demurs upon evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court; and if the matter of fact be uncertainly alleged, or it be doubtful whether it be true or no, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true.

As, if it be alleged by one party, that there is such a writ, which is denied by the other, and thereupon there is a demurrer to the evidence; upon this there can be no judgment given, for the being or not being such a writ is a fact that the jury should determine; but in this case a writ should have been admitted *tiel quel*, and then the effect thereof might have been determined by the court; and in this case both parties having misbehaved themselves, the one in offering and the other in joining in demurrer, the court held, that judgment could not be given for either, but that an (a) *alias venire facias* should be awarded.

insufficient; but in Allen, 18. the opinion of the court was, that an *alias venire facias* should be awarded, and not a *venire de novo*, because no verdict was given.

[If a matter of *record*, or other matter in *writing*, be offered in evidence to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict by demurring to the evidence, and obliging the party offering the same to join in demurrer, or waive the evidence: and the reason given for it is, that there cannot be any variance of matter in writing. The books also agree, that if *parol* evidence be offered, and the adverse party demur; he who offers the evidence may join in demurrer if he will. But the language of the old books is very indistinct upon the question, whether the party offering *parol* evidence shall be obliged to join in demurrer. In a late case which came before the House of Lords, (*Gibson and Johnson v. Hunter*, 2 H. Bl. 187.) it was observed, in delivering the opinion of the judges, that *parol* evidence is sometimes certain, and no more admitting of any variance, than a matter

is said, that if either party offer

Co. Lit. 72. a. Dyer, 53. pl. 8. Cro. Eliz. 752. 5 Co. 104. S. P. 85. a. 236.

Allen, 18. Wright v. Paul Pinder, said to be resolved. Stile, 22. 34. S. C.

Stile, 22. 34. Allen, 18. (a) In Stile, 34. it is said by Rolle, that a new *venire facias* should go in the same manner, as if a special verdict be found

Tidd's Pr. 522, 3. 4.

matter in writing; but it is also often loose and indeterminate, often circumstantial. The reason for *obliging* the party offering evidence in *writing*, to join in demurrer, applies to the first sort of parol evidence; but it does not apply to parol evidence that is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all, will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. In such cases, however, if the party, who demurs, will admit the evidence of the fact, which evidence is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing; and in such case, the party shall be allowed to demur, and his adversary must join in demurrer. But on a demurrer to *circumstantial* evidence, unless the party demurring will distinctly admit, upon the record, every fact, and every conclusion, which the evidence offered conduces to prove, it is not competent to him to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering it to join in demurrer: though, if the party offering the evidence consent to waive the objection, and to join in demurrer, every fact is to be considered by the court as admitted, which the jury could infer in his favour, from the evidence demurred to: and the court will, if they can, give judgment upon such evidence: but otherwise, a *venire de novo* must be awarded.

Dougl. 119.
2 H. Bl.
209.

2 H. Bl.
208. Cro.
Car. 341.
Bull. N. P.
313.

The whole operation of entering the matter upon record, and conducting a demurrer to evidence, is and ought to be under the direction and controul of the court, upon a trial at bar, or of the judge at *nisi prius*: subject, however, to an appeal, by bill of exceptions, if the demurrer be refused. And where a demurrer to evidence is admitted, it is usual for the court, or judge, to give orders to the associate, to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*.

Dougl. 218.

The question upon a demurrer to evidence being, whether the evidence offered be sufficient to maintain the issue, the party, on such demurrer, cannot take advantage of any objection to the pleading.]

Plow. 408.
Scholastica's
case, Style,
22.

(a) Cro.
Car. 143.
Darrosc v.
Newbott.

Upon a demurrer to evidence, though the matter of fact be confessed, yet the jury may inquire of the damages, and assess them conditionally, *viz.* if upon the argument of the demurrer the law should be for the plaintiff, then so much, &c. Also, it hath been resolved (a), that the damages may be inquired of by a writ of inquiry of damages, when the demurrer is determined; and it is said to be the most usual course, when there is a demurrer upon evidence, to discharge the jury without more inquiry.

Lev. 87.
Fitz-Harris
v. Boiun.

Error of a judgment in the palace court in *assumpsit*, where to prove the consideration an arrest was to be proved by the plaintiff; and for that he did not produce the writ the defendant-demurred

murred on the evidence, and thereupon judgment was given for the plaintiff: and now to reverse the judgment it was said for the plaintiff in error, that the king's writs are matters of record, and are not to be proved but by themselves; and it was agreed by the court, that the writ ought to have been produced in evidence, but by the demurrer it is confessed, the arrest being matter of fact, though it be to be proved by a matter of record; and the jury might of their own knowledge know that there was a writ, and by the demurrer on the evidence all matters of fact are confessed that the jury could know of their own conscience.

(O) Plea at what Time to be put in, and the Ceremony requisite therein.

IF the defendant neglects to put in his plea, when the rules for pleading are out, the plaintiff may sign judgment for want thereof; but if the matter which is to be pleaded is difficult, the court will upon motion grant the defendant longer time to put in his plea than otherwise by the rules of court he ought to have; but without leave of the court he cannot have longer time, because the court is to judge whether it be necessary to plead such a plea as requires longer time to consider of than ordinary; and should it be otherwise, the defendant might upon such pretences delay the plaintiff without cause*.

Lil. Reg. 36, 37.
* It is usual now to grant time, by Judge's order, obtained on summons for that purpose. — [When a summons is taken out,

and made returnable, before the expiration of the time for pleading, it is a stay of proceedings, pending the application: but it is otherwise, when taken out, or made returnable, after the expiration of the time for pleading. Say. Rep. 165. Barnes, 240. 252. Caf. Pr. C. B. 137. Pr. Reg. 292. S. C. Barnes, 255. Caf. Pr. C. B. 144. S. C. Barnes, 254. Pr. Reg. 293. S. C. Nor will it operate as a stay of proceedings, where the object of it is collateral to the time for pleading, as, to discharge the defendant out of custody upon common bail, &c. Per Cur. M. 28 G. 3.]

Also, where the plaintiff doth keep any deed, or writing, or other thing from the defendant, which doth belong unto him, and whereby he is to make his defence, and is disabled by the retaining thereof to plead for his best advantage, the court will upon a motion grant an imparlance to the defendant till the plaintiff do deliver it to him, or bring it into court, and also a convenient time after till he can draw up his plea; for the law gives every defendant convenient time to make his best defence; and in this case, if the plaintiff be delayed, it shall be adjudged his own default.

Lil. Reg. 37.

So, where an executrix was sued by special original, it was moved, that being executrix she might imparl till next term, that she might know how to plead with safety; the motion was granted for four days to plead, and afterwards for three more; but the court refused to enlarge it to the following term, because of the inconveniency that might accrue to other creditors; and in doing it thus far obliged the defendant to enter into terms not to acknowledge judgment in the mean time to other creditors that were in

Hil. 5 G. 2. in B. R. Snellgrave v. Morris, Executor of H. Morris, and S. P. so ruled between the Bank of England v.

Morris. equal degree with the plaintiff, nor to do any thing to his pre-
 2 Str. 1002. judice *.

1028. Ca.

temp. Hard. 165. 2 Barnard. K. B. 183. * Now, if defendant obtains, by a judge's order, time to plead, it is customary to insert the like conditions.

Trin. 5 G. 2. So, a defendant had time to plead given till the second day of
 in B. R. the next term, upon affidavit that four days before the declaration
 Knight v. delivered he was and still continued to be so indisposed in mind
 Robinso. that he could not make his defence.

5 Mod. 215. When a person appears upon a recognizance, or in *propria per-
 sona*, or is a prisoner in custody upon any information for a misde-
 meanor, where no process issued out to call him in, by the course
 of the court, in these cases, he must plead *instantér*.

Comb. 3. Those that come in upon a *habeas corpus* or attachment must
 per Aston. plead the same term without imparlance, giving the ordinary
 * This must rules, which are eight days *.
 depend on the situation of the cause when removed, the time when the *habeas* is returnable, and the person who
 sues it forth, &c.

Comb. 251. A plea in abatement must be pleaded within four days, without
Vide supr. special leave from the court, because the person coming in by the
 tij. Abate- process of the court ought not to have time to delay the plaintiff:
 ment (O), also such plea by the 4 & 5 Ann. c. 16. being for delay, is not to
 27. be received, unless on oath, and probable cause shewn to the
 court.

Comb. 19. Upon a *respondeas ouster* they have usually four days' time to
 plead; but this is said to be in the discretion of the court.

Mich. By the rule of the court, as many days are allowed for the
 4 G. 2. in defendant to plead after oyer given, as he had by the rule of the
 B. R. An- court at the time of oyer demanded.
 drews v.

Dingley. 2 Str. 877. and Barnard. K. B. 368. S. C. but S. P. does not appear.

R. T. 5 & 6 [In B. R., if the plaintiff amend his declaration, the defendant
 G. 2. and shall have *two* days, exclusive of the day of amendment, to alter
 see R. M. his first plea, or plead *de novo*.]
 30 G. 2.

Reg. 2.

Mich. Defendant had an order by consent from a judge for eight
 7 G. 2. days' time to plead, and at the expiration of the eight days plain-
 in B. R. tiff signed judgment, without giving a rule to plead; & *per cur.*
 Stackie v. the judgment is regular; rules are only to give the parties notice
 Wilkes. when they are expected to plead, here, the defendant's praying
 time to plead excludes any presumption that the plaintiff has not
 given him such notice.

2 Lil. Reg. If the defendant do not plead according to the rules of the court,
 298-9. so that the plaintiff may enter judgment upon a *nil dicit*, yet if
 after the rules are out the defendant put in his plea into the office
 before the plaintiff hath entered his judgment, this plea is to be
 accepted, and the plaintiff ought not then to enter his judgment;
 and if he do, the judgment may be set aside for irregularity.

R. T. [In B. R., where the defendant has appeared, or filed bail, up-
 3 & 4 G. 2. on any kind of process, returnable the *first* or *second* return of any
 term;

term; if the plaintiff declare in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or, in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, within *eight* days *exclusive* after the delivery or filing thereof; and the defendant must plead accordingly without any imparlance.

Where the defendant has not appeared, or filed bail, the rule in *B. R.* is, that "upon all process returnable before the *last* return of "any term, where no affidavit is made and filed of the cause of "action, the plaintiff may file or deliver the declaration *de bene esse*, "at the return of such process, with notice to plead in *eight* days "exclusive, after the filing or delivery thereof; and if the defend- "ant do not file common bail, and plead within the said *eight* "days, the plaintiff, having filed common bail for him, may sign "judgment for want of a plea." But, if the declaration be not filed, until *after* the return of the process, the defendant has *eight* days to plead from the time of filing it, whenever it may be. And "upon all process, where an affidavit is made and filed of "the cause of action, the declaration may be filed or delivered *de* "bene esse, at the return of such process, with notice to plead in "four days after the filing or delivery, if the action be laid in "London or *Middlesex*, and the defendant live within *twenty* miles "of *London*, and in *eight* days, if the action be laid in any other "county, or the defendant live above twenty miles from *London*; "and if the defendant put in bail, and do not plead within such "times as are respectively before mentioned, judgment may be "signed." But in all the foregoing cases, the declaration should be delivered, or filed, and notice thereof given, *four* days *exclusive* before the end of the term, a rule to plead duly entered, and a plea demanded, when necessary.

When the process is returnable the *last* return of the term, or, where it is returnable before, but the declaration is not delivered, or filed, and notice thereof given, *four* days *exclusive* before the end of the term, the defendant is entitled to an imparlance, and must plead within the first *four* days of the next term, provided the declaration be delivered or filed, and notice thereof given, before the effoin-day of that term, otherwise the defendant will be allowed to imparl to a subsequent term.

If four terms have elapsed, since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead, before judgment can be entered against him, unless the cause have been staid by injunction or privilege; and the notice in such case must be given before the effoin-day of the term: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation.

After a defendant in a *quo warranto* information has appeared, the prosecutor must give two four-day rules to plead, and after the expiration of the last, must also move in term-time for a preemp-

R. T.
22 G. 3.

1 Burr. 56.
Delatre v.
Mango, M.
20 G. 3.
Tidd's Pr.
244-

Tidd's Pr.
245-

R. T.
5 & 6 G. 2.
2 Burr. 660.
Doug. 71.
2 Bl. Rep.
2 Str. 1164.
1 Str. 211.
contr.
2 Term Rep. 40.

6 Term
Rep. 524.
In all cri-
minal pro-

seutions
for misde-
meanors two

tory rule to plead, otherwise the defendant has until the next term to plead.

four-day rules are given to plead, and a peremptory rule moved for; and then, if there be a demurrer, one four-day rule to join in demurrer, and a peremptory rule moved for. *Ibid.* Rex v. Sayer.

R. T.
33 G. 3.

The time allowed persons in confinement, charged with offences against the excise laws, is, in case such persons are confined in any gaol within the distance of *forty* miles from *London*, *six* days; if above *forty* miles, *eight* days, after the delivery of the copy of the indictment or information to such persons, or to the gaoler, keeper, or turnkey of the gaol, with a notice thereon indorsed.

Rusholm v.
Chapman,
5 Term
Rep. 473.

A prisoner needs not give notice of a plea, unless he files it before the time when by the rules of the court he is compellable to plead.

Thomas v. Prichard, 4 Term Rep. 664.

Dyche v.
Buggoane,
3 Term
Rep. 454.
Bowles v.
Edwards,
4 Term Rep. 128.

A plaintiff must make a demand of a plea before he signs judgment, and he cannot sign judgment until the expiration of twenty-four hours after the demand has been made. But the demand may be made at the time of delivering the declaration.

Churchwardens of Edmonton v. Osborne, 6 Term Rep. 689.

Kaye v.
Whithead,
2 H. Bl. 35.

Time to plead under a judge's order, is reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day on which it expires.

Mesure v.
Britten,
2 H. Bl.
616.

If a rule to plead expire on a *dies non juridicus*, supposing such day not to be *Sunday*, the defendant is bound to plead on or before that day; and if he do not, judgment may be signed on the next day; for the offices are open on all the other *dies non juridici*, but *Sunday*.]

2 Lil. Reg.
399.

Every special plea must have counsel's hand, otherwise it will be rejected, and the plaintiff may sign judgment; but, if there be two defendants, and one plead a general issue, and the other specially, and both are on the same paper; though the special plea is not signed, the plaintiff cannot reject the general issue, and take judgment against both; for, if he do, the judgment is totally erroneous, and if execution be sued, restitution shall be awarded: but the plaintiff may regularly take judgment against him who pleaded specially.

Lil. Reg.
399. Stile,
373. 345.
8th vide

Met. 126.
(a) If one
will not

A foreign plea must be engrossed in parchment, and signed by counsel, and put in upon the (a) oath of the defendant, that is, he must swear that his plea is true, or such a plea is not to be received; because thereby he endeavours to oust the court of its jurisdiction.

(a) If one will not swear a foreign plea, where he ought to do it, the plaintiff may enter judgment upon a *nihil dicit*. Stile, 225.

Sid. 17a.
Reb. 477.
479. 658.
323.

Error was assigned, that the defendant in the writ of error was dead before the first judgment given, and it appearing by affidavits that he was alive, and that it was a trick merely for delay, the court determined to over-rule the plea, unless the plaintiff would swear that it was true.

(P) Continuance and Discontinuance in Pleading.

A T common law no plea could be determined but in the presence of the parties, unless default was made by one of the parties, and not excused; and therefore by the statute *Westm.* c. 28. to save delays at the *nisi prius*, they ordered, that the inquest should be taken, though the defendant made default, and did not appear. Hence it became necessary, after issue joined, that there should be continuances from time to time till the verdict was taken, as before issue joined, a continuance was given the defendant from term to term until his plea was put in; and if these continuances were not entered from term to term, the defendant was without day in court; and wherever he was so, there was an end of the proceedings in that writ; for he had fulfilled the command of that writ in appearing, and the court might give judgment against him if he did not plead; and if the court neither gave him leave to plead, nor gave judgment against him for want of a plea, he having fulfilled the writ, the matter was at an end: so, if he had pleaded, and the court had not given a day to the parties to prove their allegations, there likewise, the defendant having appeared, the writ was complied with, and the matter at an end, unless the court gave farther time to verify the allegations; and therefore in such cases there must be continuances till the verdict.

Bro. Discontinuance (1), (2); 6 Mod. 283, Roll. Abr. 487-8. Cro. Jac. 528. Cro. Car. 236.

So, upon a demurrer, or after a verdict given, if the court give time to consider of their judgment, they must give day to the parties, because they can determine nothing in the absence of the parties, and the command of the writ being complied with by the defendant's appearance, and the effect of the writ answered, it is at an end; and the court can give time only from one term to another; for, if they could give day to a second term, they might give it to a 5th, 20th, or 100, and they would have power to delay *ad infinitum*.

Roll. Abr. 484. 3 Bull. 233. Stile, 339. Vide 1 Bull. 144. S. P. cont. but is not law.

If a man declares in an action upon the statute of monopolies, as the king's patentee of soap, and after the defendant in *Easter* term pleads, that the king did not make any such letters patent, and issue is joined thereupon, and day given to the plaintiff till *Mich.* term, but there is no continuance between *Easter* and *Trinity* term, it is a discontinuance; for though the court might give day to bring in the letters patent in *Mich.* term, omitting *Trinity* term, yet there ought to be a continuance between *Easter* and *Trinity* term by a *curia advisare vult* till *Trinity* term, or otherwise it is a discontinuance.

Roll. Abr. 483. Stile, 339. Friend v. Baker, adjudged.

In ejectment, if the defendant at the day of *nisi prius* at the assizes pleads, that the plaintiff entered into parcel of the land pending the writ, and the justices of *nisi prius* accept the plea, and dismiss the jury, though they do not give any day to the parties,

Roll. Abr. 486. Lane, 81. 86. 89. Sir Hugh Brown's

case.

(a) If the issue is found against the defendant, it is not

material whether he had a day given *in banco* or not; because he hath nothing further to do but to discharge himself. Palm. 333. Cro. Car. 236. & vide Cro. Jac. 528.

in banco, yet this is not any discontinuance, although the plea is collateral; for the day of *nisi prius* and the day in bank are but one day, for the court *in banco* gave day to the jurors *in banco nisi prius iusticiarum ad assisas venerint*, and to the (a) parties day is given there absolutely.

Roll. Abr.

485. Pipe

v. Agar,

Roll. Rep.

408. S. C.

But 3 Bult.

408. S. C.

It is held by

the clerks, that there is no necessity to have a continuance entered after the writ of inquiry awarded; and *per Coke*, it is good either way. — If a judgment be given in trespass, or other such action, by default or upon demurrer, and a writ of inquiry of damages awarded, returnable the next term, no continuance *per idem dies* shall be given to the defendant, because he is out of court by his own default; said to be the constant course of the court of King's Bench. Roll. Abr. 486. But for this *vide* 11 Co. 6. b. Cro. Eliz. 75. 244. 774. Roll. Rep. 31. Godb. 195. Sid. 16.

If a man recovers upon demurrer, or by default, &c. and a writ of inquiry of damages is awarded, there ought to be continuances from term to term between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not complete till the second judgment upon the return of the writ of inquiry of damages.

Roll. Abr.

486.

Thornton

v. Wade,

adjudged.

(b) That

the process

in an inferior court must be returned at a day certain, and ought to be to the court as well as to the day. *Vide* Cro. Eliz. 105. Cro. Jac. 314. Stile, 58. 66. 70. 122. Cro. Car. 254. 2 Bult. 36. Mod. 81. 2 Mod. 59. — But, if a continuance be made in an inferior court *ad proximam curiam ibidem tenendam*, without alleging any day to which it is adjourned, yet, if the court be to be held by custom, not at any certain day, as every week, or *de tribus in tres*, &c. but *die lune*, when the judges thereof please, this is a good continuance. Cro. Car. 254. — In a pie-powder court the adjournment was entered *idem dies datus est*, where it should have been *eodem hora*, yet adjudged good. Moor, 459. pl. 637.

In an action of debt in an (b) inferior court, if the defendant acknowledges the action at one court, and no judgment is entered at this court, but at the next court judgment is given for the plaintiff; if there be no continuance between the said courts, this is a discontinuance.

Cro. Jac.

357.

Peplow v.

Rowley.

(c) For this

vide Cro.

Car. 347.

Jon. 331.

Yelv. 155.

Stile, 328,

329.

Hard. 504.

Attorney-

General v.

Town of

Farnham.

That when

the King is

party no day

is given to him,

because he is

always present

in court. Roll.

Abr. 486-7.

If in an action upon the case in an inferior court the defendant is essoined, and hath a day *per effoigne*, and the plaintiff *habet eundem diem*, at which day the defendant being demanded appears not, but makes default, & *habet diem per defaultam secundum consuetudinem ville* given by the court, &c., this is a discontinuance; for when the defendant made default he was out of court, and (c) so no day could be given to him; and the custom alleged cannot help that which is against the common law.

If in a *quo warranto* against a corporation, for using a fair and market and taking toll, &c., issue is taken, whether they have toll by prescription, or not, and it is found for the defendants; the Attorney-General may yet proceed to take issue upon the rest, for in the case of the king there is no discontinuance before judgment.

Roll. Abr.

487. —

But for this

In an action after issue joined, and a verdict for the plaintiff, the plaintiff cannot discontinue the action without the consent of the

be defendant; and if he will not enter the judgment, the defendant himself may enter it.

vide Stile,
346.
Sid. 60.

av. 48. *Mod.* 13. — Where there has been a discontinuance after a special verdict. *Latch*, 286. *letl.* 3. *Cro. Car.* 575. *Salk.* 178. — Where by the course of the court the plaintiff may discontinue without motion, paying costs. *Stile*, 366. *Leon.* 105. — Where after a demurrer by one of the court. *Cro. Jac.* 317. *Cro. Car.* 195. *March*, 24. *Stile*, 120. 134. 306. 309. 310. 32. *Allen*, 20. *Sand.* 23. 2 *Sand.* 74. *Sid.* 84. 306. *Lev.* 227. 298. 2 *Lev.* 118. 124. *Mod.* 41. *ulf.* 217.

If a man vouches for parcel, and as to the rest makes no answer, and the demandant does not take advantage thereof by prayer of *discontinuance*, but suffers the process to be continued against the vouchee a right of the parcel, all is discontinued.

18 E. 3. 40.
Roll. Abr.
487.

If the tenant vouches for all the demand, and the process upon the voucher is made for less than it is, all is discontinued.

18 E. 3. 40.
Roll. Abr.
487.

In an action for trespass a discontinuance in parcel is a discontinuance in the whole.

7 H. 6. 27.
Roll. Abr.
487.

In trespass for several things the defendant pleads a plea in bar or part, and does not answer to the rest, and the plaintiff demurs generally, the plaintiff shall not have judgment against the defendant; for the demurrer was by intendment upon the bar, and not for want of pleading to the residue; for he ought to have prayed judgment upon *nil dicit* for it, so all is discontinued.

4 Co. 62.
Roll. Rep.
135. 176.
2 Bull. 325.
— But
where for
want of an-
swering to

part all is discontinued, *vide* Brownl. 228. *Carter*, 51. 2 *Mod.* 259. *Yelv.* 65. *Sid.* 223.

If a plea begins with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is naught, and the plaintiff may demur; but, if a plea begin only as in answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*; for if he demurs or pleads over, the whole action is discontinued.

Salk. 179.
pl. 6.
Ld. Raym.
679. & *vide*
Salk. 180.
pl. 9. S. P.
1. Str. 302.
S. P.

In *indebitatus assumpsit* the defendant pleaded an attainder of high treason in disability; the plaintiff replied a pardon, *prout per exemplification. inde*, &c., (which was held good,) & *petit judicium & damna sua*; to which it was demurred; and held, that there was a discontinuance by the misconclusion of the replication, for an ill prayer of judgment is as none.

Salk. 177.
pl. 1. Bisse
v. Harcourt,
Ld. Raym.
338.

It is said, that the course of the court of *King's Bench* is to enter no continuance on the roll till after issue or demurrer, and then to enter the continuance of all upon the back (a) before judgment.

Roll. Abr.
485.
(a) A dis-
continuance
can never be
objected

pendente placito, for before judgment it may be continued at the pleasure of the court, though not after judgment in another term. *Cro. Jac.* 211. — But at what time continuances may be entered, *vide* *Savil.* 54. *Lit. Rep.* 4. *Cro. Car.* 236.

In debt, the declaration was of *Michaelmas* term, and the plea roll of *Easter*, and no continuance entered, and this upon demurrer was shewed to the court as a discontinuance; but they said the practice is never to enter continuances till the plea roll be entered up, though the declaration be of four or five terms standing.

Salk. 179.
pl. 7.
Curtius v.
Padley, Ld.
Raym. 872.

Roll. Abr.
487. Like
point in
Godb. 219.
Cro. Jac.
35-316, 317.
Yelv. 5, 6.
Brownl.
192. S. C.
Johnson v.
Turner,
adjudged.

If the plaintiff be nonsuit, by which the defendant is to recover costs, if the plaintiff will not enter his continuances, on purpose to save the costs, the defendant shall be suffered to enter them, and so recover his costs.

If in trespass for breaking his house, and taking and carrying away his goods, the defendant justifies the whole, and the plaintiff *quoad fractionem domus*, and the taking the goods, *nec non materiam in ea contentam*, demurs upon the defendant's bar, and the defendant joins in demurrer in this manner, *quia placit. predict. quoad fractionem domus*, and the taking the goods *sufficiens*, &c., and thereupon judgment is given, here is a discontinuance; for in the offer of the demurrer *ex parte querentis* nothing is alleged specially, but only *quoad* breaking of the house, and taking the goods; and though the subsequent words *nec non materiam in ea contentam* go to all the matter in bar, *viz.* the asportation; yet, when the defendant joins in demurrer, he joins but specially *quoad* the breaking the house, and taking the goods, but says nothing as to carrying them away.

Yelv. 117.
St. John v.
Comyn,
adjudged,
and the
judgment
upon a writ
of error in
B. R. in
Ireland re-
versed upon
a writ of error here accordingly, & vide Yelv. 138.

If upon a writ of error upon a judgment in ejectment the plaintiff assigns for error the want of an original, and the defendant pleads, that such a day an original was delivered to, &c., and concludes to the country, and thereupon the judgment is reversed; here is a discontinuance; for when the defendant concludes to the country where the matter of his plea, *viz.* the delivery of the original, was triable by record, and the plaintiff does not reply or demur upon defendant's plea, here is not any perfect record.

11 Co. 5, 6.
Roll. Rep.
30. S. C.
(a) By the
32 H. 8.
c. 30. dis-
continu-
ances are
aided, so
that there

In an action of trespass against A., B., and C., A. confessed judgment, and B. and C. pleaded severally not guilty, and several *venires* were awarded to try these issues, &c., but no day given to A., and it was resolved upon a writ of error upon a judgment *in banco*, that it was according to the course of the court, and that if it was a discontinuance it was helped by the verdict against B. and C. (a)

be a verdict for the plaintiff or defendant; in the construction of which it hath been held, that if as to part the defendant joins issue, but says nothing as to the rest, and this issue is found for the plaintiff, he shall have judgment. 11 Co. 6. b. 2 Leon. 194. Godb. 55. Roll. Rep. 161. Cro. Jac. 353. Hob. 187. Golsb. 109. Bulf. 25. Carter, 51. 3 Lev. 39. Salk. 179. pl. 8. 180. pl. 9. 2 Ld. Raym. 856. 1121. 7 Mod. 24. But, if the matter is pleaded to the whole, though in fact but an answer to part, this is a bad plea, and not helped by the statute. Hard. 331. — That discontinuances, as well on the part of the plaintiff as defendant, are aided. Cro. Eliz. 489. Cro. Jac. 523. — That discontinuances, in inferior courts as well as superior, are aided, being within this act. Salk. 377. pl. 2. *

* CONTINUANCE OF SUIT OR PROCESS.

When necessary. — Defendant in custody on *capias ad satisfaciendum* was discharged on a written agreement; above a year after new *capias ad satisfaciendum* issues without continuance on the roll; it shall be set aside. Barnes, 205. — On *nul tiel record*, plaintiff may continue the day for bringing in the record. Barnes, 84. — *When not* — Continuance need not be entered on the record of *nisi prius*; therefore, if after issue joined, and before day of *nisi prius*, one of defendants dies, suggestion of it, and *venire facias* between plaintiff and surviving defendant, & *jurata* at the foot, agreeable thereto, is good. Barnes, 469. — *How it shall be entered.* — When the trial is deferred, if the *venire facias* is returned

(Q) Pleas *Puis darrein continuance*.

THE defendant can regularly have but one plea, on which, if there be an issue or demurrer, the cause is to be determined, because there can be but one verdict in a cause: but, if any new matter happens pending the writ, he may plead it after a former plea pleaded, provided he plead it before the next continuance after such new matter has happened, which is called a plea *puis darrein continuance*, because such matter being new it was not in his power to plead it when his former plea was pleaded; and it would be hard, because he had pleaded to preclude him from an advantage which he had not at the time of pleading, since there was no laches in him; but this he cannot plead after a continuance, because having suffered the former plea to continue, he rests upon it, and waives the benefit of any new matter.

In debt against an administrator, after demurrer joined, the administration was repealed, and granted to another, for which the defendant would have pleaded this matter, *puis darrein continuance*; but it was resolved not to be pleadable after demurrer, though it might after an issue joined.

Doff. pl. 297. Salt. 178. pl. 5. Ld. Raym. 693.

Moor, 872. pl. 1110. Stonner v. Gibbons, 1 Str. 493. S. P. but

see Hob. 81. contra.

So, if a release be given after the day of *nisi prius*, and before the day in bank, he cannot plead it, because there is a verdict

21 H. 6. 10. Bro. Cont. 27.

and filed, the proper entry is, that the jury *ponitur in respect*; if it be not filed, enter a *non misse brevis*; either way will prevent a discontinuance. Rex v. Hare and Man. Stra. 266.—If proper continuances are entered on the plea-roll, the want of them on the *nisi prius* roll is not material. French v. Wiltshire, And. 67.—If to declaration of Trinity, there is imparlance to Michaelmas term, and defendant procures judge's order for time to plead till the 15th of December, the imparlance shall be continued to *quinden*. Mart. Barnes, 161.—*At what Time*.—If bill is of Easter, and in Trinity defendant pleads, and issue joined, and paper-book delivered without continuance from Easter to Trinity, it shall not be set aside; for it may be entered at any time on the roll. Wilkes v. Wood, 2 Will. 203.

DISCONTINUANCE.

What shall be.—It is not a discontinuance, though no day is given to the tenants in dower to appear on the return of the writ of inquiry; or it is aided by statute 4 & 5 Ann. c. 16. Dobson v. Dobson, Ca. B. R. temp. Hardw. 29.—*When it shall be by Leave of the Court*.—After demurrer argued and allowed on payment of costs. Butler v. Maliffy, 1 Str. 76. Henderfon v. Williamson, Mich. 5 O. Stra. 116.—The court may grant it after special verdict argued, but will not do it in a hard action. Boucher v. Lawson, Ca. B. R. temp. Hardw. 194.—The court will not permit an executor to discontinue in any case where he has *knowingly* brought his action wrong, but on payment of costs. Harris v. Jones, 3 Burr. 1452.—After judgment on demurrer for plaintiff, and error brought, plaintiff may discontinue on costs in action and error. Barnes, 169.—Plaintiff may discontinue, though defendant has been arrested a second time before discontinuance. Barnes, 169.—After judgment on demurrer in replevin for avowant, plaintiff cannot discontinue. Barnes, 169.—Rules should be drawn up, "*have leave or be at liberty*" to discontinue, not "*shall discontinue*." Barnes, 170.—Whether discontinuance may be entered without leave? Q. Barnes, 170.—Also, Whether plaintiff in replevin can discontinue? Q. Barnes, 171. [The avowant cannot, though an actor. 1 Str. 112.]—Plaintiff cannot move to discontinue after defendant has moved for judgment, as in case of a nonsuit. Barnes, 326. Plaintiff may enter *nil capiat per breve* on a plea in abatement without leave, but not in other cases. Barnes, 257.—*When it shall be aided*.—If after judgment by default on a bill against an attorney in C. B. where the proceedings are on a day certain, the writ of inquiry is returnable at a general return, it is a miscontinuance, and aided by the statutes. Launder v. Cripps, Stra. 947.—The statute 32 H. 8. c. 30. extends to discontinuances made after verdict; as, if the original process is returnable at a common return, and the *scire facias* in error is returnable at a day certain, this discontinuance is aided by the statute. Bern v. Bern, Mich. 8 G. 2. Ca. Br. R. temp. Hardw. 72.

already

2 Lutw.
1143. 1174

already in the cause, and upon another plea; and therefore the cause is determined, so that he is put to his *audita querela* to hinder the execution of the judgment.

21 H. 6. 10.
Doct. pl.
297. Lev.
30. Sid.
93. 133.
143. 185.
2 Lutw.
1143. 1174.
5 Mod. 12.

But there are two cases where a man may plead, though it be not after the last continuance, *viz.* outlawry, and the death of the plaintiff: as to outlawry, it is upon the prerogative that the debt itself is forfeited to the king, and by virtue of the prerogative *nullum tempus occurrit regi*, and therefore he may plead it though a continuance has happened after the outlawry: so, he may plead the death of the plaintiff, because, though a continuance has been entered, yet the continuance is a nullity, because there was no plaintiff in being to whom day could be given: so, it may be pleaded if the plaintiff died after the day at *nisi prius**, and before the day in bank; and the reason is, that there is no cause in court, for no judgment can be given for a person who is not *in rerum natura*, and if it be given it is erroneous; and if the plaintiff's attorney will traverse the plea, he cannot say the plaintiff comes *per attorn.*, because that would be to forejudge the matter in issue; but the attorney by his name, *viz.* J. S. *venit pro magistro suo & dicit*, may appear, and so traverse it.

* Death of
a party be-
tween ver-
dict and
judgment,
not to be er-
ror, provid-
ed judgment
be entered
within two
terms.
17 Car. 2.
c. 8.
13 E. 4. 4.

But a release may, it seems, be pleaded, though there have been imparlances between, because there is no continuance of a former plea pleaded; and by the *libertas loquendi* the defendant has time given to plead what makes most for his advantage.

2 H. 6. 13.
Sid. 143.
† Certain
suits not to
be abated for
acceptance
of knight-
hood.

But, if the writ be only abateable, as, if the plaintiff be made a knight †, or the plaintiff being feme sole takes a husband, this must be pleaded after the last continuance, otherwise he depends on his first plea, and waives the benefit of his new matter: but it cannot be pleaded between the day at *nisi prius* and the day in bank, because there has been a trial in the same cause before.

4 H. 6. c. 4.
Hob. 5.

But, if the lessor of the plaintiff dies, this cannot be pleaded *pais darrein continuance*, because the right is supposed in the lessor.

15 E. 4.
149.
Allen, 66.
2 Lutw.
1143.

The pleas of this kind are twofold, *viz.* in abatement and in bar; if any thing happens pending the writ to abate it, this may be pleaded *pais darrein continuance* though there is a plea in bar, for this can only waive all pleas in abatement that were in being at the time of the bar pleaded, but not any subsequent matter: but, though it be pleaded in abatement, yet after a bar is pleaded, it is peremptory, as well on demurrer as on trial, because, after a bar pleaded he has answered in chief, and therefore can never have judgment to answer over: so, it may be pleaded in bar: but, as to the manner of its being pleaded in bar or abatement, herein it is to be observed, that in the first case it must be pleaded *quod breve cassetur*, and in the other *quod actionem ulterius manutenere non debet*, and not that the former inquest should not be taken, because it is a substantive bar in itself, and comes in the place of the former, and therefore must be pleaded to the action.

Brq. Conti-
nuance, 40.

There can be but one plea *pais darrein continuance*, that the plaintiff may not be delayed *ad infinitum*, for, if he made a second change

change he might make a third, and so in *infinitum* : but some have held, that he might plead an outlawry after the last continuance, because *nullum tempus occurrit regi* ; but *quare* whether the subject shall after plea *puis darrein continuance* partake of the prerogative, or whether it shall be presumed, after such trifling, that it is frivolous and untrue, and therefore to be rejected.

Fits. Continuance, 3.

If a matter happens after plea pleaded, and before issue joined, it shall be pleaded to be done pending the writ ; but, if it happen after issue joined, it shall be pleaded *post ultimam continuationem*.

Bro. Continuance, 1.
26 H. 3. 2.

If the plaintiff release to the defendant after the award of the *nisi prius*, and at the day of *nisi prius* the jury remain *propter defectum*, the defendant may plead it the day in bank ; because the cause was not determined by the jury, and therefore he is at liberty to plead it at any other day of continuance ; and it may be tried by the jury, when they appear.

Bro. Continuance, 30.
22 H. 6. 1.

If the plaintiff, after a writ of inquiry awarded, release to the defendant, he cannot plead this release at the day in bank ; because there is no day given him, and judgment is already : but, if the plaintiff dies, such death may be pleaded ; because there is no person in court for whom judgment can be given : but now by the 8 W. 3. c. 11. the executors, &c. may have a *scire fac.* on such an interlocutory judgment *.

* By this statute the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit.

Time and place must be laid in this as in other pleas, and it must have the same certainty with other pleas.

Doct. pl. 297.
Allen, 66. 2 Lutw. 1143.

It is no good plea to say *puis darrein continuance* such a thing happened, but it ought to be precise in the day.

5 Mod. 13.
Yelv. 141.

One may plead *puis darrein continuance*, that the plaintiff brought a second action for the same cause, and recovered, though he might have pleaded the former in abatement to the second.

Comb. 357.

Plea *puis darrein continuance* put in at the assizes must be certified as part of the record, and cannot be then tried.

2 Mod. 307.

If after a plea in bar the defendant pleads a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage shall be taken of any thing in the bar †.

Salk. 178.
Pl. 5.
Ld. Raym. 693. Barber

v. Palmer, & vide Hob. 81. —† A plea *puis darrein continuance* must be verified, or it will be set aside. Martin v. Wyvill, Stra. 492. — If on an imparlance to next term, plaintiff gives a release to defendant in the mean time, he may plead the release in bar as an original plea, as it is before issue ; but, if after issue joined, it must be pleaded *puis darrein continuance*. Price v. Kenrick, Fort. 338. — It cannot be rejected by the court if it be verified by affidavit ; and they cannot determine whether it is a good plea or not, but on demurrer. Paris v. Salkeld, 2 Will. 137.

[It seems dangerous to plead any matter *puis darrein continuance*, unless you be well advised, because if that matter be determined against you, it is a confession of the matter in issue, and no *nisi prius* shall be granted. And the plea put in cannot be amended after the assizes are over : but it may during the assizes be amended before the judge of *nisi prius*.

Cro. Elis. 49.

It is in the breast of the judge at *nisi prius* whether he will accept of such plea or not, i. e. whether he will or will not proceed in the trial, therefore the party ought to make it appear to the judge that it is a true plea ; yet the plaintiff is not to reply to this

Ibid.
2 Mod. 307.
It appears that the judge is

plea

bound to
receive this
plea, if ve-
rified by
affidavit.

3 Term Rep. 554. 2 Will. 137.

Pearson v.
Perkins,
Mill. 1 G. 1.
Bull. N. P.
310.
Thel. Dig.
204.

plea at the assizes, for the judge has no power to accept of such replication, nor to try it, but only to return the plea as parcel of the record of *nisi prius*; and if the plaintiff demur, it cannot be argued there.

A plea *pais darrein continuance* may be pleaded after the jury are gone from the bar, but not after they have given their verdict.

There are some pleas which may be pleaded at *nisi prius* that cannot properly be termed pleas *pais darrein continuance*, because the matter pleaded need not to be expressly mentioned to have happened after the last continuance.

Br. Conti-
nuance, 57.

As in trespass, after issue joined, the defendant may plead that the plaintiff was outlawed of felony, without saying after the last continuance. So, he may in like manner plead that the plaintiff was covert the day of the writ purchased, though he cannot plead that the plaintiff took baron pending the writ, without pleading it after the last continuance.—The diversity seems to be between such things as disprove the writ in fact, and such as disprove it in law.

The last continuance where such plea is pleaded at the assizes, is the day of the return of the *venire facias*, from whence the plea is continued by the award of the *distringas* or *habeas corpus* till the next term *nisi prius*, &c.

Talk. 519.

If the matter of the plea arise by deed, it ought to be pleaded with a *profert*.

The form of the plea, if at the assizes, is as follows: “ And now at this day, that is to say, &c. comes the said C. D. by R. H. his counsel, and says, that the said A. B. ought not further to maintain his action against him the said C. D. because he says that after the day of last past, from which day until the day of in Mich. term next, (unless the justices of our lord the king, assigned to hold the assizes of our lord the king in and for the county of C., should first come on the day of at B. in the said county of C.) the action aforesaid is continued, to wit, on, &c. at, &c. the said A. B. by his deed dated, &c. did release.”—And to shew the particular matter, and conclude, “ And this he is ready to verify, wherefore he prays judgment if the said A. B. ought further to maintain this action against him,” &c.

Freem. 252.

Where a plea is certified on the back of the *posse*, and the plaintiff demurs, if the defendant on the expiration of a rule given for him to join in demurrer, refuses to do so, the plaintiff may sign judgment.]

Præmunire.

(A) What Offences come under the Notion of a Præmunire.

(B) Of the Punishment therein.

(A) What Offences come under the Notion of a Præmunire.

THE offences coming under the notion of a (*a*) *præmunire*, or for which the party incurs a *præmunire*, are reduced by Serjeant *Hawkins* to the following particulars:

word in the writ, which is used for *præmonere*. Co. Lit. 129. Hawk. P.C. c. 19. (a) So called from the 3 Inst. 120.

1. The offence of making use of papal bulls is made a *præmunire*, by many ancient as well as later statutes, to which purpose it is enacted by 25 E. 3. *ft.* 6. § 4. called the statute of provisors, "That whoever shall, by a papal provision, disturb any patron to present to a benefice, &c. shall be fined and imprisoned till he make full renunciation. And it is further enacted by 25 E. 3. *ft.* 5. c. 22. that if any one purchase a provision of an abbey or priory, he shall be out of the king's protection; and by 38 E. 3. *ft.* 2. c. 1. and 12 Rich. 2. c. 15. and 13 Rich. 2. *ft.* 2. c. 2. that whoever shall accept a benefice, contrary to 25 E. 3. *ft.* 5. shall be banished; and by 13 Rich. 2. *ft.* 2. c. 3. that whoever shall bring a sentence of excommunication against any person for executing the said statute of 25 E. 3. *ft.* 5. shall suffer pain of life and member; and by 16 Rich. 2. c. 5. that whoever shall purchase or pursue, or cause to be purchased or pursued, in the court of Rome or elsewhere, any translations, processes, sentences of excommunication, bulls, instruments, or other things contrary to the tenor of that statute, which touch the king, against him, his crown, his regality, or his realm, or bring them within this realm, or receive them, &c. shall be out of the king's protection; and their lands and tenements, goods and chattels, forfeited to the king, and they shall be attached by their bodies; and by 2 H. 4. c. 3. that whoever shall purchase from Rome a provision of exemption from ordinary obedience; and by 2 H. 4. c. 4. that whoever shall put in execution bulls purchased by those of the order of *Cisterciens*, to be discharged of tithes, shall incur the like penalty. They are further

(a) Yet it hath been holden that the alleging an ancient bull in order to induce another principal matter whereon to ground a title, without claiming any thing from the bull itself, is not within this statute. 2 Lev. 251.

"restrained by 6 H. 4. c. 1. 7 H. 4. c. 8. 9 H. 4. c. 8. and 3 H. 5. ff. 2. c. 4. by which the statutes above mentioned are enforced and explained; and it is further enacted by 23 H. 8. c. 2. § 22. that whoever shall sue for or execute any licence, dispensation, or faculty from the see of Rome; and by 28 H. 8. c. 16." (by which all bulls, briefs, &c. heretofore obtained from Rome are made void) "that whoever shall (a) use, allege, or plead the same in any court, unless they are confirmed by that statute, or afterwards by the king, shall incur the like penalty."

Davis, 84.

By the 13 Eliz. c. 2. those who purchase any bull, &c. from Rome, are guilty of high treason. But, as those ancient statutes continue still in force, it is in the election of the crown to proceed either upon them or 13 Eliz. c. 2. Also, by the said statute of 13 Eliz. c. 2. the aiders, comforters, and maintainers of such offenders, after the offence, to the intent to uphold the said usurped power, incur a *praemunire*.

Secondly, The derogating from the king's common law courts, is said to have been an high offence at common law, and is made a *praemunire* by many ancient statutes; for by 27 E. 3. c. 1. of provisors, "If any subject draw any out of the realm in plea, whereof the cognizance pertains to the king's court, or of things whereof judgments be given in the king's courts, or sue in any other court to defeat or impeach the judgments given in the king's courts, he shall be warned to appear, &c. in proper person, at a day containing the space of two months, at which if he appear not, he and his proctors, &c. shall be put out of the king's protection, his lands and chattels forfeited, his body imprisoned, and ransomed at the king's will," &c.

And by 16 Rich. 2. c. 5. "Both those who shall pursue, or cause to be pursued in the court of Rome, or elsewhere, any processes, or instruments, or other things whatsoever which touch the king, against his crown and regality or his realm, and also those who shall bring, receive, notify, or execute them, and their abettors, &c. shall be put out of the king's protection."

2 Bulf. 299.
3 Inst. 125.
Cro. Jac.
336.

In the construction of these statutes it hath been holden, that certain commissioners of sewers, for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *praemunire*.

Hawk. P.C.
c. 19. § 18,
and the authorities
there cited.

Also, suits in the admiralty or ecclesiastical courts within the realm, for matters which upon the face of the libel itself appear to belong only to the cognizance of the temporal courts, are said to be within 16 Rich. 2. c. 5. by force, of the words, or *elsewhere*.

But for this
side title
Court of
Chancery.

And it hath been formerly holden, that even suits in a court of equity, to relieve against a judgment at law, are within the danger of these statutes, especially if they tend to controvert the very point determined at law, or to relieve in a matter relievable at law.

Thirdly,

Thirdly, Appeals to *Rome* are made *praemunires* by 24 *H. 8. c. 12.* and 25 *H. 8. c. 19.* by which it is enacted, "that such appeals as formerly were made to *Rome*, shall be made from henceforth to Chancery."

Fourthly, The exercising the jurisdiction of a suffragan without the appointment of the bishop of the diocese, is made a *praemunire* by 26 *H. 8. c. 14.* which sets forth at large how suffragans are to be nominated, &c.

Fifthly, By 25 *H. 8. c. 20.* "If a dean and chapter refuse to elect one named in the king's letter for a bishoprick, and to certify such election to the king within twenty days after the licence shall come to his hands, or if any archbishop or bishop after such election (or nomination by the king in default thereof, &c.) refuse to confirm and consecrate within twenty days the person signified to them by the king's letters patents, they incur a *praemunire*."

Sixthly, Maintaining the Pope's power is made a *praemunire* by 5 *Eliz. c. 1.*

Seventhly, By 13 *Eliz. c. 7.* "If any one shall bring into the realm, &c. any *agnus Dei*, crosses, pictures, beads, or such like superstitious things, pretended to be hallowed by the Bishop of *Rome*, &c. and shall deliver or offer the same to any subject to be used in anywise; or if any one shall receive the same to such intent, and not discover the offender, &c., or if a justice of peace, having any offence in that act declared to him, do not within sixteen days declare it to a privy counsellour, he incurs a *praemunire*."

Eighthly, By the 27 *Eliz. c. 2.* "Sending relief to any Jesuit, seminary priest, or college of priests or Jesuits beyond the seas, or to one not returning out of such college into *England*, shall incur a *praemunire*."

Ninthly, Persons refusing to take the oaths, incur a *praemunire* by several statutes, as 1 *Eliz. c. 1.* and 5 *Eliz. c. 1.* and 3 *Jac. 1. c. 4.* and 7 *Jac. 1. c. 6.* and 1 *W. & M. &c. c. 1.*

Vent. 171.
Raym. 212.
374-
2 Keb. 825.

[But see ft. 31 G. 3. c. 31.]

Tenthly, By the 6 *Ann. c. 7.* it is enacted, "That if any person shall maliciously and directly, by preaching, teaching, or advised speaking, declare, maintain, and affirm, that the pretended Prince of *Wales* hath any right or title to the crown of these realms; or that any other person or persons hath or have any right or title to the same, otherwise than according to 1 *W. & M. c. 2.* and 2 *W. 3. c. 2.* and the acts then lately made in *England* and *Scotland* mutually for the union of the two kingdoms; or that the kings or queens of this realm with the authority of parliament are not able to make laws to limit the crown and the descent, &c. thereof, shall incur a *praemunire*."

[By the statute 1 & 2 *P. & M. c. 8.* to molest the possessors of abbey lands granted by parliament to *Henry* and *Edward* the sixth, is a *praemunire*.

So likewise is the offence of acting as a broker or agent in any usurious contract, where above ten *per cent.* interest is taken, by stat. 13 *Eliz. c. 10.*

To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *præmunire*, by stat. 21 *Ja.* 1. c. 3.

To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *præmunire* by two statutes; the one 16 *Car.* 1. c. 21. the other 1 *Ja.* 2. c. 8.

On the abolition, by stat. 12 *Car.* 2. c. 24. of purveyance, and the prerogative of pre-emption, or taking any victual, beasts, or goods, for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *præmunire*.

To assert, maliciously or unadvisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire* by stat. 13 *Car.* 2. c. 1.

By the *habeas corpus* act, 31 *Car.* 2. c. 2. it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties, to send any subject of this realm a prisoner into parts beyond the seas.

By 6 *Ann.* c. 23. if the assembly of the peers in Scotland, assembled to elect their sixteen representatives in the *British* parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*.

The statute 6 *G.* 1. c. 18. (enacted the year after the *South-Sea* project,) makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of bubbles, subject to the penalties of a *præmunire*.

The stat. 12 *G.* 3. c. 11. subjects to the penalties of the statute of *præmunire*, all such as knowingly and wilfully solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the body of King *George II.* as are by that act prohibited to contract matrimony without the consent of the crown.

Degge, p. 1.
c. 73.
3 Inst. 122.
Br. Præmunire, pl. 21.

It is said, that if the bishop take upon him to visit a donative, and deprive the incumbent, he runs himself into the danger of a *præmunire*. And in such case was *Barlow*, Bishop of *Bath* and *Wells*, in the reign of *Edward* the 6th, who was forced to obtain a pardon for having deprived the Dean of *Wells*, the deanery being a donative by letters patent from the king.]

(B) Of the Punishment therein.

MOST of the statutes of *præmunire* refer the punishment to 16 *Rich.* 2. c. 5. which enacts, "That those who offend against the purport thereof shall be put out of the king's protection, and their lands and tenements, goods and chattels, forfeited to our lord the king; and that they be attached by their bodies if they may be found, and brought before the king and his council, there to answer to the cases aforesaid; or that process be made against them by *præmunire facias*, in manner as is ordained in other statutes of provisors."

The judgment in *præmunire* at the suit of the king, against the defendant, being in prison, is, that he shall be out of the king's protection;

Co. Lit.
129. b.
3 Inst. 125.
8.

tection; and that his lands and tenements, goods and chattels, shall be forfeited to the king; and that his body shall remain in prison at the king's pleasure: but, if the defendant be condemned upon his default of not appearing, whether at the suit of the king or party, the same judgment shall be given as to the being out of the king's protection and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall be an award of a *scapatur*.

As the above-mentioned statute 16 Rich. 2. c. 5. expressly saith, that such offenders shall be put out of the king's protection; and also the statute of 25 E. 3. stat. 5. c. 22. had farther added, that any one might do with a purchaser of the provisions therein prohibited, as with the king's enemy; and that he who should offend against such an one in body, lands, or goods, should be excused; it was formerly holden, that a person attainted in a *praemunire* might lawfully be slain by any one, as being the king's enemy and out of the protection of the laws; but the later opinions seem to have disapproved of this severity; and it is now expressly enacted by 5 Eliz. c. 1. § 21, 22. "That it shall not be lawful to kill any person attainted in a *praemunire*, saving such pains of death or other hurt or punishment, as heretofore might without danger of law be done upon any person that shall send or bring into the realm, or within the same shall execute any process, &c. from the see of Rome."

It is clearly agreed, that a person attainted in a *praemunire* can bring no (a) action whatsoever; neither is it safe for any one, knowing him to be guilty, to (b) give him any aid, comfort, or relief.

c. 19. § 47. (b) That it seems doubtful whether there can be any accessories in *praemunire*, vide Stamp. P.C. 44. Plow. 97.

It hath been resolved, that a statute, by appointing that an offender shall incur the penalty and danger mentioned in the 16 Rich. 2. c. 5. does not confine the prosecution for the offence to the particular process thereby given.

It is holden, that the statutes of *praemunire* which give a general (c) forfeiture of all the lands and tenements of the offender, extend not to lands in tail.

lands, &c. shall relate to the time of the offence, or only to that of the judgment, *Q. & vide* Cro. Car. 172. Jon. 217.

It hath been adjudged, that a pardon of all misprisions, trespasses, offences, and contempts, will pardon a *praemunire*.

The defendant in a *praemunire* must regularly appear in person, whether he be a peer or commoner, unless he is dispensed with by some writ or grant for that purpose; though in the case of (d) Sir Anthony Mildmay he was allowed to plead a pardon to a *praemunire* by attorney: but (e) it has been thought, that there was some clause to this effect in the pardon.

Upon an indictment of a *praemunire*, a peer of the realm shall not be tried by his peers.

2 Hawk. P. C. c. 48. § 9.

Co. Lit. 130.
12 Co. 68.
3 Inst. 128.
Bro. Cor. 197.
Jenk. 199.

Co. Lit. 130.
(a) Whether he is entitled to surety of the peace.
Hawk. P. C.

Vent. 173.

Co. Lit. 130.
(c) Whether the forfeiture of any

Cro. Jac. 336.
2 Bull. 299.
3 Inst. 125.

(d) 1 Roll. Rep. 190.
2 Bull. 290.
(e) 2 Hawk. P. C. 273.
12 Co. 92.
Ld. Vaux's case.

a Ld. Raym.
1361. The
King v.
Cawood,
Stra. 472.

Upon an information on the statute 6 G. 1. c. 18. for setting up a bubble called the *North Sea*, it was determined, that the court was not obliged by that act to give the whole judgment, as in case of a *præmunire*, against the defendant, but only such parts of it as in their discretions they should think fit; and accordingly a fine of 5 l. was set on the party convicted, and judgment that he should remain in prison during the king's pleasure.

Prerogative.

Vide Stamf.
Præro. c. 1.
Co. Lit. 90.
[By the
word pre-
rogative we

PRREROGATIVE is a word of large extent, including all the rights and privileges which by (a) law the king hath, as head and chief of the commonwealth, and as intrusted with the execution of the *laws*.

usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies, (in its etymology from *præ* and *rego*), something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any prerogative of the crown could be held in common with any subject, it would cease to be prerogative any longer. And therefore Finch lays it down as a maxim (Finch's L. 85.), that the prerogative is that law in case of the King, which is law in no case of the subject. 1 Bl. Com. 239.] (a) That the King's prerogative is part of the law of England, and comprehended within the same. 2 Inst. 496.

And. 153.
Co. Lit.
39. 73.
4 Co. 124.
—That he
is to defend
his subjects.
7 Co. 4.—
That he
cannot
change the
law.
5 Co. 55.
3 Inst. 36.
32 Co. 70.

The nature of our constitution is that of a limited monarchy, in which the legislative power is lodged in the king, lords, and commons; but the king is intrusted with the executive part, and from him all justice is said to flow: hence he is styled the head of the commonwealth, supreme governor, *parens patriæ*, &c., but still he is to make the law of the land the rule of his government; that being the measure as well of his power, as of the subjects obedience: for as the law asserts, maintains, and provides for the safety of the king's royal person, crown, and dignity, and all his just rights, revenues, powers, and prerogatives; so it likewise declares and asserts the rights and liberties of the subject.

—Finch's L. 81, 82, 83. speaks highly of it, as a matter divine: the king, says he, carries God's stamp, and has the shadow of God's excellencies given him: the power of God is joined with excellency; for to do wrong is not omnipotency, but weakness; so it is with the king, he can do no wrong, &c. As to which my Ld. Ch. J. Hale saith, it is regularly true, that the law presumes the king will do no wrong, neither indeed can he do any wrong; and therefore, if the king command an unlawful act to be done, the offence of the instrument is not thereby indemnified: For though the king is not under the coercive power of the law, yet, in many cases, his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful; and so renders the instrument of the execution thereof obnoxious to the punishment of the law; yet in time of peace, if two men combat together at barriers, or for trial of skill, if one kill the other, it is homicide; but if it be by the command of the king, it is only felony. Hal. Hist. P. C. 43, 44.

Hence

Hence it hath been established as a rule, that all prerogatives must be for the advantage and good of the people, otherwise they ought not to be allowed by the law *.

Moor, 67a.
Show. F.C.
75.

* And most undoubtedly this is the great end of the King's prerogative, who is not the sovereign of the state, but the people's executive magistrate: For as to sovereignty, that resides where the constitution has placed the legislative power, i. e. in king, lords, and commons, in parliament assembled; so that the king, in his political capacity, as one of the states of the realm, possesses a part, and only a part of the sovereignty, but is not sovereign, any more than a part is equal to the whole. But, as executive magistrate, he is invested with great power, pre-eminence, and many prerogatives; all intended by the constitution to be employed for the good of the people; none to their detriment; nor can any prerogative be legally so employed.

[This passage, which has been industriously foisted into the work by the last editor, abounds throughout with the most dangerous political errors. It gives a false view of the nature of our government: it represents it as almost a pure republic. From the qualifications which the kingly power is subjected to, the editor would infer the non-existence of the power itself: Because the king acts with *advice* in all cases, and with *advice* and *consent* in some cases, therefore he never acts *proprio jure*. Because the law hath assigned him various counsellours to aid and advise him in the deliberative and executive parts of his government, therefore these counsellours are co-equal and co-ordinate with him.—But let us mark the several parts of this notable passage, and let us see how well they correspond with the authorities we shall hereafter cite, authorities drawn from our records and statute books, and from the writings and speeches of men eminent for their knowledge of the law and constitution of their country, and not suspected of any blind attachment to monarchy. “The king is not the sovereign of the state, but the people's executive magistrate.”—“Sovereignty resides where the constitution has placed the legislative power, viz. in king, lords, and commons, in parliament assembled.—So that the king, in his political capacity, as one of the states of the realm, possesses a part, and only a part of the sovereignty; but is not sovereign, any more than a part is equal to the whole.”—In the first place this writer seems to suppose, that the sovereign power of a state consists merely in legislation; whereas the power of a state consists equally in enforcing the execution of laws when made, as in the making of them.—“But,” saith this writer, “the king is not the sovereign of the state, but the people's executive magistrate;”—if then the king is not the sovereign of the state, but the people's executive magistrate, the people are the sovereign of the state, for the king is *their* magistrate: but according to this writer, the sovereignty is lodged not in the people only, but in king, lords, and commons; then, upon this writer's own hypothesis, the people cannot be sovereign, for, to use his own words, *a part cannot be equal to the whole*; but if they are not sovereign, how can the king be the people's executive magistrate? whence is their authority to commission this officer?—But so far from the king not being the sovereign of the state, it will appear from the following authorities, that the whole power of the state, both legislative and executive, subject to certain limitations and qualifications, is vested in the king alone; that he, with the advice and consent of his gr at council, makes laws; and, with the advice of other councils, executes those laws when made: that he is not one of the estates of the realm, as this writer supposeth him to be, but paramount those estates. Lord Coke saith, in his 4 Inst. pa. 3. that the king is *caput, principium et finis* of his court of parliament. In 22 E. 3. Hil. term, plea 25. it is laid down thus: *Et fait dit, que le roy fait les leis par assent des peres et de la commune, et non pas les peres et la commune.*

According to Lord Hale, “Although that the English monarchy is not in all respects absolute and unlimited, but hath certain qualifications of monarchical power, especially in point of making laws, and imposing taxes upon the people; yet, certainly, since the denomination of government is *ad plurimum*, the government is monarchical, and not aristocratical or democratical. And hence it is, that all jurisdiction in this realm, whether ecclesiastical or civil, is derived from the crown; and that the exercise thereof in the ministers or judges, to whom it is so delegated by the crown, is in right of the crown, and by virtue of a delegation from it.” *Id.* 190. And in a preceding part of this tract, Lord Hale, speaking of the deliberative and executive parts of civil government, says, “In both which, though the king under God be supreme governor and fountain; yet it is necessary for him to call in others in *partem sollicitudinis*, and, as to use their assistance in the executive part, so to have their advice and council in the deliberative part of his government. Hale's Jurisd. of the Lords' House, pa. 4. Again, Whitelock in his comment on the parliamentary writ, says, “The making of statutes is by the king with the assent of the lords and commons in parliament.” Vol. 1. 406. And farther, the style of our acts of parliament is, “*Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in parliament assembled.*” Even in money bills, when the commons have granted the king their money, they pray that he will be graciously pleased to make it a law. “We your Majesty's most dutiful and loyal subjects, the Commons of Great Britain in parliament assembled, having, &c. &c. Do beseech your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent,” &c. &c.

With respect to the king's not being one of the estates of the realm, read the words of Lord Hale in another part of the tract above referred to. The nobility, clergy, and commonalty are the three estates of the kingdom. The king comes in upon a higher denomination and title, namely, the head of these three estates. And therefore they that have gone about to make the king one of the three estates, are mistaken, as will easily appear to any that will but read the records fully, being, viz. *Rec. Parl.* 9 H. 5. n. 15. the conclusion of the peace between the kings of England and France by the

king's command in parliament, 2 May, 9 H. 5. read *coram tribus statibus regni, viz. prelati et clerici, nobilibus et magnatibus, et communitate regni Anglie*, and by them assented to. Rot. Parl. 3 & 4 E. 4. c. 23. *le roy et les trois estates*. Rot. Parl. 13 E. 4. n. 16 & 17. *domino rege et tribus statibus regni flantibus in eodem parlamento*. And in the first parliament of the usurper R. 3. who would be sure to want no formality to countenance his usurpation, Rot. Parl. 1. *titulus Regius*, there is recited an instrument allowing him to be king before his coronation was declared in the name of the three estates of this realm, of England, viz. the lords spiritual and temporal, and commons. "Bee it ordained," that "the honour of the said rolle, with all the contynue of the same, presented as is abovesaid, and delivered to our beforesaid souverain lord the king, in the name and on the behalf of the sayd three estates: out of of parliament, now by the same three estates assembled in this present parlement, and by auctorite of the same, bee ratified, enrolled, recorded," &c. This, though done in a time of usurpation, yet sufficiently evidenceth what the three estates were *. And the objections against it, 1. that two of those estates are constituents of the lords' house, and so must outbalance the commons, which are but one of the three estates; and, 2. that the lords spiritual by this means should have a negative voice upon the lords temporal and commons, and so no law could be made without the consent of the major part of the spiritual lords and the major part of the temporal lords, as well as the most part of the commonsality; I say these objections are vain. For though it be true, that two of the three estates are constituents of the lords' house, yet they constitute but one house. And the laws and customs of the kingdom, which are the true measure of all bounds of power, have given a negative voice of either house upon the other, and of the king upon both; but have not given a negative voice of only one of the two estates constituting the lords' house unto the other, or to the commons being the third estate; the legislative power being lodged in the king with the assent of the two houses of parliament as such, and not with the assent of the three estates simply considered as such; for it is the settled confusion and custom of the kingdom, that fixeth and defineth where the legislative power is lodged; not notions and fancies. Hale's Jurisdict. of the Lords' House, &c. p. 10, 11. And Lord Coke, before him, had begun his chapter on the High Court of Parliament in these words: "This court consisteth of the King's Majesty, sitting there, as in his royal political capacity, and of the three estates of the realm, viz." &c. 4 Inst. cap. 1. And after him, at the memorable era of the Revolution, in the preamble to the Bill of Rights, the Convention Parliament use these words: "Whereas the lords spiritual and temporal, and commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did, upon, &c. present unto their Majesties," &c. Stat. 1 W. & M. Sess. 2. c. 2.

But the theory of our government is sketched with admirable spirit and correctness by the Attorney-General, in his address to the jury upon Hardy's trial. "The power of the state, by which I mean the power of making laws, and enforcing the execution of them when made, is vested in the king; enacting laws in the one case, that is, in his legislative character, by and with the advice and consent of the lords spiritual and temporal, and of the commons in parliament assembled, according to the law and constitutional custom of England; in the other case, executing the laws, when made, in subordination to the laws so made, and with the advice, which the law and the constitution hath assigned to him in almost every instance, in which it has called upon him to act for the benefit of the subject." — Hardy's Trial, by Gurney, p. 32. Again, in a subsequent passage, after having stated the royal duties, he goes on thus: "To that king, upon whom these duties attach, the law and constitution, for the better execution of them, have assigned various counsellours, and responsible advisers: it has clothed him, under various constitutional checks and restrictions, with various attributes and prerogatives, as necessary for the support and maintenance of the civil liberties of the people: it ascribes to him sovereignty, imperial dignity, and perfection: and because the rule and government, as established in this kingdom, cannot exist for a moment without a person filling that office, and able to execute all the duties from time to time, which I have now stated, it ascribes to him also that he never ceases to exist. In foreign affairs, the delegate and representative of his people, he speaks war and peace, leagues and treaties: in domestick concerns, he has prerogatives, as a constituent part of the supreme legislature; the prerogative of raising fleets and armies: he is the fountain of justice, bound to administer it to his people, because it is due to them: the great conservator of publick peace, bound to maintain and vindicate it; every where present, that these duties may no where fail of being discharged: the fountain of honour, office, and privilege; the arbiter of domestick commerce, the head of the national church." &c. 35. And in the conclusion of this brilliant sketch, he closes the whole with these emphatical words: "Gentlemen, I hope I shall not be thought to mispend your time in stating thus much, because it appears to me, that the fact that such is the character, that such are the duties, that such are the attributes and prerogatives of the king in this country, (all existing for the protection, security, and happiness of the people in an established form of government,) accounts for the just anxiety, bordering upon jealousy, with which the law watches over his person—accounts for the fact, that in every indictment, the compassing or imagining his destruction or deposition, seems to be considered as necessarily co-existing with an intention to subvert the rule and government established in the country: it is a purpose to destroy and to depose him, in whom the supreme power, rule, and government, under constitutional checks and limitations, is vested, and by whom, with consent and advice in some cases, and with advice in all cases, the exercise of this constitutional power is to be carried on." Id. 36.

With respect to the rule which is said in the text to be established, viz. "that all prerogatives must be for the advantage and good of the people, otherwise they ought not to be allowed by the law," it is neither

* In addition to the above authorities collected by Lord Hale, see Rot. Parl. 13 E. 3. m. 90. 21 H. 6. m. 17.

expressed in terms sufficiently clear and precise, nor will it hold in the extent to which, as there stated, it may be carried. It is not clear from the terms, whether it meant, that the prerogative or right itself shall be disallowed, if found to be injurious to the publick, or only the act done by virtue and in exercise of that right or prerogative. If the former be the meaning, we may not hesitate to pronounce that there is no such rule of law : for all the prerogatives of the crown are vested in it for the protection and happiness of the people, and cannot in law be wrested from it without danger to both. If the latter be the meaning, then the rule will not hold universally and in all cases. The higher prerogatives of the crown are not to be measured by the rules of law, or to be scanned by the reason of our judges ; nor are acts done by virtue of any of those prerogatives to be set aside on the ground, that they are not for the publick good. For instance, the king has the prerogative of making war and peace : invested with that prerogative, he makes a treaty of peace : that treaty is found to be injurious to the country : is the treaty therefore a nullity ? is there any authority in any man, or body of men in this country, to vacate it, because it is a bad treaty ? The king has the prerogative of giving his *assent*, as it is called, to such bills as his subjects, legally convened, may present to him, that is, of giving them the force and sanction of a law : he withholds his assent to a bill evidently calculated to promote the interests of his people : does the bill, because it is a good bill, therefore pass into a law, though it want the royal *assent* ? or does the utility of the measure deprive the crown of its constitutional power of *rejecting* ? The rule then seems to go no farther than this, that in the exercise of some of the prerogatives, the royal authority is submitted to the control and direction of the courts of law, the judgment of the King is in some cases committed to his judges. In those cases it is the duty of the judges so to admeasure the royal prerogatives as that they shall in no case be exerted so as to affect the inheritance of any one, to change the course of the law, or to work individual injury. Plowd. 236. 487. Noy, 175. They will always remember the maxim of law, that the king can do no wrong : if they find that wrong has been done, the act cannot be the act of the king, and therefore ought not to be allowed.]

The rights and prerogatives of the crown are in most things as ancient as the law itself ; for though the statute 17 E. 2, *§*. 1. commonly called the statute *de prerogativa regis*, seems to be unproductive of something new, yet for the most part it is but a sum or collection of certain prerogatives that were known law long before : as, that the king's wardship of lands *in capite*, did attract the wardship of lands held of others ; that the grant of a manor did not pass an advowson appendant, unless named ; that the king had a right to escheats, wrecks, royal fishes, and many others which were ancient prerogatives of the crown.

Bendl. 117.
2 Inst. 263,
496.
10 Co. 64.

But for the better understanding hereof, I shall consider,

(A) When the King commences his Reign, and the Ceremony requisite therein.

(B) Of the King's Prerogative as universal Occupant : And herein,

1. That he is universal Occupant, and entitled to all derelict Lands.
2. Of his Prerogative in Escheats.
3. Of his Prerogative in Seas and Navigable Rivers.
4. Of his Prerogative in Swans and Royal Fishes.
- [5. Of his Prerogative in Ports and Havens.]
6. Of his Prerogative in Beacons and Light-Houses.
7. Of his Prerogative in Wreck.
8. Of his Prerogative in relation to Coins and Mines.
9. Of his Prerogative in derelict Goods ; and therein, of Waifs, Strays, and Treasure Trove.
10. Of his Prerogative in Fines and Forfeitures.

(C) Of

(C) Of his Prerogative over the Persons of his Subjects: And herein,

1. Who shall be said his Subjects.
2. That he is entitled to the Service and Allegiance of his Subjects; and therein, of the Oaths enjoined them.
3. That he may restrain his Subjects from going abroad; and herein, of the Writ *de Ne exeat regno*.
4. That he may command his Subjects to return Home; and therein, of awarding a Privy Seal.

(D) Of the King as the Fountain of Justice, and intrusted with the Execution of the Laws: And herein,

1. That all Civil Jurisdiction flows from the King.
2. Of the King's Prerogative in Ecclesiastical Matters.
3. Of his Prerogative in creating Officers.
4. Of his Prerogative in making War and Peace.
5. Of his Prerogative in taking Care of Infants, Idiots, Lunatics, and Charitable Uses.
6. Of his Prerogative in Pardoning.
7. Of Dispensations and *Non obstantes*.
8. Of his Proclamations.

(E) How the Rules of Law differ with respect to the King and a private Person: And herein,

1. Of what Things incapable, from the Dignity of his Person and Office.
2. What Things enure to him in his natural, what in his political Capacity.
3. Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.
4. That his Rights shall be preferred to a Subject's where they happen to meet.
5. Of Acts of Parliament which extend to or bind not the King.
6. That no Laches can be imputed to him; and therein, of the Maxim, *Nullum Tempus occurit Regi*.
7. Of his Prerogative in his Suits and Proceedings in Courts of Justice.

(F) Of the King's Grants and Letters Patent : And herein,

1. What Things the King may grant : And therein,
 1. Of Grants arising from his Prerogative of Power, and what are inseparably annexed to the Crown.
 2. Of Grants arising from his Interest.
 3. How far the King must have an Interest, in order to enable him to grant.
 4. Grants tending to a Monopoly ; and therein, of Things of a new Invention.
 5. Grants of the sole Liberty of Printing.
2. Of the Construction of the King's Grants and Letters Patent, as to their being good or void ; and herein, of the King's being deceived in his Grant.
3. Where the King's Grantee shall partake of his Prerogative.

(A) When the King commences his Reign, and the Ceremony requisite therein.

UPON the death or demise of the king, his heir is that moment invested with the kingly office and regal power, and commences his reign the same day his ancestor dies ; whence it is held as a maxim (a), that the king never dies.

7 Co. 12.
in Calvin's
case.
6 Co. 27.
7 Co. 30.
(a) And

therefore if lands are given to the King by deed enrolled, without the words *heirs or successors* ; yet a fee-simple passeth, for that in judgment of law he never dies. Co. Lit. 9.

And herein we must take notice, that the rules of descent are the same with those that govern private inheritances, except only as to the rule of *possessio fratris* ; which does not hold in the descent of the crown or its possessions : neither is half blood any impediment in such case ; for the brother of the half blood shall be preferred to the sister, in the enjoyment of the crown, as the most capable of the two, by the advantages and prerogative of his sex.

Co. Lit.
15. b.
[But these
are not the
only excep-
tions in the
case of the
crown to the
general rules
of descent :

for, among the females, the crown descends by right of primogeniture to the eldest daughter only, and her issue, and not, as in common inheritances, to all the daughters at once ; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect : and therefore Queen Mary on the death of her brother succeeded to the crown alone, and not in partnership with her sister Elizabeth. 1 Bl. Com. 194.]

Therefore, if the king hath issue a son and a daughter by one *venter*, and a son by another *venter*, and purchases lands and dies, and the eldest son enters, and dies without issue, the daughter shall not inherit those lands, nor any other fee-simple lands of the crown,

Co. Lit.
15. b.

crown, but the younger brother shall have them together with the crown.

3 Inst. 7.
Hal. Hist.
P. C. 107.
(a) The late
Mr. Justice
Foster is,
however,
very far

As the king commences his reign from the day of the death of his ancestor, it hath been held, that compassing his death before coronation, yea before proclamation of him, is a compassing of the king's death within the statute of 25 E. 3. stat. 5. c. 2. he being king presently, and the proclamation and coronation only (a) honourable ceremonies for the further notification thereof.

from thinking that the solemnity of a coronation is to be considered among us merely as a royal ceremony, or as a bare notification of the descent of the crown, as authors of high distinction have been pleased to express themselves: He admits that it is, on the part of the nation, a publick solemn recognition that the regal authority, and all the prerogatives of the crown, are vested in the person of the king, antecedent to that solemnity; but the solemnity of a coronation with us goeth a great deal farther; the coronation oath importeth, on the part of the king, a publick solemn recognition of the fundamental right of the people; and concludeth with an engagement under the biggest of all sanctions, that he will maintain and defend those rights; and to the utmost of his power make the laws of the realm the rule and measure of his conduct. Foxt. Rep. 189. See Sid. on Gov. 91, 92. S. 7.

Hawk. P. C.

c. 17. § 11.

(b) As to

the distinction

between a

king *de*

facto and

de jure, my

Ld. Hale

says, a king

de facto, but

not *de jure*,

such as were

H. 4. H. 5.

H. 6. R. 3.

H. 7. being

in the actual

possession of

the crown, is

a king within

this act; so

that compassing

his death is

treason within

this law; and

therefore in the

4 E. 4. 20. a

person that

compassed

the death of

H. 6. was

attainted for

that treason

in the time

of the right

king; but

had it been

an act

of hostility

in assistance

of the right

heir of the

crown, which

Also it is held, that every king for the time being, in the (b) actual possession of the crown, is a king within the intention of the above-mentioned statute; for there is a necessity that the realm should have a king, by whom, and in whose name, the laws are to be administered; and the king in possession, being the only person who either doth or can administer those laws, must be the only person who hath a right to that obedience which is due to him who administers those laws; and since, by virtue thereof, he secures to us our lives, liberties, and properties, and all other advantages of government, he may justly claim returns of duty, allegiance, and subjection.

H. 7. being in the actual possession of the crown, is a king within this act; so that compassing his death is treason within this law; and therefore in the 4 E. 4. 20. a person that compassed the death of H. 6. was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown, which afterwards obtained, this had not been treason; but *à conserjo*, those that assisted the usurper, though in the actual possession of the crown, have suffered as traitors; as appears by the statute of 1 E. 4. and as was done upon the assistants of H. 6. after his temporary redemption of the crown, in 10 E. 4. and 39 H. 6. Hal. Hist. P. C. 103, 103. [Sir M. Foster, speaking of a king *de jure* & *de facto*, and contending that allegiance is due by the subject to the latter as well as the former, hath these remarkable words: "He (the subject) begeth for protection from the crown, and he payeth his allegiance to it, in the person of him whom he seeth in full and peaceable possession of it: he entereth not into the question of title, he having neither leisure, nor abilities, nor is he at liberty to enter into that question: but he seeth the fountain, from whence the blessings of government, liberty, peace, and plenty flow to him, and there he payeth his allegiance." Foxt. Cr. L. 399.]

Hawk. P. C.

c. 17. § 13.

and the au-

thorities

there cited.

It hath been settled, that all judicial acts done by Henry the Sixth, while he was king, and also all pardons of felony and charters of denization granted by him, were valid; but that a pardon made by E. 4. before he was actually king, was void even after he came to the crown.

The right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir is not a king within this act; as was the case of the house of York, during the plenary possession of the crown in H. 4., H. 5., H. 6. But, if the right heir had once the possession of the crown, as king, though an usurper had afterwards gotten the possession thereof, yet the other continues his style, title, and claim thereto, and

Hal. Hist.

P. C. 104.

and afterwards re-obtains the full possession thereof; a compassing the death of the rightful heir, during that interval, is a compassing of the king's death within this act; for he continued a king still, *was* in possession of his kingdom; which was the case of E. 4. in that small interval wherein H. 6. re-obtained the crown; and the case of E. 5. notwithstanding the usurpation of his uncle Rich. 3.

It was resolved by the judges, in the case of Sir H. (a) Vane, that king Car. 2. was king *de facto*, as well as *de jure*, from his father's death; and that therefore all those who acted against and kept him out of possession, in obedience to the powers then in being, were traitors.

Keiling,
14, 15.
Feb. 315.
(a) Mr. Justice Foster
says, that
the rule laid

down by the court in this case, involved, in the guilt of treason, every man in the kingdom who had acted in a publick station under a government possessed *in fact* for 12 years together of a sovereign power; and that Ld. Ch. J. Hale, when of high rank at the bar, took the engagement "To be true and faithful to the Commonwealth of England, without a King or House of Lords." This, in the sense of those that imposed it, was plainly an engagement for abolishing kingly government, at least for supporting the abolition of it; and with regard to those who took it, it might, upon the principles of Sir H. Vane's case, have been easily improved into an overt act of treason against King Charles the Second. Folt. Rep. 402.

[But it ought to be considered, that it was first resolved by the same judges, that King Charles the Second was king *de facto* as well as *de jure* from his father's death; and it is apparent, that no other person was in possession of any sovereign power known to our laws.]

1 Hawk.
P. C. c. 17.
§ 10.
Hence the
statutes
passed in the
first year

after the restoration of King Charles II. are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

By the 1 Mar. stat. 3. c. 1. § 3. "The kingly office of this realm, and all prerogative, royal power, authorities, and jurisdiction thereunto annexed, being invested in (b) either male or female, are as absolutely invested in the one as the other."

(b) The
Queen Re-
gent, as were
Q. Mary
and Q. Eli-
zabeth, is a

king within the 25 E. 3. stat. 5. c. 2. Hal. Hist. P. C. 101. but a titular king, as the husband of a queen regent, is not. 3 Inst. 8. Hawk. P. C. c. 17. § 20.

By the 1 W. & M. stat. 2. c. 2. § 9. "Every person that shall be reconciled to, or hold communion with, the see or church of Rome; or shall profess the popish religion; or shall marry a papist; shall be incapable to inherit or enjoy the crown of this realm and Ireland; and in such case the people shall be absolved of their allegiance, and the crown shall descend to such persons, being protestants, as should have inherited the same, in case the person so reconciled, &c. were dead."

And by § 10. "Every king and queen, who shall come to and succeed in the imperial crown of this kingdom, shall, on the first day of the meeting of the first parliament, next after his or her coming to the crown, sitting in the throne of the House of Peers, in the presence of the lords and commons, or at his or her coronation, before such person as shall administer the coronation oath, at the time of taking the said oath, (which shall first happen,) make, subscribe, and repeat the declaration mentioned in the statute 30 Car. 2. for preserving the king's person and government, by disabling papists from sitting in either house of parliament."

Dyer, 209.

pl. 22.

Plow. 209.

Case of the

Duchy of

Lancaster.

Co. Lit. 23.

5 Co. 27.

Raym. 90.

[But it hath

been usually thought prudent, when the heir apparent hath been very young, to appoint a protector, guardian, or regent, for a limited time : but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority ; and therefore he hath no legal guardian. 1 Bl. Comm. 248.]

The king, as king, cannot be a minor; so that grants, leases, &c. made by him, though under age, bind presently, and cannot be avoided by him, either during his minority, or when he comes of age; for the politick rules of government have thought it necessary, that he who is to govern and manage the whole kingdom, should never be considered as a minor incapable of governing himself and his own affairs.

(B) Of the King's Prerogative as universal Occupant : And herein,

1. That he is universal Occupant, and entitled to all derelict Lands.

Co. Lit. 1.

Dyer, 154.

Bendl. 237.

Seld. Mare

Clauf. 223.

* A fiction

of law,

adopted by

the consti-

tution to

answer the ends of government, but for the good of the people, the great object of the law and constitution of this country.—The right of the people of England to their property does not depend upon nor was it fact derived from any royal grant. The reception of the feudal policy, in this nation, exactly answers the definition of a fiction; which is some supposition in law, for a good reason, against the real truth of a fact, in a matter possible to have been actually performed, according to that supposition. Conf. on Law of Forfeiture, 55.

Dyer, 326.

2 Roll. Abr.

170.

Hence it is, that if the sea leaves any shore by a sudden falling off of the water, such derelict lands belong to the king : but, if a man's lands, lying to the sea, are increased by insensible degrees, they belong to the soil adjoining.

2 Roll. Abr.

170.

So, if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the king; for the *Englisch* sea and channels belong to the king; and he hath a property in the soil, having never distributed them out to his subjects.

2 Roll. Abr.

170.

But, if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have in that case the property of the soil; this being no original part or appendix to the sea, but distributed out as other lands.

3 Co. Sir

Francis Bar-

rington's

case.

2 Mod. 107.

If land be drowned, and so continue for divers years; if it be after regained, every owner shall have his interest again, if it can be known by the boundaries.

It is said that there is a custom in *Lincolnshire*, that the lords of manors shall have derelict lands; and that such is a reasonable custom; for if the sea wash away the lands of the subject, he can have no recompence, unless he should be entitled to what he regains from the sea.

2 Lev. 171.

2 Mod. 106.

Raym. 241.

Information by *Englisch* bill in the Exchequer-chamber for one hundred acres of derelict lands in *Lincolnshire*; the case was this:
King

S. C. Attorney-General v. Sir Edward Farmer.

King Ja. I. granted to J. S. the manor of *Holbeck*, with the appurtenances, by express words; and in the letters patent there was the following clause, *necnon totum illud fundum et solum et terras suas contigue adiacen.* to the premises, *quæ sunt aquâ cooperta, vel quæ in posterum de aqua possunt recuperari, &c.*, *non obstante non nominando valorem, qualitatem sive quantitatem, &c.*; and these hundred acres being afterwards improved and recovered from the sea, the question was, Whether they passed to the patentee? and though it was urged in his behalf, that these words were as general as they well could be; that the king was entitled to the foil of the sea, not as matter of prerogative only, but as an interest which he might grant; that in some cases the king may grant a possibility; that the *non obstante* was so particular in this case, as if intended to cure all defects; and that the king's grants ought to be construed liberally, as most for his honour: yet, it being urged on the other side, that these words were too general; that though they might be intended to pass some small parcels or lines of land which may become derelict, yet not so as to pass any great tracts of land; and that, by the construction contended for, all the lands between that and *Denmark* might pass; and admitting the king might grant part of his seas, yet that must be by express name: It was held by *Montague*, Ch. B. with the advice of *Rainsford* and *North*, Ch. Justices, that the patent, as to these hundred acres which became derelict, was void.

2. Of his Prerogative in Escheats.

An escheat may be either *per defectum sanguinis*, or *per (a) delictum tenentis*. But it is said, that in case of an attainder of felony, the escheat to the lord is *pro defectu tenentis*; and the not descending, the consequence of the corruption of the blood; but in case of treason, the lands come to the crown as an immediate forfeiture, and not as an escheat.

no escheat.

Co. Lit. 13. 92. Godb. 212. (a) That if the party be pardoned there can be no escheat. Owen, 87.

If the king's tenant dies without heir, the lands shall escheat and revert again to the crown; but the lands holden of any (b) other lord shall, for want of the heirs of the tenant, escheat to the lord.

4 Inst. 224. (b) That the lord by escheat is in the poss., and cannot vouch.

2 Inst. 64. Keilw. 104. 2 Roll. Rep. 251.

If lands held of the king as of an honour come to him by a common escheat, as the tenants dying without heir, or committing felony, these lands are part of the honour; otherwise, if forfeited for treason, for then they come to the king by reason of his person and crown; and if he grants them over, &c. the patentee shall hold of the king in chief.

1 Co. 1. 2 Inst. 64.

It was found by special verdict, that the prior of *Merton* was seised of a house in *Southwark*, held of the Archbishop of *Canterbury*, as of his borough of *Southwark*; and 30 Hen. 8. surrendered it to the king, who granted the said messuage and divers other lands in *London*, *Middlesex*, and *Essex*, to J. S. and his heirs, to hold of him *in libero burgagio*, by fealty, for all services and demands, and not *in capite*; that afterwards Queen *Mary* granted the manor and borough of *Southwark* to the mayor and commonalty of

Cro. Elis. 120. May v. Street.

London; and the tenant of the said messuage died without issue; and the question was, Whether queen *Eliz.* or the patentees of the borough should have the escheat? and adjudged for the queen; for the first patentee of the messuage held it of the queen in socage *in capite*, as of a seignory in gross; and the words *in libero burgagio* are merely void; for the land out of the borough cannot be held *in libero burgagio*; and there shall not be several tenures; for one tenure was reserved by the king for all; and therefore of necessity it shall be a tenure in socage of the king.

Co. Lit. 8.
3 Inst. 19.
(a) But a right of action, which consists only in privacy, cannot escheat.
3 Co. 2. b.

Upon an attainder of high treason, the king by his prerogative shall have all the lands of inheritance whereof the offender was seised in his own right; and also all rights of (a) entry to lands in the hands of a disseisor or other wrong-doer; though such lands are holden of another: but, in case of petit treason and felony, they go to the lord of whom they are holden; for the blood being corrupted, so that no person can represent him, it is the same as if he had died without heir; and, consequently, the lord is in by escheat.

Stamf. P.C.
191.

But the lord cannot enter into the lands holden of him upon an escheat for petit treason or felony, without a special grant; till it appears by due process, that the king hath had his prerogative of the year, day, and waste.

3 Inst. 213.

If one attainted of felony commits treason afterwards, and is thereof attainted, as he may be, because the offence is of a higher nature than felony; yet this shall not divest the right of escheat, which by the felony was lawfully vested in the lord, contrary to the opinion of *Stamford*; for the act of the party shall not divest the lawful escheat of the lord.

3 Inst. 21.

If one seised in fee of a fair, market, common, rent-charge, or seck, warren, corody, or other inheritance not holden, is attainted of felony, the king shall have the profits of them during his life; but after his death they cannot descend, because his blood is corrupted; nor escheat, because not holden; but perish and are extinct by act in law.

Roll. Abr.
316.
Comp. In-
cumb. 75.

If a man grant an advowson in gross to another in fee, and the grantee die without heir, it seems that this shall revert to the grantor, not being held of any man; for it is a thing that cannot vanish, but ought to be in some person: but in that case, if the grantor cannot have it, the king shall have it as supreme patron; and for that reason ought to present where none hath right.

Co. Lit.
268. b.

If a disseisor makes a feoffment, or dies seised; and after the disseisee dies without heir, there shall be no escheat, because the lord hath a tenant by title.

4 Co. 11.

Though the lord hath not been seised of his services within the time of limitation, yet, if the tenant dies without heir, the land shall escheat; for at the time of the escheat the seignory remained, though seisin of the services was wanting.

4 Co. 125.
(b) Dyer, 10.
pl. 38. S. P.
because the lord hath a tenant by title.

If an infant or *non compos* in person make a feoffment, and after die without heir (b), the land shall not escheat: otherwise, if made by letter of attorney, for then the feoffment is void.

—If J. S. convey lands to trustees and their heirs, to the use of himself

for life, remainder to his first and every other son, &c. remainder to his own right heirs, and *cestui que trust* dies without heirs, *quare*, Whether the lands shall escheat or remain with the trustees? [In the case of *Burgess v. Wheate*, the Master of the Rolls (Sir Thomas Clarke), and the Lord Keeper Henley, held, against my Lord Mansfield, that the crown could not in equity, upon a failure of the heirs of *cestui que trust*, claim against a trustee by escheat, if he had the legal estate in him, for that (among other reasons) the title by escheat could only arise, where there was a defect of a tenant; that where there was a feoffee, there was a tenant, whether he were beneficially entitled or not; so that the principle of escheat failed. 1 Bl. Rep. 123. The authority of this case, however, hath been somewhat shaken by the intimation of Lord Thurlow's opinion in *Middleton v. Spicer*, 1 Br. Ch. Ca. 204.—Where the character of land is not imperatively and definitively fixed upon money by the terms of a will or other instrument, a court of equity will not order it to be laid out in land, in order to let in the crown claiming by escheat. *Walker v. Denne*, 2 Vez. jun. 170.]

If he who hath title to a writ of escheat accept homage or Co.Lit.268.
fealty of the tenant, this will bar him; otherwise if he accept
rent of the tenant; for that may be done by a bailiff.

If there be lord and tenant, and the tenant be disseised, and the Co.Lit.268.
disseisor die without heir; and after the lord accept the rent from
the disseisor, this is no bar to him: otherwise, if he avow upon
the disseisor for the rent.

But if, after title of escheat accrued, the disseisor make a feoff- Co.Lit.268
ment or die seised, the acceptance of the rent from the feoffee or
heir, will be a bar.

If one lease a manor for life or years, and a tenancy escheat (a), 2 Inst. 146.
this belongs to the manor held in farm, for which the lessor shall
have a general writ, and suppose a lease by him made of the lands
escheated, and maintain it by the special matter. (a) After
the death of
the tenant
for life, the
lessor may

have a writ of escheat, and the words of the writ are true, viz. that the tenant that died, &c. held the
lands of him. Keilw. 114. a.—The tenancy comes in lieu of feignory. Co. 122.

For the better taking care of the king's escheats there is an Co. Lit. 13.
ancient officer named (b) by the lord treasurer, and called escheator,
because his office is properly to (c) look to escheats, wardships, and
other casualties belonging to the crown. (b) By the
14 E. 3. c. 8.
to be chosen
by the chan-

cellor, &c. as sheriffs; by 12 E. 4. c. 9. must have a freehold in the same county worth 20 l. per ann.
—by the 1 H. 8. c. 8. must have 40 marks yearly—by the statute 14 E. 3. st. 1. c. 8. there shall
be as many escheators as when King Edward came to the crown, viz. one in every county.—But
anciently there were but two, one on this side Trent, and the other beyond Trent, but they had sub-
escheators. Co. Lit. 13. b. (c) To inquire of casual profits, and seize them into the King's hands,
that they may be answered to him. Co. Lit. 92. b.

If the inheritance of lands escheat to the king, although he is Vern. 357.
in the *pos*, yet he shall have a term that was limited to attend the
inheritance. Attorney-
General v.
Thruston.

3. Of his Prerogative in Seas and Navigable Rivers.

It is universally agreed, that the king hath the sovereign do- Seld. Mar.
minion in all seas and great rivers; which is plain from *Selden's*
account of the ancient *Saxons*, who dealt very successfully in all
naval affairs, and therefore the territories of the *English* seas and
rivers always resided in the king. Cl. 251. &c.
Roll. Abr.
168, 169.
5 Co. 106.
10 Co. 141.
[In the nar-

row seas, that is, the seas which adjoin to the coasts of England, the king hath a double right, viz.
a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or own-
ership. This right of propriety or ownership is evidenced, 1st, in the right of fishing in these seas and

the arms and creeks thereof, which is originally lodged in the crown, as the right of depaupering is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is owner of a private or inland river; and, 2d, from the king's right of propriety to the shore, and the *maritima incrementa*.—The shore, as to this purpose, is the land lying between high-water and low-water mark in ordinary tides; and this land belongeth to the king *de jure communi* both in the shore of the sea, and the shore of the arms of the sea. And that is called an arm of the sea where the tide flows and reflows, and so far only as the tide flows and reflows. 29 Aff. 93.—The *maritima incrementa* are of three kinds—1. *Per projectionem vel alluvionem*—2. *per relictionem vel desertionem*—3. *per insulae productionem*. The increase *per alluvionem* is, when the sea by casting up sand and earth doth by degrees increase the land, and shut itself out farther than the ancient bounds went; and this is usual. The reason why this belongs to the crown is, because in truth the soil, where there is now dry land, was formerly part of the very *fundus maris*, and, consequently, belonged to the king. But indeed if such alluvion be so insensible, that it cannot be by any means found that the sea was there, *idem est non esse est non apparere*; the land thus increased belongs as a perquisite to the owner of the land adjacent.—As to the increase *per relictionem*, or recess of the sea, this doth *de jure communi* belong to the king; for as the sea is part of the waste or demesne, so of necessity the land that lies under it, and therefore it belongs to the king when left by the sea; and so also it regularly holds in lands deserted by a river, that is an arm of the sea or creek of the sea *primâ facie*, especially, if the creek or river be part of a port.—And as to islands arising *de novo* in the king's seas, or the king's arms thereof, these upon the same account and reason *primâ facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or by the exaggeration of sand and slab, which in process of time grow firm land invironed with water; and thus some places have arisen, and their original recorded, as about Ravensend in Yorkshire. Hale De Jure Maris, c. 4.]

Dyer, 326.
a Roll. Abr.
170.

And, as the king hath a prerogative in the seas, so hath he likewise a right to the fishery and to the soil; so that if a river as far as there is a flux of the sea leaves its channel, it belongs to the king.

4 Inst. 143.
Molloy, 66.
For this
court and
its jurisdic-
tion, and
how far it
extends, see title Court of Admiralty.

Hence the Admiralty Court, which is a court for all maritime causes or matters arising upon the high sea, is deemed the king's court; and its jurisdiction derived from him who protects his subjects from pirates, and provides for the security of trade and navigation.

20 Co. 121.
Case of title
of Ely.
[(a) The
commission
enacted by
R. 28 H. 8.

From the king's dominion over the seas it was holden, that the king as protector and guardian of the seas might, before any statute made for commissions of sewers, provide against inundations by lands, banks, &c., and that he had a prerogative herein as well as in defending his subjects from pirates, &c. (a)

c. 1. recites this part of the king's jurisdiction, viz. "We therefore, for that by reason of our royal dignity and prerogative royal we are bound to provide for the safety and preservation of our realm, &c. This prerogative of the crown Lord Hale calls an *interest of jurisdiction*, viz. in reference to common nuisances. "And" he says, "another part of the king's jurisdiction in reformation of nuisances, is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage: for as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called *altæ viæ regie*, so these public rivers for public passage are called *fluvii regales*, and *haut streames le roy*; not in reference to the propriety of the river, but to the public use; all things of public safety and convenience being in a special manner under the king's care, supervision, and protection. And therefore, the report in Sir John Davies, of the Pricary of Han, mistakes the reason of those books, that called these *streames le roy*, as if they were so called in point of propriety, as 19 Aff. 6. Dy. 11. for they are called so, because they are of public use, and under the king's special care and protection, whether the soil be his or not. Hale De Jure Maris, by Margrave, [a. 8.]

2 R. 4. 18.
19. Bro.
Custom, 46.
The Bar.

But notwithstanding the king's prerogative in seas and navigable rivers, yet it hath been always held, that a subject may fish in the sea; for this being a matter of common right, and the means

means of livelihood, and for the good of the commonwealth, 93. Mod. cannot be restrained by grant or prescription. 105. 2 Salk. 637. pl. 4.

[Although *prima facie* an arm of the sea be in point of propriety the king's, and *prima facie* it be common for every subject to fish there, yet a subject may have by usage a several fishery there, exclusive of that common liberty which otherwise of common right belongs to all the king's subjects. See Hale De Jure Maris, cap. 5. and the several authorities there collected.]

Also it is held, that every subject of common right may fish with lawful nets, &c. in a navigable river as well as in the sea; and the king's grant cannot bar them thereof; but the crown only has a right to royal fish; and that the king only may grant. 6 Mod. 73. Warren v. Matthews. Salk. 357. pl. 4. S. C. and S. P.

Per Holt, C. J. on a claim of *salam piscariam* in the river Ex by grant from the crown.

[And as a subject may have a right of fishing in the sea and the arms thereof, so the shore, that is, the land, which lies between high-water and low-water mark at ordinary neap-tides, may belong to a subject. The statute of 7 Ja. 1. c. 18. supposeth it; for it provides, that those of *Cornwall* and *Devon* may fetch sea-sand for the bettering of their lands, and shall not be hindered by those that have their lands adjoining to the sea-coasts, which it appears by the statute, they were formerly. Vide *Carte Antiquæ*, D. D. n. 24. the charter of *Alan de Percy* to the monks of *Whitby*, and the bounds thereof, viz. *totam marinam a portâ de Whitby usque Blowick, &c., et usque Terdiso, et usque in mare, et per marinam in Whitby*, confirmed by king *Henry I.* And the bounds of that abbey's possessions take in many creeks of the sea, yet are given by a subject, viz. *Derwent, Mufe, Efe, &c.* Hale De Jure Maris, c. 6.

The shore may not only belong to a subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor. And the evidences to prove this fact are commonly these, constant and usual fetching gravel and sea-weed and sea-sand between the high-water and low-water mark, and licensing others to do so; inclosing and imbanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there in the court of a manor, and such like. Ibid. So agreed in Sir Henry Constable's case, 5 Co. 107. 5 E. 3. 3. Dy. 326. b. So in the Exchequer-chamber, P. 16 Car.

inter l' Attorney General et Sir Samuel Rolles, Sir Richard Buller, and Sir Thomas Arundel, per omnem barones.

And as it may be parcel of a manor, so it may be parcel of a vill or parish. And the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like. And upon this account the parson of *Sutton*, about 14 Car. 1. had a verdict for the tithes of *Sutton-Marsh* in *Lincolnshire*, upon a long and a great evidence; though it appeared, that within time of memory it was the mere shore of the sea covered at ordinary tides, and without the old sea-bank. Hale, ubi supra.

And it may not only be parcel of a manor, but *de facto* it many times is so, and perchance it is parcel of almost all such manors as by prescription have royal fish or wrecks of the sea within their manor. For, for the most part, wrecks and royal fish are not, nor indeed cannot be well left above the high-water mark, unless it be at such extraordinary tides as overflow the land: but Hale, ubi supra. these

these are perquisites which happen between the high-water and low-water mark; for the sea withdrawing at the ebb leaves the wrecks upon the shore, and also those greater fish, which come under the denomination of royal fish.

From De Jure
Maris, c. 6.

And as the shore may thus belong to a subject, so in some instances may the *maritima incrementa*. Hence, custom and prescription may give the *jus alluvionis* to the land whereunto it accrues. But custom cannot entitle the subject to *relict* lands, or make them parcel of a manor. For the soil from under the water must needs be of the same propriety as it is when covered with water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's because the water hath left it. But in the case of *alluvio maris*, it is otherwise; because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite, and an accession to the land; and therefore in case of private rivers, it seems by the very course of the common law, such a gradual increase *cedit solo adjacenti*; and though it may be doubtful whether it be so *ex jure communi* in case of the king; yet, doubtless, it gives a reasonableness and facility for such right of *alluvio* to be acquired by custom; for though in every acquist *per alluvionem* there be a reliction or rather exclusion of the sea, yet it is not a recess of the sea, nor properly a reliction.

See
De Jure

But, though it be regularly true, that *terra relictæ per mare* cannot be prescribed, yet a creek, arm of the sea, or *distriktus maris*, may be prescribed in point of interest; and, by way of consequence or concomitance, the land *relict* there, according to the extent of such a precinct as was so prescribed, will belong to the former owner of such *distriktus maris*. But otherwise it would be, if such prescription before the reliction extended only to a liberty, or *privilegium*, or jurisdiction only within that district; as, liberty of free fishing, admiral jurisdiction, or the jurisdiction of a lord, hundred, or other court; for such may extend to an arm of the sea, as appears by 8 E. 2. *corone*; for these are not any acquits of the interest of the water and soil, but leave it as it found it. Therefore the discovery of the extent of the prescription or usage, whether it extends to the soil or not, rests upon such evidence of fact, as may justly satisfy the court and jury concerning the interest of the soil.

See
De Jure

And the same rule, which hath been observed before touching acquits by the reliction or recess of the sea, or the arms or creeks thereof, holds with respect to islands arising within those parts. Of common right and *primâ facie*, it is true, they belong to the crown: but, where the interest of a *distriktus maris*, or arm of the sea, or creek, or haven, doth in point of propriety belong to a subject either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject according to the limits and extent of such propriety. And therefore, if the west side of an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of *filiam aquæ* invironed with the water, the propriety

priety of such island will entirely belong to the lord of the manor of the west side : and if the east side of an arm of the sea belong to a manor of the east side *usque filum aquæ*, and such an island happen between the east side and such a *filum aquæ*, it will belong to the lord on the east side : and if the *filum aquæ* divide itself, and one part take the east, and the other the west, and leave an island in the middle between both the *fila*, the one half will belong to the one lord, and the other to the other. But this is to be understood of islands that are newly made ; for if a part of an arm of the sea, by a new recess from its ancient channel, encompass the land of another man, his propriety continues unaltered.]

4. Of his Prerogative in Swans and Royal Fishes.

The king, as a perpetual sign and acknowledgment of his dominion of the seas, hath several creatures reserved to him under the denomination of royal creatures, as swans, sturgeons, and whales ; all which are the natives of seas and rivers. 7 Co. 16.

But a subject may have a property in swans three manner of ways :

First, by the acquisition of tame swans ; viz. by buying tame swans, or by grant of the king of wild swans, and taming them ; and then the subject shall have the property in them wheresoever they are, as of any other tame animal. 7 Co. 16. b.

If the cock swans of one man get into the hen swans of another, by the custom of *England* this brood shall be divided ; and it shall not follow the female, according to the common right of accession. And this is founded on a natural observation on the moderation of this sort of creatures, that they will not couple with more than one ; and so if they were to be separated they could never be propagated. 7 Co. 17. a. 2 Bl. Com. 290-1.

A custom that the owner of swans should have two cygnets, and the owner of the manor the rest, has been held good. 7 Co. 17. a.

Swans that are not the king's may be strays in a manor as well as any other creatures ; and a man may prescribe to have swanning for them in another manor. 7 Co. 17. a.

Secondly, the property of wild swans may be in the subject by a grant of swan-mark from the king ; for, in this case, all the swans marked with such mark shall be the subjects wheresoever they fly. 7 Co. 17. a. 7 Co. 17.

A swan-mark may be granted over as well as the privilege of a park or warren. 7 Co. 17.

By the 22 E. 4. c. 6. " No person, other than the son of the king, shall have any mark or game of swans, except he have lands of freehold to the yearly value of five marks ; and if any person not having lands to the said yearly value, shall have any such mark or game, it shall be lawful to any of the king's subjects, having lands to the said value, to seize the swans as forfeit ; whereof the king shall have the one half, and he that shall seize the other."

7 Co. 17.

Thirdly, swans may be the subject's *ratione privilegii*; as, if the king grants to the subject the game of wild swan in such a river; but in such case, the subject cannot bring an action of trespass, *quare cygnos suos ibid. nudiſcant. or gignent. cepit*; for a man cannot call that his own, which he hath only during particular occupancy and possession in a certain place.

Hawk. P.C.

c. 33. § 27.

If a man take away swans marked or pinioned, or those which are unmarked, if they be kept in a pond or private river, it is felony.

St. de prerog.

regis.

15 E. 2. c. 11.

[(4) To give

The king shall have wreck of the sea, whales, and great sturgeons taken in the sea and elsewhere throughout the whole realm (a); except in places privileged by the king.

the crown a right to fish fish, they must be taken within the seas parcel of the dominion and crown of England, or in the creeks or arms thereof; for, if taken in the wide seas, or out of the precinct of the seas belonging to the crown of England, they belong to the taker. 39 E. 3. 35. per Beiknap.—A subject might and may unquestionably have this franchise or royal perquisite, 1st, by grant; 2d, by prescription within the shore between the high-water and low-water mark, or in a certain distinct *districtus maris*, or in a port, or creek, or arm of the sea; and this may be had in gross, or as appurtenant to an honour, manor, or hundred. Hale De Jure Maris, c. 7.]

[5. Of his Prerogative in Ports and Havens.

Hale De

Portibus

Maris, c. 2.

A port, saith my Lord Hale, is *quid aggregatum*, consisting of something that is natural, viz. an access of the sea, whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade: something that is artificial, as keys, and wharfs, and cranes, and warehouses, and houses of common receipt: and something that is civil, viz. privileges and franchises, viz. *jus applicandi, jus mercandi*, and divers other additaments given to it by civil authority.

H. c. 3.

To erect a publick port originally and *de novo*, is a part of the *jus regale* of the crown of England. And as it is not competent to a subject to institute or erect a common port without the charter of the king, or a lawful prescription, so neither is it competent to a subject without such charter or prescription to erect a port for the men of such a fee or precinct, as for his own tenants. A lord of a county palatine, though he may have, and usually had, ports by charter or prescription, yet he cannot erect a common port within his palatine jurisdiction. For the concernment of a port must necessarily exceed the extent and limits of the *jura regalia* that are incident to a county palatine; for the safety of the kingdom, the commerce of the kingdom, and the king's revenue are concerned in it. Merchants and seamen of all parts and quarters of the world are let into the kingdom publicly, and under the publick protection, in a publick port: and, consequently, it is not within the extent of a jurisdiction palatine *de novo* to erect a publick port.

H. c. 5.

In the erecting of a port the royal authority is not restrained, as in the grant of a market, by the vicinity of the new port to a former port. For though the old port may be greatly injured by the erection of the new port in its neighbourhood, yet that circumstance

cumstance will, of itself, be no objection to it, provided that the new port be not within the proper limits of the old port, and there be no obstruction to the water or otherwise, but that ships may, if they will, arrive at the former port.

But, 1. it cannot be erected within the peculiar limits by charter or prescription belonging to the former port, because that is part of the interest of the lord of the former port. Neither can the first port be obstructed or wholly defaced, or excluded for arrival of ships, but by act of parliament, as was done in the case of *Melcombe* translated to *Poole*. *Rot. Parl.* 11 H. 6. n. 30. And the reason is, because a publick interest is concerned; viz. the interest of the merchant at large, and the interest of the traders and mariners in that particular place or port, who have a right settled in them for the application, lading, and unlading of ships there.

2. If the king have an ancient port at *A.*, and he erect another port hard by, with a general prohibition that no man shall bring his goods or merchandizes by sea to any other port within five miles but to that which is newly erected, this prohibition is good, as against the king's interest in the former port, though the new port be erected within the precincts of the old; for he may derogate from his own simple interest by his own restriction. But this restriction is not good against the subjects of the port of *A.*, who by usage had a right to come with their own shipping, and lade and unlade: and this; although the goods might be customable goods; for the inhabitants of *A.* had an easement acquired to themselves by prescription.

3. But if the king erect by his own proclamation a port at *A.* where there was no arrival of ships before, and doth not grant it to another person, but keeps the interest in himself of this franchise; there, it seems the king may dissolve this port, or erect another port, with a prohibition that no ship shall arrive within such a distance, but at the new port; for there was no right of arrivage of any ships at the former harbour lodged in the inhabitants nor any other subject, but only permissive at the king's pleasure, and he may derogate from his own right.

4. But if a subject hath a port and arrival of ships at *B.* by prescription or charter, and afterwards the king erect a new port, within three or five miles within or without the precincts of the port of *B.*, with a prohibition that no ships shall arrive within five miles of the new-erected port elsewhere; this prohibition or restriction is void, as against the interest of the owner of the port of *B.*, or the inhabitants of *B.*, because there was a former interest lodged in the owner and inhabitants of the port of *B.*, which cannot be taken from them without their own consent, or by act of parliament.

5. But if a subject, or the king's fee-farmer, hath a port at *R.* by prescription or charter, and the king grants that no ships shall arrive within five miles or such like compass, the king cannot within that precinct erect *de novo* a port to the prejudice of that port to which he had precedently granted this privilege. For the grant is good as against the king, and any interest derived from

him after this grant : and although, as hath been said, without this restrictive clause, the king might have erected a port near to the former, which would have had this concurrent power or franchise, yet the king hath bound up his hands by his own charter; and by this inhibition, the precinct, to which this inhibition extends, is become as it were, parcel of the precinct of the port.

Id. c. 6.

The right in ports, according to Lord *Hale*, is threefold :—The *jus privatum*, or the interest of propriety or franchise. The *jus publicum*, or the common interest that all persons have to resort to or from publick ports, as publick sea-marts or markets, with their goods, wares, and merchandizes. The *jus regium*, or the right of superintendency and prerogative, which the king hath for the safety of the realm, or benefit of commerce, or security of his customs. The first, *viz.* the *jus privatum* divides itself into the ownership of propriety, and the ownership of franchise. The ownership of propriety is, where the king, or a common person by charter or prescription, is the owner of the soil of a creek or haven, where ships may safely arrive and come to the shore. This interest of propriety is *primâ facie* in the king, but may belong to a subject. But the subject hath not thereby the franchise of a port, nor may he so use or employ it, unless he hath had that liberty time out of mind, or by royal charter. Indeed he may bring thither for his own private use his own boats and vessels to carry off and bring in his own goods that are not customable, as fish, &c.; but he may not use it as a publick port or admit foreigners, unless in case of necessity, nor take toll or anchorage there; for that is fineable, either by presentment, or in a *quo warranto*.—The ownership of franchise is that which gives the formality or denomination of a publick or lawful port, and becomes a free arrival of ships to lade and unlade their merchandizes, and this may be acquired by prescription, or by creation by the king either by proclamation or by charter.

Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or a private person, yet the king hath his *jus regium* in that creek or harbour; and there is also a common liberty for any one to come thither with boats and vessels as against all but the king. And upon this account, though *A.* may have the propriety of a creek or harbour or navigable river, yet the king may grant there the liberty of a port to *B.*, and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to *A.*, for he hath what he had before, *viz.* the interest of the soil, and, consequently, the improvement of the shore, and the liberty of fishing; and as the creek was free for any one to pass in it against all but the king, for it was *publici juris* as to that matter before, so now the king takes off that restraint, and by his licence and charter makes it free for all to come and unlade.

But if *A.* hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa*, without his consent, unless custom hath made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the private interest

interest of *A.*, which may not be taken from him without such consent. And therefore in the creation of a new port either by proclamation or charter, it hath been the course to secure the interest of the shore beforehand, for the building of wharfs and keys for the application of merchandize, and for the building of houses. So, that it is possible, though not ordinary, that the interest of propriety and the interest of franchise may be divided : but it is usual and best in conjunction.

But, though the dominion either of franchise or propriety be lodged by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men ; and so it is charged or affected with that *jus regium*, or right of prerogative of the king, so far as the same is by law invested in the king. It is only with the *jus regium*, that we have to do at present, observing by the way, that the patronage and protection of all *jura publica* being intrusted by the common law to the king ; the care of preventing and reforming publick nuisances in ports is left to him, and his courts of justice, the prosecutions for them are in his name, and the fines for the defects or annoyances in them are part of his revenue.

and nuisance have been committed, he may proceed by information in equity, and have a decree to abate it. *Case of the City of Bristol v. Morgan*, Trin. 11 Car. 1. cited in *Lord Hale De Portibus Maris*, p. 81. and *Attorney-General v. Richards*, Anstr. 603.

Id. c. 2. Though the question of nuisance be a question of fact, and therefore proper for the cognisance of a jury, yet where the king claims and proves a right to the soil, where a purpresture

The *jus regium*, or prerogative of the king in the ports of the sea, branches itself into three parts, as it relates first to the preservation of the safety and peace of the kingdom ; second, to the trade and commerce of the kingdom ; or, third, to the improvement and due answering of the ship's customs and subsidies arising by merchandize imported or exported. From the first ariseth his power of inhibiting persons to come into the realm, or of inhibiting persons to go out of the realm, of both which see hereafter (C. 3, 4). From the second ariseth the power claimed by him of opening or shutting the ports in reference to goods exported or imported, of which we shall treat under this division of the subject. With respect to his power in the last, it will be treated of under title (*Smuggling*).

As to his power of opening and shutting the ports in reference to goods exported or imported, we shall transcribe the words of *Lord Hale* upon this delicate point.

Concerning importation of foreign goods, and the prohibition of the importation of them, we may find *de facto* that such inhibitions have been of two sorts, *viz.* general inhibitions that such or such merchandizes shall not at all be imported, under pain of confiscation or forfeiture ; or else they have been inhibitions or restraints *sub modo* ; as, namely, they shall be imported only at such ports or in such ships.

First, For general prohibitions of merchandizes of any particular kind. These were sometimes made, but very rarely ; neither indeed could they be lawful without the help of an act of parliament, because there have been in all times several statutes made for the liberty and encouragement of merchants strangers especially

to come into the kingdom and trade, which could not be derogated by a proclamation. *Magna Charta*, c. 30. 2 *E.* 3. c. 4. 9 *E.* 3. c. 1. 14 *E.* 3. c. 2. 25 *E.* 3. c. 2. and divers other statutes.

And therefore, if at any time there were such inhibitions by proclamation, they were commonly temporary upon an exigence of state, and not perpetual, nor of any certain continuance. But when there were perpetual or long restraints of this nature, they were always done by parliament. 3 *E.* 4. c. 4. 1 *R.* 3. c. 12. 19 *H.* 7. c. 21. against importation of foreign manufactures therein specified; 4 *E.* 4. c. 1. against importation of foreign clothes; 5 *Eliz.* c. 7. against importation of daggers, &c.; 27 *H.* 6. c. 1. an inhibition of the wares of *Brabant* and *Holland*, because they there had made restraint of importation of *English* cloth; 23 *H.* 8. c. 7. an inhibition by act of parliament of the importation of *French* wines between *Michaelmas* and *Candlemas*; and very many more of the like kind. And the reasons of these interpolings of acts of parliament was, because that proclamations proved very ineffectual to that purpose, partly because it was at best doubtful whether they could at all be effectual against so many acts of parliament; but doubtless they could not without an act of parliament induce a forfeiture of the goods so imported, as hath been often resolved; whereof more hereafter. See the resolution of the case of monopolies, 11 *Rep.* 88. the grant of the sole importation of foreign cards, though prohibited by act of parliament, ruled to be against law, and a monopoly. Much more were the things not prohibited by law to be imported. *Vide Peetb's case*, *Rot. Parl.* 50 *E.* 3.

The only act of parliament, that seems to give a countenance to these kinds of inhibitions, is that of 3 *Ja.* c. 6. The king granted a charter to the merchants, that no *Spanish* wines should be imported but by them. This act repealed that charter in a great measure, whereby some would infer that the patent was good, since nothing but an act of parliament seemed necessary to repeal it. But the consequence is mistaken. *In majorem cautelam*, an act of parliament was used in this case as the most safe and effectual means: but if any man consider those acts of parliament, that enact the sea to be open, or the resolutions of court in cases of this nature, or the very preamble of the act itself, he will easily find that such inhibitions cannot be without an act of parliament.

Secondly, as touching particular restraints; as, for instance, that malmseys shall not be imported, but unto the port of *Southampton*; such a grant is against law, and was accordingly resolved in the case of *Southampton*, *T.* 1 *Eliz.* *Rot.* 73. cited in *Cooke's* comment upon *Magna Charta*, c. 30. and therefore there was a special act of parliament made the 5 *Eliz.* for the making good of that charter; and the like course hath been used to make good those restrictions of foreign trade to particular companies; as, for instance, the *Muscovy* Company, and some others.

2. Concerning exportation, and how far forth the ports may be shut in reference to goods and merchandizes exported, both the

quid facti and the *quid juris* therein. These prohibitions of exportation were never generally for all goods; for that were to destroy trade, but of some particular goods and merchandizes. And those restraints were of two kinds, *viz.* general restraints, that they should not be at all exported; or special and qualified restraints, that they should not be exported, but in such ships, or at such places. Touching both these briefly: and first, touching the general inhibitions.

It is certain, that inhibitions of this nature were very frequent by proclamation; and when they carried with them the apparent reasonableness and fitness of the inhibition, they were not much disputed. Those inhibitions were for the most part touching such commodities whereby the kingdom might be weakened, or scarcity occasioned, by the exportation: as arms, ammunition, corn, victuals, gold, silver, horses, timber, thread of yarn or woollen, and sometimes of falcons. *Vide Claus. 10 E. 2. m. 13. dorso. Claus. 38 E. 3. m. 29. Claus. 41 E. 3. m. 24. dorso. Claus. 43 E. 3. m. 3. dorso. Claus. 45 E. 3. m. 4. dorso.* And sometimes in the proclamation there was annexed a clause of imprisonment of offenders; sometimes the forfeiture of the things imported; sometimes the forfeiture of all their goods and lands. But these clauses of forfeiture were only *in terrorem*; for, as we have before observed, a proclamation barely cannot induce a forfeiture of goods. But yet sometimes the searchers and other officers did seize the goods; and when they had so done, they were compelled to account for the goods so seized in the Exchequer; and the parties, whose goods were so seized, were put to much trouble, before they could have their goods again. But the most usual way to punish offenders against such proclamations was by fine and imprisonment; for where the king may by law prohibit, the proclamation doth increase the offence. And these proceedings were by information at the king's suit, sometimes in the King's Bench, as *H. 1 E. 2. B.R. Rot. 38.* against such as exported horses, arms, money, and plate, against the king's proclamation; sometimes in the Exchequer, *Communia Trin. 16 E. 3. Rot. Mich. 19 E. 3. Rot. claus. 64. m. 29.* and sometimes *coram concilio*, *viz.* in Chancery.

How far these proclamations might be warrantable by law in these particular cases, I shall not positively determine; only thus far I shall say,

Firſt, That if it were admitted, that in these particular cases of arms, ammunition, victuals, and money, such proclamation might be made, and thereby the offenders might be subject to fine and imprisonment; yet it could not be extended to other things, neither ought or might this inhibition be an engine to gain money for licences. For if the proclamation had any strength, it was because of the inconveniences of the exportation of these things. If it were not a publick inconveniency, it could not be inhibited barely by proclamation; and if it were a publick inconveniency, it might not be licensed for private profit. If it might, the strength of the proclamation would consequently cease.

Secondly,

Secondly, If these proclamations were admitted lawful; yet they could not induce any forfeiture of lands or goods, or of the very goods so exported against that inhibition; because that lies not within the strength of any thing but a law.

Thirdly, Though possibly in the time of hostility, or publick danger, or common scarcity, such prohibitions by proclamation of exportation of victuals and arms, might have a temporary effect and use; yet we may easily guess that they were not effectual for perpetuity, nor indeed sufficient provisions *pro tempore*; for the king and his council thought not fit to rest upon such ineffectual means, but acts of parliament have successively passed for the inhibition of exportation of these very things, with penalties of forfeitures added to them. See 1 E. 4. c. 5. for horses; 1 E. 2. P. M. c. 5. of corn, herring, butter, cheese, and wood; 25 H. 8. c. 5. of victuals of all sorts; 9 E. 3. c. 1. 19 H. 7. c. 15. of bullion or money. The like might be instanced in divers other things.

Let us now come to particulars, or qualified restraints; and they are of two kinds:

First, The restraints of exportation in any but *English* bottoms. This hath been attempted to be done by proclamation, as a good expedient for the increase of shipping and mariners, and the encouragement of trade and navigation. *Vide inde claus.* 41 E. 3. m. 25. of a proclamation to that purpose; but it proved ineffectual, till provision was made for it by acts of parliament, viz. 5 R. 2. c. 3.—6 R. 2. c. 8.—14 R. 2. c. 6.—4 H. 7. c. 10. But because it provoked foreign princes to do the like, it was repealed by the statute 1 Eliz. c. 13. with certain provisions made in the case by that statute and the statutes of 5 Eliz. c. 5. and 13 Eliz. c. 15. But now, by a late act of parliament, 12 Car. 2. intitled, “An act for encouraging of navigation,” the use of foreign ships is in a great measure restrained.

And upon the whole matter, it will appear from the several acts of parliament that have been made for the support and increase of trade, and for the keeping of the sea open to foreign and *English* merchants and merchandize, that there is now no other means for the restraint of exportation or importation of goods and merchandizes in times of peace, but only when and where an act of parliament puts any restraint. Several acts of parliament having provided, *que la mere soit overt*, it may not be regularly shut against the merchandize of *English*, or foreigners in amity with this crown; unless an act of parliament shut it out, as it hath been done in some particular cases, and may be done in others.

In another place Lord Hale hath these words: “Touching the prohibitions of exportations and importations of commodities. —It is true, that by divers graunts in parliaments the sea ought to be open for exportation and importation of merchandize. *Rot. Parl.* 18 E. 3. n. 17. 22 E. 3. n. 8. *Item que passage de leines et d’autres merchandises soient overts sans faire apresles custer la custome a les merchaunts, que ont les custumes du roi par un cer-*

Pref. to
Harg. Hale's
Tracts, v. 1.
p. xxx.
18 E. 3.
c. 3.

tain, *quele aprest turne al profit des dits merchaunts et outrageouse grevance & nusshance a votre comun.* Resp. *Soit le passage ouvert, et que chescun poit passer fraunchement, savant au roi se que lui est due.* Yet clerely the kinges of this realme always exercised a power in restraint of the free passage of some commodities of this realme by their own power, as well before as after 22 E. 3. And though complaints were made of it, yet the crown retained the power. *Vide* 25 E. 3. n. 22. 1 H. 5. n. 41.

"Some instances of the particulars.

"(1.) For exportation prohibited.

"1. The kinges have usually before the stat. of 1 & 2 P. & M. *Vide clauf.* c. 4. & 13 Eliz. c. 15. prohibited the exportation of corne and graine; because the necessary sustenance of the realme. And this is in effect admitted legal, *Rot. Parl.* 17 R. 2. n. 39. Upon a petition for a repeal of such a restraint, the answer was, *Le roi le voet a present, proviso que bien lise a son counsel a restrainer le passage quant il semble besoignable.* For such restraints *vide clauf.* 5 E. 3. parte 1. m. 21. dorf. *Rot. Parl.* 50 E. 3. n. 156.

Clauf. 47 E. 3. m. 12. dorf. B. 127. Of wools and woollfels, 49 E. 3. m. 21. dorf. B. 178.

"2. The kinges of this realme have usually prohibited the exportation of coigne and bullion before any act to restrain it, because it is the riches and wealth of the realme. *Clauf.* 30 H. 3. m. 11.

"3. The kinges of this realme have usually prohibited the exportation of armes, or such other thinges as are for the necessary defence or strength of the realme. *Vide clauf.* 10 E. 3. m. 31. dorf. a proclamation inhibiting the exportation of boards or timber for ships. *Clauf.* 38 E. 3. m. 29. a prohibition of exportation of horses, falchons, thread, bowes, arrowes, bowstrings, and arms, and to arrest the ship and goods. The like prohibition of commerce with enemies.

"4. The kinges have usually restrained the passage of customable goods to some particular ports for the better preventinge of defrauding of customes, and at these ports the cockets kept. Thus did E. 3. *clauf.* 5 E. 3. parte 1. m. 12. dorf.

"And in these cases prohibitions of this nature were legal, and for the most part the coercion was by stay of the ship or goods prohibited; for no proclamation could induce a forfeiture; and for that cause most of these thinges were provided for by act of parliament, which subjected the party to a forfeiture or other penalty.

"(2.) Now for an instance of a restraint of foren trade or importation.—Upon this the acts of *Magna Carta*, c. 30. 9 E. 3. c. 1. 25 E. 3. stat. 4. c. 2. 2 R. 2. c. 1. lye heavy; and it hath been seldom practised. *Vide* a restraint of foren trade in *Ireland*, 3 R. 2. n. 44.

"Thus much for the kinge's power of shutting the ports; which, though it was sometymes useful and profitable for the kingdom,

Clauf.
43 E. 3.
m. 3. dorf.
B. 50.

Now settled
by the act of
1 Eliz. c. 12.

Vide the penalty for
breaking
such an
rest. clauf.
46 E. 3.
m. 28.
B. 110.

"kingdom, yet oftentimes was made a meanes of great damage
"and oppression, which did arise by lettting loose the restraint to
"particular men for profit.

"And so ariseth the next consideration of the king's power of
"opening the ports.

Vide Clauf.

46 E. 3.

m. 22. dorf.

B. 118.

"The king might open the passage, which either by his own
"proclamation he had restrained, or which by act of parliament
"were restrained, either in respect of this or that particular
"commodity; as when exportation of some particular wares were
"restrained in respect of the place, as the transportation of wools
"to the staple. This is cleere and without question, wherof
"before. These licences were also complained of, and often
"enacted against, but could never be remedied. *Vide* 21 R. 2.
"n. 82. and the procurers of such licences punished. 51 E. 3.
"n. 17. *Vide* 27 H. 6. n. 29. 9 H. 6. n. 37."]

6. Of his Prerogative in Beacons and Light-Houses.

4 Inst. 148.

12 Co. 13.

Carter, 90.

2 Keb. 114.

3 Inst. 204.

(a) Before

the reign of

E. 3, there

were but

stacks of

wood set

upon high

places, which

were fired when the enemy was descried; but in his reign, pitch-boxes were instead of

these stacks of wood set up; and this is properly a beacon. 4 Inst. 148.

It is clearly agreed, that the king only has a prerogative
in (a) beacons and light-houses; and that he may erect any such,
and in such places as will be most convenient for the safety and
preservation of ships, mariners, and navigation. Also, it seems to
be the better opinion, that this being for the publick utility, and
one of the prerogatives which he is intrusted with for the safety of
the whole realm, he may erect such beacon, &c. as well in the
soil or ground of a subject as in that of the crown; and that he
may do this without the subject's consent.

Vide the

authorities

supra, and

Carter, 90.

(b) Resolv-

ed by the

two Ch.

Justices,

Attorney

and Soli-

citor Gene-

ral, that

this act ex-

tended as

well to

light-

houses in the

night, as to

beacons,

&c. by the day. 4 Inst. 149. in marg.

Also, it is clear, that the subject hath not any power to erect
any such beacon, &c. without the king's licence and authority
for that purpose.

But by the 8 Eliz. it is enacted, "That the master, wardens,
"and assistants of the Trinity-house of *Deptford Strond*, shall and
"may lawfully from time to time at their will and pleasure, and
"at their costs, make, erect and set up such and so many beacons,
"marks, and (b) signs for the sea, in the sea-shores and upland
"near the sea coasts or forelands of the sea only, for sea-marks,
"as to them shall seem meet; whereby the dangers may be
"avoided, and the ships the better come to their ports; and all
"such beacons, marks, and signs so by them to be erected, shall be
"continued, renewed, and maintained from time to time at the
"costs and charges of the said master, wardens, and assistants."

Vide title

Court of

Admiralty.

And although by the common law none but the king could
erect beacons, light-houses and sea-marks, yet of later times, by
letters patent granted to the Lord High Admiral, he hath power to
erect beacons, sea-marks and signs for the sea; which power is now
vested in the Lords of the Admiralty.

And

And therefore a suit for the profits of the beaconage of a rock in the sea near ——— in *Cornwall*, may be in the Court of Admiralty; for, as the profits of the beacons belong to the Admiral, so the suit for them ought to be in his court; though the rock be the freehold of another and part of his inheritance.

Sid. 153.
Croft v.
Ligg.

It hath been resolved, that an order or decree for raising a tax for repairing a *beacon*, without setting forth, that it was in decay or out of repair, is good, in that it would be dangerous to wait until it became in decay: for the consequence would be, that there would be no *beacon* in the mean time and during the reparation: besides, that it cannot be presumed, that the parties who contribute to the tax will tax themselves unnecessarily.

Raym. 448.
the Case of
the Town of
Winchelsea.

7. Of his Prerogative in Wreck.

By the common law (a) the king hath an undoubted right to wrecks; and his prerogative herein is founded on the dominion he has over the seas; and being sovereign thereof, and protector of ships and mariners, he is entitled to the derelict goods of the merchant; which is the more reasonable, as it is a means of preventing the barbarous custom of destroying persons who in shipwrecks approach the shore, by removing the temptations to inhumanity.

Cro. Jur.
Bell, 117.
132. 141.
2 Inst. 167.
Molloy,
237.
Moor, 224.
[(a) De-
clared by
stat. de

Regi, 17 E. 2. c. 11.—King R. 1. in the second year of his reign released wreck through all England, as Spelman in his Glossary, title Wreck, cites it out of Hoveden. But his successor resumed the prerogative, and that before the above statute of 17 E. 2.; and frequent instances thereof are long before that statute in the times of E. 1., H. 3. and King John, Hale De Jure Maris, c. 7. p. 40.]

prerogative

There are four sorts of shipwrecked goods, *flotsbam*, *jetsbam*, *ligam*, and *wreck*.

Flotsbam, is when the ship is split, and the goods float upon the water between high and low water mark.

Jetsbam, is when the ship is in danger to be drowned, and for saving the ship the goods are cast into the sea.

Ligam, *lagan* or *ligan*, is when the heavy goods are cast into the sea with a buoy, that the mariners may know where to retake them.

Wreck, is where goods shipwrecked are cast upon the land.

The *flotsbam*, *jetsbam*, and *ligan*, in shipwrecks belong to the king as well as the *wreck*; for when the mariners are cast away, there is the same reason that the prerogative should take place in these goods as in the *wreck*.

5 Co. 106.

But, though the king hath a prerogative herein, yet *wreck* may be in a subject by grant or prescription: but, if the subject prescribes in *wreck* alone, he shall not have *flotsbam*, *jetsbam*, or *ligan*; for the king's grant shall not be taken to be more extensive than the natural import of the words will bear.

5 Co. 107.

Goods are said to be wrecked at common law, when there are no marks or signs of their property whereby to prove an owner; which anciently, and before the methods of trading were well known, was very difficult to do; unless some living animal escaped

2 Inst. 167.

to

Bract. lib. 3.
fol. 120.

to the shore, whereby they might take the tokens of a property. Hence, ancient authors define it to be no wreck, if a dog or a cat escape alive; or, if certain signs were placed on the goods whereby they might be known. And because this prerogative of wreck was abused, to the prejudice of the merchant, the statute *Westm. 3 Ed. 1. c. 4.* has provided, that if a dog or cat escape alive (which in these cases they took to be the most certain proofs of property) that then the sheriff, coroner, or lord of the ille might claim them; and if the owner came and made his claim within a year and day, he should have his goods, otherwise they remained to the king.

2 Inst. 167. The instance of a dog or cat are only for examples; for if any living thing escapes, the claim may be made.

2 Inst. 167. Molloy, 239. If the mariners are pursued by enemies, and come ashore and leave the empty floating ship, which comes to land without any person; yet shall they claim the ship when it comes on shore.

2 Inst. 168. The year and the day mentioned in the statute, shall be from the time of the seizure; for from the time of seizure there is a notoriety, in order for the party to make his claim.

5 Co. 107. But the property is in the king or the lord of the manor, against all but the right owner, from the time that the goods touch land, even before seizure; for the king's interest herein is different from that of another occupant, who only acquires a right by the seizure; for he is intrusted with this prerogative in order to prevent any other occupant.

2 Inst. 168. If the owner dies within the year and the day, his executors or administrators may make claim thereto; because it is not limited by the statute to the owner at the time of the wreck.

5 Co. 107. This law extends not only to wreck, but to *flotbam*, *jetsbam*, and *ligam*: but the wreck must be claimed by action at (a) common law, the *flotbam*, &c. by suit in the Admiralty; because the wreck is on the land, the *flotbam*, &c. in the seas.

15 R. 2. c. 3. the Admiralty cannot take cognizance of goods wrecked.

5 Co. 108. If the suit be commenced before the year and the day, it sufficeth, though the verdict be not given; for the delay of the law must do no man an injury.

2 Inst. 168. If wreck be embezzled both from the king and the owner, this may be inquired into on a commission of *oyer and terminer*, and the party fined.

2 Inst. 168. If a lord of the manor take the king's goods as wreck, the king may claim them after the year and the day; because the king being perpetually employed in the business of the publick cannot be bound to a time.

If goods wrecked be *bona peritura*, the king or lord may sell them before the year and the day be past; for the statute shall not be understood to restrain them to keep these things that of their own nature cannot be kept.

5 Co. 107, 108. Sir Henry Constable's case. If wreck be granted to the lord of the manor, and he take *flotbam* and wreck, and the jury find this whole matter, and assess entire damages, judgment shall be given against the plaintiff; for the

the court will not give their judgment, when for part of the matter claimed the plaintiff hath no title; and it being matter of fact, the court cannot apportion the damages.

Tunnage is granted to the king for all goods imported into the realm as merchandize, by any merchant whatsoever: certain goods are wreckt, and the question was, Whether they should pay this duty? And resolved by *Vaughan*, that they should not; 1st, Because they could not be said to be imported; for importation is the bringing in of goods by artificial means, as by ships, &c. with deliberation, in order for some use; therefore these goods casually cast up, cannot be said to be imported. 2^{dly}, They cannot be said to be imported for merchandize, but they are now as goods destined for sale; but they may be reserved to the proprietor. 3^{dly}, They are not brought in by any merchant, for they are presumed to be deserted and derelict, and thence the property changed; and the king having a property in the whole, it is to no purpose to give him a part.

Originally all wrecks were in the crown, and the king has a right to a way over any man's ground for his wreck; and the same privilege goes to the grantee thereof.

8. Of the King's Prerogative in relation to Coins and Mines:

It is clearly agreed, that by the common law the king hath a prerogative in, and is entitled to, all royal mines of gold and silver, and treasures of gold and silver hid in the earth; and that he is intrusted with the (a) coinage, and making money current; and that he alone can bring the mines and treasures of any conquered country into use, by coining them out into his money. And this prerogative is lodged in the king, as he administers justice to all; and therefore the power and regulation of that which is the (b) common standard and measure of all bartering and commerce is committed to his care.

we majestatis; and in England it is one special part of the king's prerogative. Hal. Hist. P. C. 188. Money is the common measure of all commerce almost through the world; it consists principally of three parts; 1. The materials whereof it is made; 2. The denomination or extrinsic value; 3. The impression or stamp. Hal. Hist. P. C. 188. — Sir John Davis mentions six things as essentials to the legitimation of coin; 1. Weight; 2. Fineness; 3. Impression; 4. Denomination; 5. Authority of the prince; 6. Proclamation. Davis, 19, in the case of mixed money—which last, viz. the proclamation, is always necessary to the legitimation, says my Lord Ch. J. Hale; for the currency of money is a question of fact, and may be proved by the officers of the Mint or their indenture, on an indictment for clipping and counterfeiting the king's coin. Hal. Hist. P. C. 196. 2 Salk. 446. S. P.

Also, this prerogative is given to the king as a necessary consequence of the power of war and peace; for there can be no wars made without the expence and consumption of treasure.

War. Co. Lit. 90. b. 11 Co. 91. 2 Roll. Rep. 298

Besides, it was thought, that if any other persons had the power of mines of gold and silver, they might by these immense treasures grow too formidable, and wrest that authority from the king which is deposited in his hands only.

Cotton, 4.
Lock of
Coin.

The use and necessity of money arose from the nature of trade; but more especially from this, that the several provisions of life are in their own nature perishable, and not to be laid-up in specie. This made it necessary that some things should be fixed on to pass as tickets of credit in exchange for those commodities: hence, the thing agreed on must have these qualities. *1st*, It must be durable, because otherwise it would not be more easily laid up than the provisions themselves. *2^{dly}*, It must be scarce, that a little of it may serve to be carried from place to place, in order to supply men's several occasions. Upon these two accounts gold and silver were pitched on as the two metals most scarce and most durable, and therefore best able to answer both the purposes. If therefore gold and silver be taken up as the measures of all other things, it follows, that the comparison of their value will stand thus: when the labour spent in digging, refining, and importing an ounce of silver, is equal to the labour in sowing, reaping, and threshing a bushel of corn, then is an ounce of silver equal to a bushel of corn; the industry in the acquiring is equal, and, consequently, men's property in them is the same, that is, their values are equal; for, if the corn be more plenty than the silver, then a bushel and a half of corn will possibly be worth an ounce of silver; if on the other hand, the silver be more plenty than the corn, then, possibly, an ounce and a half of silver will amount to no more than a bushel of corn; and what is done by coining of silver is no more than ascertaining the value of several pieces in order for commerce; as that the crown shall contain an ounce and the like, that the people may not be compelled to use their scale and touchstone on every bargain.

Lock of
Coin.

The policy in relation to the coin is, that the value remains unalterable; for the standard cannot be varied without manifest injustice; as, suppose a man contracts for ten crowns, which is equal to ten ounces of silver, that suppose equal to ten bushels of corn, and before payment the publick standard should alter; for instance, that the crown were lessened to half an ounce, and yet we suppose that the industry in the acquirement is the same in relation to the ounce of silver and the bushel of corn; it then follows that the ten crowns paid in publick money will be equal to but five bushels of corn, and, consequently, the man by the publick act will lose half the value in which he had a property, by the contract: so, in cases of foreign trade, where the measure of commerce is the intrinsic value of the silver or gold, there can be no variation of such measure without injustice.

2 Inst. c. 75.

[(a) In this
opin on Sir
W. Black-
stone's curs
with Lord
Coke, 1 Bl.
Com. 278.]
Hart. Hist.
B. C. 191.

And indeed the keeping to the common standard is of that importance, that my Lord Coke seems to be of opinion (a), that the alteration of money in weight or alloy cannot be without an act of parliament; and in this grounds his opinion on the statutes of 25 E. 3. c. 13. and 9 H. 5. *sess.* 2. c. 6. but herein the law seems to be as laid down by my Lord Hale.

1. That at the first institution of any coin within this kingdom, the king, and he alone, sets the weight, the alloy, the denominated value of all coin; and this is done commonly by indenture between the king and the master of the Mint.

2. He may by his proclamation legitimate foreign coin, and make it current money of this kingdom according to the value imposed by such proclamation; but the counterfeiting such money was not treason till the statute of 1 Mar. c. 6. made it so; nor the clipping, washing, impairing thereof was not treason till 5 Eliz. c. 11. and 18 Eliz. c. 1. but all these statutes allow the power of legitimization thereof to the king by proclamation.

Hal. Hist.
P. C. 192.

3. He may enhance the external denomination of any coin already established, by his proclamation; and thus it hath been gradually done almost in all ages (a). This is sometimes called imbasement of coin, and sometimes enhancing of it; and it is both; it is an enhancing of coin in respect of the extrinsic value or denomination, but an imbasement in respect of the intrinsic value; as for instance, when in the time of Edward IV. a noble was raised to a higher rate by twenty pence.

Hal. Hist.
P. C. 192.
(a) Though it be not absolutely an imbasement of the coin in the species, yet it hath very

near the same effect. Hal. Hist. P. C. 194.

4. He may by his prerogative imbase the species or material of the coin, and yet keep it up in the same denominated or extrinsic value as before; namely, to mix the species of money with an alloy below the standard.

Hal. Hist.
P. C. 192.
Dav. 18.
2 Roll. Abr. 166.

As to my Lord Coke's opinion, all he says that can be inferred from it is, that it is not safe nor honourable for the king to debase his coin below sterling; and that if it be at any time done, it is fit to be done by assent of parliament; but certainly all it concludes is that *feri non debet*, but *factum valet*.

Hal. Hist.
P. C. 194.

From the king's prerogative in coins it hath been adjudged, that at common law, and without any statute, an information lay against persons for transporting large quantities of money, being against the policy of the state and government.

Hob. 270.
Courteen's case, and
Poph. 149.
where it is held, that

engrossing a great quantity of money is an offence; & vide Roll. Rep. 299.

But, though mines of gold and silver belong to the king, yet mines of tin and copper belong to the subject; for by none of the above-mentioned reasons are these to be annexed to the crown.

Plow. 323.
2 Inst. 578.
12 Co. 12.

But herein there hath been a great question, viz. Whether, if the mine of copper or tin contained gold or silver, as they often do, whose it should be, the king's or the subject's? And the judges were made a very extended construction, and held, that gold and silver being the nobler and more valuable metals should attract the less valuable, and belong to the king; as likewise for the following reason, that the king's property cannot be held in jointure with the subject, and that the king's property, though ever so small, shall not be lost by mixture with the subject's.

Plow. 323.
328. 336.

But upon this case the reporter very justly observes, that in all base metals of copper, tin, &c. there is a mixture of gold and silver, which mixture is of no value in comparison to the other metal, and the gold or silver is the life of the mine, without which it cannot be worked; so that this was declaring all copper and tin mines in the king.

Plow. 339.

And therefore by the statute 1 W. & M. stat. 1. c. 30. § 4. it is enacted, "That no mine of copper, tin, iron, or lead, shall be

" adjudged a royal mine, although gold or silver may be extracted
" out of the same."

And by the 5 *W. & M. c. 6. § 2.* " All proprietors of mines
" wherein any ore shall be found in which there is copper, tin,
" iron, or lead, shall hold and enjoy the same, notwithstanding
" that such mines or ores shall be claimed to be royal mines;
" provided that their majesties, and all claiming royal mines under
" them, may have the ore of such mines, (other than the tin ore
" in the counties of *Devon and Cornwall*) paying to the proprie-
" tors within thirty days after the ore is laid on the banks, and
" before the same is removed, the rates following, *viz.* for all ore
" washed wherein is copper, 16 *l. per ton*; and for all ore washed
" wherein there is tin, 40 *s. per ton*; and for all ore washed
" wherein there is iron, 40 *s. per ton*; and for all ore washed
" wherein there is lead, 9 *l. per ton*; and in default of payment
" it shall be lawful for the proprietors to dispose of the ore."

*Plow. 336.
Et vide
postea.*

The king by exprefs words may grant away royal mines as well
as invest a subject with any property in the aforementioned chat-
tels, but then it must be by exprefs words; for, if the king grants
to *J. S.* lands and the mines therein contained, and royal mines
are found in them, they shall not pass to the subject; for the king's
grant shall not be taken to a double intent, because they are re-
cords that ought to have the strictest truth and certainty; and the
most obvious intent is, that they should only pass the common
mines that are grantable to a common person.

25 Co. 32.

It hath been held by the judges assembled at *Serjeant's Inn*, that
the king may enter into any man's ground and dig salt-petre for
making gunpowder; and that the king hath a prerogative herein,
being necessary for the safety of the realm, although it be a thing
of a new invention.

22 Co. 23,
24.

And herein my Lord *Coke* observes, 1st, That it must be done
with as much conveniency and as little to the prejudice of the
owner of the ground as possible; and, consequently, that the
digging in a man's house, barn, outhouse, &c. or weakening the
walls of any such house, &c. is unlawful.

12 Co. 12.

2. That the soil or ground must be made and left as commodi-
ous to the owner as it was before.

12 Co. 23.

3. That this is in nature of a purveyance, and an incident in-
separable to the crown, and cannot be granted, demised, or trans-
ferred over to another.

12 Co. 14.

4. That the owner of the land cannot be restrained from digging
and making salt-petre; the king not having an interest in it as he
hath in gold and silver in the land of the subject.

9. Of his Prerogative in derelict Goods; and therein of Waifs, Strays, and Treasure Trove.

*Bro. tit.
Prerog. pl.
20. a Vent.
267-8.*

All derelict goods, and in which no man hath a property, be-
long to the king as well as derelict lands; so (a) of extraparochial
tithes, though things of an ecclesiastical nature.

5 Co. 18. a Inst. 646. — That a person may be guilty of felony in taking goods, the owner
not known, in which case the king shall have the goods, and the offender shall be indicted for
it *bona ejusdem ignoti.* Hawk. P. C. c. 33. § 29.

So, if a person dies intestate and without kindred, his goods and chattels belong to the king. And herein the usual course is said to be for a person to procure the king's letters patent, and then the ordinary admits the patentee to administration. Salk. 37.
Pl. 3.

As to goods waived, these belong to the king, and are in him without any office; because the property is in nobody, and therefore by publick agreement is put out of the finder, in whom it was by the state of nature, and is vested in the king in recompence for his trouble and charge in the execution of justice. 5 Co. 109.

But at the common law, the owner pursuing the felon, and the felon waiving the goods, the owner may retake them. Also, upon an appeal of felony the owner is entitled to a writ of restitution; and as a farther encouragement for the prosecution of felons, by the 21 H. 8. c. 11. it is provided, that if the party come in as evidence on the indictment and attain the felon, he shall have a writ of restitution awarded by the judge of assize. How far a sale in a market overt alters the property in those cases, vide tit. Fairs and Markets.

If a felon in flight waive his own goods; and the king seize them, these also are waifs; for they are relinquished, and the property is in nobody. Bro. Elfray, (9).
29 E. 3. 19.

In trover the defendant pleads in bar, that the queen was seized of the manor of *Newport Pagnel*, and that in the said manor the goods were found waived, and doth not say, that they were waived in flight; this is no bar; for if the goods were only laid upon the manor, and not waived in the pursuit, they are no such waived or derelict goods as the king may claim by his prerogative. 5 Co. 109.
Cro. Elis.
694. Fox-
ley's case.

The owner may at any time retake the goods waived, if they are not seized by the king or lord of the manor; for the lord's property begins from the seizure; for since there is no property altered by the wrong and theft of the felon, it follows that the right remains till they are seized for the king as guardian of the publick safety, upon the pursuit, or forfeited to him upon the conviction. 21 E. 4. 16.
2a.

Waifs and strays are not necessarily incident to a leet, but they may be appurtenant to it by grant from the king; for the original prerogative is in the crown, and comes from thence to the subject at the pleasure of the king. 8 H. 7. 1.
Bro. Elfray
15.

And though a lord of a private manor may have waifs and strays by prescription, yet he cannot have *bona felonum* and *fugitivorum* without grant from the king; because no man can prescribe for them, for every prescription must be immemorial, and the goods of felons and fugitives cannot be forfeited without record, which presupposes the memory of that continuance. Bro. Elfray,
13.
5 Co. 109.
43 E. 3. 16.

The king may grant the privilege of strays to the lord of a manor, or he may claim it by prescription, which supposeth a grant lost; but no lord of a manor can take the king's beasts as strays, because the grant of the king must be supposed to extend no farther than this particular prerogative of the king, that is, to take the cattle of common persons. 44 E. 3. 19.
5 Co. 105.
Kitchen,

Where the lord of a manor hath not a grant or prescription for stray, there, the sheriff shall seize it in behalf of the king, and shall account for it to the king in the Exchequer. 24 H. 6. 5.
Bro. title
Elfray, 5.

Co. Lit.
221. b.

If *A.* be seised of a manor whereunto the franchises of waif and stray be appendant, and the king purchase the manor with the appurtenances, the royal franchises are re-united to the crown, and not appendant; because the stray belongs to the king by his prerogative, and when the manor comes to him, the strays are in him *jure coronæ*: but, if he grant the manor in as ample a manner as *A.* had it, this grants the strays by reference to the former grant.

29 E. 3. 3.
Bro title
Estray, 4.

In the case of the king, if a man justifies, as beasts taken in behalf of the king, yet he must say that the beasts were taken and proclaimed; for otherwise the king's mere seizure shall not be a sufficient presumption in behalf of his property.

Bro. Estray,
(5).
24 H. 6. 5.
Cro. Elis.
694.

The sheriff or bailiff of the king cannot pray in aid of the king in an action of trespass brought against him; for the aid of the king cannot be demanded to come in to justify the acts of his ministers, but they are answerable for their own acts; and the taking any chattels is only a fact of the king's ministers; but in matters of titles of land which are no fact of the king's ministers, but relate to his permanent revenue, the particular tenant shall pray in aid of the king in reversion.

Cro. Elis.
694.

Also, the pleading of the officer is not good unless he says, he hath answered the value of them to the king; for the officer cannot justify the taking in his own right.

Yelv. 96.

The king or lord of the manor hath property from the time of the stray's coming upon the manor against all others but the right owner; but in relation to the right owner, he hath only the custody, and not the property.

3 Inst. 113.
Kitch. 80.

The king hath a prerogative in treasure trove, that is, treasures of gold and silver which must be hid in the earth, and in which no man hath a property; but treasures of gold and silver found on the surface of the earth, or found in the sea, belong to the finder.

3 Inst. 133.
Hal. Hist.
P. C. 506.

This prerogative was thought to be of that consequence to the crown, that it is said, that anciently the concealing of treasure trove was punished with death; but it is now only punishable with fine and imprisonment.

10. Of his Prerogative in Fines and Forfeitures.

2 Vent. 268.
Fide title
Forfeiture.

Fines and forfeitures for offences at law, go to the king as the head of the government; and are given to him as well for the publick good as for the increase of his revenue.

Hal. Hist.
P. C. 253.

Hence it is held, that if a person be attainted of high treason, all his lands of whomsoever holden are forfeited to the king, and that though the lands are immediately held of the king, yet he hath them not as royal escheats, but *jure coronæ* or *prærogative regalis*.

Moor, 238.
7 Co. 36.
13 Co. 68.

Also, where a statute giveth a forfeiture, either for nonfeasance or misfeasance, the king shall have it, unless it be otherwise particularly directed by the statute.

And

And on this foundation it hath been adjudged, that an archdeacon having sold the office of registrar of the archdeaconry, which is a forfeiture within the statute 5 & 6 E. 6. c. 16. the right of nomination belonged to the crown, and not to the bishop of the diocese.

Vide plus titles Forfeiture and Outlawry.

2 Vent. 267.
Woodward
v. Fox.

(C) Of his Prerogative over the Persons of his Subjects: And herein,

1. Who shall be said his Subjects.

ALL persons born in any part of the king's dominions and within his protection are his subjects, as are all those born in Ireland, Scotland, Wales, the king's plantations, or on the *English* seas; who by their births owe such an inseparable allegiance to the king that they cannot by any act of theirs renounce or transfer their subjection to any foreign prince.

7 Co. 1. &c.
Calvia's
case. Mol-
loy, 370.
Co. Lit. 129.
Dyer, 300.
vide title
Aliens.

Also, the subjects of a foreign prince, coming into *England* and living under the protection of our king, may, in respect of that local ligeance which they owe to him, be guilty of high treason, and indicted that they *contra dominum regem* (the words *naturalem dominum suum* being omitted) did compass, &c. *contra ligeantiam suam debitam*. And it is said that even an ambassador, committing a treason against the king's life, may be condemned and executed here, and that for other treasons he shall be sent home.

3 Inst. 4, 5.
Dyer, 145.
Hob. 271.
2 Salk. 630.
pl. 2.
Hawk. P. C.
c. 17. § 5.
Hal. Hist.
P. C. 59.

But aliens who in a hostile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themselves or in company with *English* traitors, cannot be punished as traitors, but shall be dealt with by martial law.

Hawk. P. C.
c. 17. § 6.

If the king of *England* makes a new conquest of any country, the persons there born are his subjects; for by saving the lives of the people conquered he gains a right and property in such people, and may impose on them what law he pleases.

Dyer, 224.
Vaugh. 281.

But until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent (a); for in all such cases the laws of the conquering country shall prevail.

2 P. Wms.
75. 76.
(a) That
where the
laws are re-
jected or
silent, the
2 Salk. 4: 2.

conquered country shall be governed according to the rule of natural equity.

If there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them; and therefore such new found country is to be governed by the laws of *England*; though, after such country is inhabited by the *English*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them.

2 P. Wms.
75. 2 Salk.
411. pl. 1.
Like point.
2 Ld. Raym.
1245.

2. That he is entitled to the Service and Allegiance of his Subjects; and therein, of the Oaths enjoined them.

Serv. 43.
Moor, 111.
2 Vent.
247-8.
4 Mod. 269.
Salk. 167.
pl. 1.
Ld. Raym.
59. Skin.
574. pl. 1. Carth. 306.

It is clearly agreed, that the king hath an interest in all his subjects, and is entitled to their services, and may employ them in such offices as the publick good and the nature of our constitution require; and on this foundation it hath been held, that the king may oblige a person to serve the office of sheriff, and that no person can be exempt from such office but by act of parliament or letters patent.

7 Co. Cal-
vin's case.
Hal. Hist.
P.C. 59. 61.
(a) 1 Vent. 3.
[For the
misapplica-
tion of their
allegiance to
the regal ca-
pacity or crown,

exclusive of the person of the king, (among other things,) were the Spencers banished in the reign of Edward the second. Hal. Hist. P. C. 67.] — That the obligation of allegiance is not to be applied nor laid upon private causes; for no man can make a cause of allegiance other than such as the law makes, and as concerns the faith and loyalty that the subject oweth to his sovereign in point of state. Hob. 271, 272.

1 Bl. Comm.
369. Sir M.
Foster ob-
serves, that
"the well-
known
" maxim
" which the
" writers of
" our law
" have
" adopted
" and ap-
" plied to
" this case,
" *nemo po-
" test exuere
" patriam;*
" compre-
" hendit
" the whole

[Natural allegiance cannot be forfeited, cancelled, or altered by any change of place, time, or circumstances, nor by any thing but the united concurrence of the legislature. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those hands, by which he is connected to his natural prince.]

" doctrine of natural allegiance." Fost. Cr. L. 184. This is exemplified by a strong instance in the report which that learned Judge hath given of *Æneas Macdonald's* case. He was a native of Great Britain, but had received his education from his early infancy in France, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king: acting under that commission, he was taken in arms against the king of England, for which he was indicted and convicted of high treason; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. *Id.* 59. — By st. 26 G. 3. c. 60. it is enacted, that no registry of any ship or vessel shall thenceforth be made, until the owner or owners of such ship or vessel shall have taken an oath therein set forth in manner therein directed, containing, among others, the words following: "That I the said *A. B.* (and the said other owners, if any) am (or are) truly and *bonâ fide* a subject (or subjects) of Great Britain, and that I the said *A. B.* have not (nor have any of the other owners, to the best of my knowledge and belief) taken an oath of allegiance to any foreign state whatever, except under the terms of some capitulation (describing the particulars thereof)." And by st. 27 G. 3. c. 19. § 4. reciting the above clause, it is enacted, that any oath which

which shall have been, or may be taken, for the sole purpose of acquiring the rights of a citizen or burgher in any foreign city or town in Europe, to be enjoyed during the time that the person or persons taking such oath shall reside in such city or town, and for a limited time after such residence shall have expired, shall not be deemed an oath of allegiance to a foreign state, within the true intent and meaning of the above act.

The express allegiance, or by oaths and promises, is either by the common law, or by particular acts of parliament. By the common law, besides the oath due by tenure or *ratione feodi*, all persons above the age of twelve were obliged in the torn or leet to take an oath of fidelity and allegiance, whether such persons held any lands of the king or not; and in all oaths of fealty, as likewise in the profession of homage to any inferior or subordinate lord or prince, it was with a *salva fide et ligeantia domini regis*, which saving to omit was punishable in such lord.

The particular acts of parliament relating to this matter are the 1 *Eliz. c. 1.* which enjoins the oath of supremacy, 3 *Jac. 1. c. 4.* which instituted the oath of obedience, the statutes 7 *Jac. 1. c. 2 & 6.* 13 *Car. 2. stat. 2. c. 1.* 13 & 14 *Car. c. 3 & 4.* 25 *Car. 2. c. 2.* 30 *Car. 2. stat. 2. c. 1.* which are abrogated by 1 *W. & M. sess. 1. c. 1 & 8.* and new oaths appointed in their room by the 1 *W. & M. sess. 2. c. 2 & 3.* 3 *W. & M. c. 2.* 13 *W. 3. c. 6.* 8 *Ann. c. 22.* 4 *Ann. c. 8.* 6 *Ann. c. 7.* 14. 23. 1 *Geo. 1. c. 13.* 13 *Geo. c. 29.* 2 *Geo. 2. c. 31.* 9 *Geo. 2. c. 26.* 6 *Geo. 3. c. 53.*

By the 2 *Geo. 2. c. 31.* it is enacted, "That all persons that shall be admitted into any office civil or military, or shall receive any pay by reason of any grant from his Majesty, or shall have command or place of trust under his Majesty, or by authority derived from him, in *England*, or in his Majesty's navy, or in *Jersey* or *Guernsey*; or that shall be admitted into office in the household of his Majesty, or of the Prince of *Wales*, or any other of his Majesty's issue; and all ecclesiastical persons, heads and other members of colleges and halls in the universities, that are of the foundation and enjoy any exhibition, being of the age of eighteen years; and all persons teaching or reading to pupils, and all school-masters and ushers, and all preachers of separate congregations, high constables, and every person who shall act as a serjeant at law, counsellour, barrister, advocate, attorney, solicitor, proctor, clerk, or notary, by practising as such in any court in *England*, who shall after the 21st of *January* 1728, be admitted into any of the above-mentioned preferments, &c., or shall come into any such capacity, &c., shall take the oaths appointed by 1 *Geo. 1. c. 13.* as by the said statute is directed in the court of Chancery, King's Bench, Common Pleas, or Exchequer, at any time (a) before the end of the next term after he shall be admitted, &c., or before the end of the next quarter-sessions where such persons shall reside."

Persons neglecting, to incur the penalties in 1 *Geo. 1. c. 13.* viz. disability to, &c., or to be guardian or executor, or capable of

Spelm. tithe
Fidelitas.
Co. Lit. 85.
Finch of
Law, 247.
2 Inst. 147.
Hal. Hist.
P. C. 64.
&c.

[(a) By the 9 G. 2. c. 26. the time is enlarged to fix calendar months after such admittance, &c. And statutes are annually passed for the purpose of enlarging the time and indemnifying those who have omitted to qualify.]

of any legacy or deed of gift ; or to be in any office, or to vote at any election for members of parliament, and shall forfeit 500*l*.

3. That he may restrain his Subjects from going abroad ; and herein, of the Writ *de Ne exeat Regno*.

F. N. B. 85. By the common law every subject may go out of the kingdom
Dyer, 165. for merchandize or travel, or other cause, as he pleases, without
196. any licence for that purpose : this appears from the (a) *statute*
2 Roll. Rep. 5 R. 2. c. 2. made to restrain persons passing out of the realm,
12. but excepts lords, great men, and notable merchants ; as also by
3 Mod. 131. the statute 26 H. 8. c. 10. which gave power to the king during
Lit. Rep. 27. his life to restrain persons from trading to some certain coun-
Stile, 442. tries (b) ; which acts had been vain and idle, if the king by his
(a) This statute is re- prerogative might have done it.
pealed by
4 Jac. 1. c. 1.
(b) Noy, 182.

12 Co. 33. But, notwithstanding this general freedom and liberty allowed
11 Co. 92. by the common law, it appears plainly that the king by his pre-
Fitz. N. B. rogative, and without any help of an act of parliament, may prohibit
39. his subjects from going out of the realm ; but this must be by
2 Inst. 54.— some express prohibition ; as (c) by laying on embargoes, which
One reason, says Sir John Davis, why the king is entitled to customs, is, his permitting his subjects to go beyond sea when he might restrain them.
Dav. 9. (c) *Vide* title Merchant. 4 Mod. 179.

Dyer, 179. It is agreed, that the matter alleged in the writ of *ne exeat regno*
Moor, 109. is not traversable, and that the king may avoid it without shewing
3 Inst. 179. any cause ; and though it may be objected, that if the king may,
Comb. 53. without assigning any reason, grant it in one case, he may in five
Skin. 166. hundred, &c., the answer is, that this is a royal trust reposed in
the king, which the law does not presume that he will abuse or
make use of to the prejudice of the subject.

F. N. B. 85. This writ may be awarded under the privy seal or signet, as
Lane, 29. well as the great seal.
2 Co. 17.
b. 76. 11 Co. 92.

The writ of *ne exeat regno*, though a prerogative or state writ, hath been introduced into the court of Chancery. It was at first but tenderly made use of, but is now become the common process of that court. The plaintiff, by a standing order made in my Lord Cowper's time, is to make oath of his debt ; and the writ is always marked for the sum sworn in the affidavit, in words at length and not in figures ; and the plaintiff swears the defendant is going out of the kingdom, which if he should do, the debt may be

be lost ; the order is till answer or further order ; and it was formerly thought, that upon the party's putting in a full answer the writ should be discharged ; but of late, the party hath been obliged to give security to abide the order on hearing, before the court will discharge the writ ; which security is taken by recognizance before a master, as all other security is ; and it is in the penalty of what is sworn due, and the sheriff takes bail accordingly when he arrests the party thereon, the sum sworn due being constantly indorsed on the *ne exeat regno*, as a guide for the sheriff to take bail by.

A writ of *ne exeat regno* may be granted in any case where there is danger of subterfuge from the justice of the nation, though of a private concern.

Giving out that he intends to go beyond sea, assigned as a reason for awarding a writ of *ne exeat regno*, and it was granted.

A solicitor's bill being taxed and reported overpaid 60 l. on motion and affidavit of his going beyond sea, a *ne exeat regno* was granted, though no bill was in court whereon to ground this writ (a).

mined, that this writ cannot be granted but on bill filed. *Ex parte Brunker*, 3 P. Wms. 312.]

A motion was made for a *ne exeat regno* against Sir *Jerom Smithson*, for that his wife had sued him in the ecclesiastical court for alimony, and it was suspected that he would go beyond sea to avoid the sentence ; and the writ was granted ; and the Lord Chancellor said, that it had been so done before, for this court was to aid the ecclesiastical court in such cases.

2 Atk. 210. *Pearne v. Lisle*, Ambler 76.]

It hath been held, that a *ne exeat regno* lies to prevent one from going into *Scotland*, it being out of the jurisdiction of Chancery ; and the process thereof not reaching thither, is equally mischievous to the suitor here as if he actually went out of the kingdom : and in this case it is said, that the condition must be not to go out of the realm, or to *Scotland* ; but in (a) a latter case it is held, that there is no occasion that the order should be particular as to *Scotland* ; and that even since the union, the writ in the general form will restrain the party from going into *Scotland* as well as any of the king's other dominions that are out of the process of this court.

A *ne exeat regno* having been awarded against the defendant, *J. S.* (who was the now petitioner) became his surety to the sheriff ; after answer put in *J. S.* petitions to be discharged, but was denied ; then the cause was heard, and 19,000 l. decreed against the defendant, and he committed for non-payment ; and then *J. S.* petitions again to be discharged, because being a *manu-captor*, and the party in prison, there can be no danger of his going beyond sea. *Lord Keeper* : If so, then his surety is in no danger, and would not discharge him.

Skin. 13
Chan. Ca.
115.
2 Chan. Ca.
245.
7 Mod. 9.
Ld. Raym.
696.
Cases in
B. R. 562.
Stil. 441,
442.

2 Chan. Ca.
245.

2 Chan.
Rep. 20.

Prec. Chan.
171. Lloyd
v. Cardy.
[(a) But it
hath been
since deter-

2 Vent. 345.
Sir Jerom
Smithson's
case.
[So, Read
v. Read,
1 Ch. Ca.
715. Anon.
Ambl. 76.]

1 P. Wms.
263. pl. 604
Done's case.

(a) Hunter
v. Maccray.
Ca. temp.
Talbot. 196.

Prec. Chan.
230.
Le Clee v.
Trot.

Ex parte
Brooker,
3 P. Wms.
312.

[It hath been determined, that this writ shall not issue on a mere legal demand, for which the defendant might have been holden to bail.

Anon. 2 Atk. 410. Pearne v. Lisle, Amb. 76. Atkinson v. Leonard, 3 Br. Ch. Rep. 218. Parker v. Appleton, Id. 427. But from the case of Atkinson v. Leonard it seems, that it *shall* issue in matters where the courts of law and equity have concurrent jurisdiction.

Anon. Nor shall it issue on a demand which is not certain.

1 A. K. 431.

Shearman v. Shearman, 3 Br. Ch. Rep. 370. Anon. 1 Br. Ch. Rep. 376.

Rico v.
Gualtier,
3 Atk. 501.
Anon.

In general, the application for it must be supported by an affidavit, swearing positively to the debt: but on a bill for an account, it is sufficient for the plaintiff to swear to the balance *as to his belief*.

2 Vez. 489.

Anon.

2 Vez. 489.

Where the demand is against an administrator, &c., the plaintiff should also swear to his belief of assets come to the defendant's hands.

Jerningham
v. Glas,
3 Atk. 409.

This writ may issue against a feme covert executrix, whose husband is out of the jurisdiction.

Amb. 62. S. C. and Moor v. Mellish, therein cited.

Baker v.
Duma-
scique,
2 Atk. 66.

Jerningham

v. Glas,

3 Atk. 409.

Rep. 218.

As the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the suit, the court always inclines to discharge the writ upon such security being given.

Amb. 62. S. C. Robertson v. Wilkin, Amb. 177. Atkinson v. Leonard, 3 Br. Ch. Rep. 218.

Whether the writ shall issue against a foreigner or person usually resident *out* of the jurisdiction, in respect of a demand which originated *abroad*, and is *there* suable, *vide* Pearne v. Lisle, Robertson v. Wilkie, Atkinson v. Leonard, *ubi supra*.]

4. That he may command his Subjects to return Home; and therein, of awarding a Privy Seal.

Dyer, 128.b.
Lane, 44.
Moor, 109.
3 Inst. 179.

As the king may restrain any of his subjects from going abroad, in like manner it is clearly agreed, that he may command them to return home; and that the disobeying a privy seal to this purpose is the highest contempt. 1st, It is a disobedience to the command of the king himself directed to the party. 2^{dly}, The command is, that he shall return upon his faith and allegiance, which is the strongest compulsion that can be used. 3^{dly}, The thing required by the king is the principal duty of a subject, *viz.* to be at the service of his king and country.

(a) And when he does return he shall be fined. Hawk. P. C. c. 22. § 4.

The punishment for this offence is, the seizing the party's estate (a) till he return; and of this there are divers instances in our books.

Dyer, 128 b.
Vouched in
a case there.

As that of *William de Brittain* in the 19th year of *Ed. II.* who refusing to return upon the king's writ, his goods and chattels, lands

lands and tenements, were thereupon seized into the king's hands : and the like was done in the case of (a) *Edward of Woodstock Earl of Kent*, in the same reign. Lan. 44.
S. C. cited
and said to
proved by other precedents. (a) Leon. 10. cited.

So, in the case of one *Eartue* who married the Duchefs of *Suffolk*, they obtained a licence from *Queen Mary* to go out of the realm, under pretence of recovering some debts they were entitled unto as executors to the duke ; when in reality it was on account of the religion established by *Queen Mary*, and living with other fugitives under the protection of the *Palsgrave* of the *Rhine* in *Germany*, who was an eminent *Calvinist*, were sent to by privy seal ; but the messenger in endeavouring to serve them with his letters, being obstructed, beat and abused by their servants and attendants, a certificate was made of this, and their lands and tenements seized. Dyer, 176.
Jenk. Cent.
220. Ber-
tue's case.

So, in the case of *Sir Francis Englefield*, who departed the kingdom on a licence obtained for three years ; but not returning at the expiration of the three years, a privy seal was sent to him by *Queen Eliz.* which he not obeying, and this matter being certified into Chancery by the queen under her sign manual, in the fifth year of her reign by virtue of a commission under the great seal directed to *Sir Henry Nevil* and others, his lands and tenements were seized. Leon. 9.
Moor, 109.
Dyer, 375.
And. 95.
S. C. Sir
Francis
Englefield's
case. Vide
also 7 Co. 18.
Poph. 18. 4 Leon. 135.

So, in the case of *Sir Robert Dudley*, who, intending to travel, obtained a licence from *King James I.* to go to *Venice* ; but, before his departure, he by indenture enrolled for valuable consideration, as was expressed in the deed (but none paid), conveyed the manor of *Killingworth*, with other lands, to the *Earl of Nottingham* and others in fee, with a proviso, that upon tender of an angel of gold all should be void ; and with a covenant on the part of the bargainees, that they should make all such estates as the said *Sir Robert* should appoint : the bargainees were not parties to the deed, nor had they notice of it until some time after ; but afterwards they made a lease to *Sir Robert Lee*, to the intent that *Lady Dudley* should take the profits of part of the premises for ten years, if their estate continued so long unrevoked. The king, hearing that *Sir Robert* had been guilty of some bad practices beyond seas, in the fifth year of his reign, sent his privy seal to him, which he not obeying. the great question in this case was, whether those lands thus conveyed were forfeited ? And adjudged that they were, the conveyance being fraudulent as to the king. Lane, 42,
&c. The
King v. Earl
of Notting-
ham. Pasch.
7 Ja. 1. in
Spec.

In these cases it hath been held, that the king hath only an interest in the offender's lands till he return ; and (a) that his restoring of them to him is not a matter of grace but of right. (a) Lane, 48.
per Tanfield,
Ch. Baron.

But, though the lands are to be restored to the offender, yet it is held, that till his return the king hath a greater interest than the perception of the profits ; and that he may assign or grant them, *quamdiu in manibus suis fore contigerint* ; and that he or his patentee are entitled to woodfals, may make leases, and grant copyholds, being *domini pro tempore*.

And

Sav. 7, 8.
Leon. 9.
Dyer, 176.
in marg.
Moor, 112.

Moor, 109.
Dyer, 375.

And on this foundation it was holden, in Sir *Francis Englefeld's* case, that where *Q. Eliz.* in the eighth year of her reign, and after the forfeiture of Sir *Francis*, granted a manor, part of Sir *Francis's* estate, with all the profits, *quamdiu in manibus nostris fore contigerit*; and afterwards the acts 13 *Eliz. c. 3.* & 14 *Eliz. c. 6.* were made for vesting the estates of fugitives in the crown; after which the queen made a second seizure of those lands, and by her letters patent appointed a steward, who held a court, took surrenders, and granted admittances in right of the queen; yet it was resolved, that this second seizure, by virtue of these acts, gave the queen no greater estate or interest than she had before by the common law; consequently, that the first grant was good, and the courts holden, surrenders and admittances by her steward were void.

Dyer, 176.
And. 9c.
(a) The writ ought to be served by some messenger, who upon his oath is to make a certificate of it in Chancery.

The regular course in those cases is for the messenger to certify his proceedings into Chancery, of which, by *mittimus*, a certificate is sent into the Exchequer, out of which court a commission issues to inquire, &c. and seize the lands of the delinquent; and it is said, that this certificate admits of no traverse, because no venue can be laid here for its trial, the matter being transacted beyond sea: but it is said, that the (a) messenger ought to make oath of the service of the writ of privy seal.

3 Inst. 180.

Leon. 9.

And it is said, that there is no need of a date to the privy seal; for that the matter therein contained is not traversable, nor is it returned as other writs are, but the king who issues it is to receive the message or answer of the party, and he is the judge of the contempt.

Lane, 46.

The contempt incurs from the very time notice is given the party; for the words of the writ are *quod indilate*, &c.

Lane, 46. &
vide Dyer,
176.

It is held, that though the party hath a licence at the time of his going abroad, that yet he is obliged to obey the privy seal; for that such licence is countermandable, being only an authority or dispensation, and not like an interest moving from the king.

3 Inst. 180.

It is said that the king cannot recall the party, but by the great seal or privy signet.

(D) Of the King as the Fountain of Justice, and intrusted with the Execution of the Laws: And herein,

1. That all Civil Jurisdiction flows from the King.

Floto, c. 17.
C. 11. l. 99.
a 114. vide
title Courts.

ALL jurisdiction exercised in these kingdoms that are in obedience to our king, is derived from the crown; and the laws, whether of a temporal, ecclesiastical, or military nature, are called his laws; and it is his prerogative to take care of the

due execution of them. Hence, all judges must derive their authority from the crown, by some commission warranted by law; and must exercise it in a lawful manner, and without any the least deviation from the known and stated forms.

So, although the king is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to change or alter the laws which have been received and established in these kingdoms, and are the birthright of every subject; for it is by those very laws that he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner do they declare and ascertain the rights and liberties of the people, and therefore admit of no innovation or change but by act of parliament.

From the inherent right inseparable from the king to distribute justice among his subjects, it hath been held, that an appeal from the *Isle of Man*, lies to the king in council without any reservation in the grant of the *Isle of Man* of any such right; and it was said, that though there had been exclusive words, that yet the grant must have been construed to be void upon the king's being deceived, rather than the subject should be deprived of a right inseparable to him as a subject, of applying to the crown for justice.

4 Inst. 164.
2 Inst. 54.
478.
2 Hal. Hist.
P. C. 131.
282.
Vaugh. 418.
2 Salk. 510.

1 P. Wms.
329.
Christian
v. Correa.

2. Of the King's Prerogative in Ecclesiastical Matters.

The supremacy of the crown of *England*, in matters ecclesiastical, is a most unquestionable right, which, as my Lord Hale says, may be proved by records of undoubted truth and authority; and though, as he says (a), the Pope made great usurpations and encroachments on this right, yet these were always complained of as illegal; and those encroachments are now pared off by the statutes 25 H. 8. c. 19, 20, 21. and 26 H. 8. c. 1.

royal authority in all matters ecclesiastical, as is manifest by the statute of provisors, which was made as a remedy for this grievance, &c. Ld. Raym. 25. & vide 5 Co. Cawdry's case. Cro. Eliz. 542. and the statutes 26 H. 8. c. 1. and 1 Eliz. c. 1. whereby such authority as the pope had, claiming as supreme ordinary, is annexed to the crown, and is declared to belong thereto of right; for which vide 4 Inst. 311. Lit. Rep. 232. Moor, 463. Dyer, 237. Selden *Janus Anglo*. 27. Co. Lit. 134. Dav. 38. 2 Inst. 580. 584.

Hal. Hist.
P. C. 75.
(a) The
pope by de-
grees, and
whilst the
people were
blinded with
superstition,
usurped the

(b) So that the King of *England* doth not recognize any foreign authority superior or equal to him in this kingdom, neither do the laws of the Emperor or Pope of *Rome*, as such, bind in the kingdom of *England*; but all the strength and obligation that either the papal or imperial laws have obtained in this kingdom, is only because they are and have been received and admitted in this kingdom, either by consent of parliament or by immemorial usage and acceptance in some particular courts and matters, and not otherwise.

(b) The laws
of *England*
have no de-
pendance on
the civil
law, nor are
governed by
it, but are
binding by
their own
authority.

Hal. Hist. P. C. 16.

The king therefore is said to have two jurisdictions, one temporal, the other ecclesiastical; the latter of which is derived from the common law, though the form of the proceedings and the coercive power exercised in the ecclesiastical courts, is after the form

Show. Rep.
218.
Roll. Abr.
530.
4 Co. 29.

7 Co. 42.
5 Co. 7.
2 Vent. 43.

of the canon and civil law; and this being indulged to them, the judges of the common law will give credit to their proceedings and sentences in matters in which they have a jurisdiction, and believe them consonant to the law of holy church, although against the reason of the common law; and if there be a *Gravamen* it must be redressed by appeal.

Vide title
Courts.

But, if these courts exceed their jurisdiction, and the bounds and limits prescribed them by the laws and statutes of the realm, they are subject to the controul of, and may be prohibited by, the king's temporal courts; for the canon and civil law did not bind originally in *England*, nor have they been received universally; and therefore are called *leges sub graviore lege*, the common law still maintaining its superintendancy over them.

(a) *Vide*
4 Eliz. c. 1.
a statute enacted An act for restoring to the crown the ancient jurisdiction ecclesiastical; and the 16 Car. 1. c. 11. by which this court is abolished — and for the jurisdiction it exercised, *vide* 12 Co. 45, &c. 13 Co. 2 Roll. Abr. 224. 4 Inst. 332. Noy, 149. Moor, 917. March, 80. Gibf. Cod. 50.

The king being delivered from papal usurpation, might by common law grant a commission to hear and determine ecclesiastical causes. Hence the jurisdiction of the High Commission Court was acknowledged as deriving its authority immediately from the crown: but it was held, that that court, without the (a) help of an act of parliament, could not in matters of ecclesiastical consufance use any temporal censure or punishment, as fine or imprisonment.

Vide title
Ecclesiastical
Courts.

Also, the common law hath annexed unto certain offices ecclesiastical jurisdiction, as incident to the offices: thus, every bishop by his election and confirmation, even before consecration, hath ecclesiastical jurisdiction annexed to his office, as *judex ordinarius* within his diocese; and divers abbots anciently, and most archdeacons at this day, by usage, have the like jurisdiction within certain limits and precincts; all which they derive from the crown, although the process in the ecclesiastical court runs in the name and under the seal of the bishop or ecclesiastical judge.

2 Inst. 488.
Vaugh. 218.
(b) They cannot hold plea of a legal perjury, or perjury in contracts, but for perjury in their courts they may punish. — So, where one forged letters of ordination, it was held, that the spiritual court may proceed to deprive him. Sid. 217. Lev. 138. Keb. 721. Keilw. 39. — So, where a parish clerk was guilty of scandalous crimes, and being proceeded against in the spiritual court, it was held on a motion for a prohibition, that they may proceed to deprive him for these crimes, though they were in their nature only punishable in the temporal courts. 2 Ld. Raym. 1507. *See* *vide* Dyer, 293. temp. Incumb. 53. Hob. Searle's case L. P. — Cannot punish for writing a libel, being an offence punishable at law. Comb. 71. — For sacrilege the party may be proceeded against in the spiritual court,

The matters of ecclesiastical consufance are of two kinds, criminal and civil: their criminal proceedings extend to such crimes as by the laws of the land are of ecclesiastical consufance (a), as heresy, fornication, adultery, and some others, wherein their proceedings are *pro reformatione morum*, and *pro salute anime*; and the reason why they have the consufance of these and the like offences, and not of others, as murder, theft, &c. is not from the nature of the offence, for the one is as much a sin as the other; and therefore if the consufance were of offences *quatenus peccata contra Deum*, it should extend to all sins against God's law; but the true reason is, because the law of the land hath indulged them with the consufance of some crimes, and not of others.

Sid. 217. Lev. 138. Keb. 721. Keilw. 39. — So, where a parish clerk was guilty of scandalous crimes, and being proceeded against in the spiritual court, it was held on a motion for a prohibition, that they may proceed to deprive him for these crimes, though they were in their nature only punishable in the temporal courts. 2 Ld. Raym. 1507. *See* *vide* Dyer, 293. temp. Incumb. 53. Hob. Searle's case L. P. — Cannot punish for writing a libel, being an offence punishable at law. Comb. 71. — For sacrilege the party may be proceeded against in the spiritual court,

court, although the robbery is likewise punishable in the temporal courts. 37 H. 6. 59. Bro. Appeal 31. 45. 2 Inst. 492. 2 Keb. 23. Sid. 281. — So, an action at law lies for an assault and battery on a spiritual person, as also a suit in the spiritual court for irreverence to his person. 6 Mod. 156. Cro. Eliz. 655. — But for calling a woman whore and thief, the party cannot be proceeded against in the spiritual court and by action at law, being one continued act. 2 Roll. Abr. 259. So, for solicitation of chastity which is attended with force and violence. Vide 4 Co. 20. 2 Salk. 552. pl. 35. 7 Mod. 78. 2 Ld. Raym. 809, 1101.

The civil causes committed to their consueance, wherein the proceedings are *ad instantiam partis*, ordinarily are the business of tithes, rights of institution and induction to ecclesiastical benefices, matters of matrimony and divorce, and testamentary causes, and the incidents thereunto, as the insinuation of testaments, legacies of goods and money, &c. wherein they proceed according to the canon law, and the civil law, which is taken as a director in points of exposition and determination.

[The king is patron paramount of all the benefices in England. In virtue of which, the right and care of filling all such churches as are not regularly filled by other patrons belongs to the crown; whether it happen through the neglect of others, (as, in the case of lapse,) or through incapacity to present, as, if the patron be attainted, or outlawed, or an alien, or have been guilty of simony, or the like.

Vide title Ecclesiastical Courts, ltr. (D).

Gibf. Cod. 763.

Upon which ground, the king hath right to present to all dignities and benefices of the advowson of bishopricks and archbishopricks during the vacation of the respective sees. Not only to such as shall become void after the seizure of the temporalities, but to all such as shall become void after the death of the bishop, though before actual seizure. And because it is a maxim in law, that the church is not full against the king, till induction; therefore, though the bishop hath collated, or hath presented, and the clerk is instituted upon that presentation, yet will not such collation or institution avail the clerk, but the right of presenting devolves to the king.

Ibid. Watf. c. 9.

And it is said, that this privilege which the king hath of presenting by reason of temporalities of a bishoprick being in his hands, shall be extended unto such preferments, to which the bishop of common right might present, though by his composition he hath transferred his power to others. And therefore when the temporalities of the archbishoprick of York are in the king's hands, the king shall present to the deanery of York, although by composition between the archbishop and the chapter there, the chapter are to elect him: and this, because the patronage thereof *de jure* doth belong to the archbishop, and his composition cannot bind the king, who comes in paramount, as supreme patron: for of the whole bishoprick the king is supreme patron, although it be dismembered into divers branches, as deans, and other dignities; and of ancient time all the bishopricks were of the king's gift, but afterwards the king gave leave to the chapter to elect; yet the patronage notwithstanding remains in the king.

Watf. c. 9. 2 R. Ab. 343.

Upon promotion of any person to a bishoprick, the king hath a right to present to such benefices or dignities as the person was possessed of before such promotion; though the advowson belonged to a common person (a). This right of presenting upon promotion

Gibf. Cod. 763. (a) Lord Chief Justice De Grey, speak-

ing of this right, faith, It appears in Bro. Presentment, 61. to be as old as Edw. the 3d's time. It was exercised under H. 3., and 2r. Elis. The law concerning it was doubted in Car. 2d's time, and since, but finally determined in favour of the crown

motion, by the king, as making the avoidance which would not otherwise happen, did spring from the practice of the popes, and is now an uncontested right of the crown; and hath been established not only by long practice, but by many judgments upon full and solemn hearings; and that, whether the churches are new or old, and how often soever this happens successively by promotions to bishopricks from the same benefice or dignity: as was adjudged in the case of *St. Martin's* and *St. James's* (a). Of late, the great question hath been, on supposition of the right, how far it is answered, and the term of the crown satisfied, by the grant of a *commendam* to retain such promotions, or any part of them, together with the bishoprick. Of which question the solution hath been, that by a *commendam* for life, and for the time of continuing in such a bishoprick, the turn of the crown is answered, and in such case the proper patron shall present, upon death or translation; but that the right of the crown shall not be defeated by a *commendam* granted for a term of months or years, certain and limited.

in King William's time, *K. v. Bp. of London*, 4 Mod. 202. This is not a right of patronage in the king; nor is it a right of election, for it ejects nobody: nor an usurpation; for it is a rightful act. But it is a contingent, casual right, arising upon a particular event, the incumbent's becoming a bishop. 2 Bl. Rep. 773. — (a) 4 Mod. 200. 3 Lev. 377. S. C. Lev. Intr. 344. S. C. 1 Show. 413. 44 L. 493. S. C. 1 Ld. Raym. 23. S. C. Show. P. C. 164. S. C. Carth. 313. S. C.

Burn's
E. L. title
Benefice,
12 S. title
Bishop,
292. But
in Woodley
v. Bp. of Exeter, Cro. Jac. 691

But in *Ireland*, the law is, that a man shall not be promoted to a bishoprick there, until he hath resigned all the preferments which he hath in *England*: which preferments being void before the acceptance of the bishoprick, it seemeth, that in such case the king shall lose the presentation.

v. Bp. of Exeter, Cro. Jac. 691 it is holden, that this prerogative right of presenting accrues as well where the incumbent is promoted to an Irish, as an English bishoprick. But, as the report of this case hath been lately considered in other respects as rather apocryphal, it may not be safe to rely upon its authority in this particular.

Greene's
Company v.
Archbishop
of Canterbury,
2 Bl.
Rep. 770.
3 Will. 224.
S. C.

It hath been determined, that where the advowson is in common, so that the patrons are to present by turns, the prerogative presentation doth not pass for the turn of the otherwise rightful patron; for the prerogative right doth not supply, but only suspends or postpones the turn of the patron, and of all the patrons, if more than one, and doth not take away the right of the one, and leave the rest entire; for that would be rank injustice, and this, being the act of law, *nemini facit injuriam*.

Colthard v.
Troward,
2 H. Bl.
324 Judge-
ment affirmed
in H. R.

And as the intervention of the prerogative presentation doth not satisfy or disappoint the turn of the otherwise rightful patron, neither doth it destroy the effect of a prior grant of the next presentation by the owner of the advowson.

3 Tiron Rep. 439. and afterwards in the House of Lords, May 16, 1796. According to the report of the case of Woodley v. Bishop of Exeter, Cro. Jac. 691. and Winch. Rep. 94. it was holden, that the right of the crown in this case defeats the right of a grantee who hath the next avoidance, for his right is only to the next, and the next he cannot have, and therefore shall have none. But this report we have already observed is of very doubtful authority. Lord Hobart, though at that time one of the judges by whom it was determined, takes no notice of it in his Reports. Lord Chief Justice De Grey faith, (2 Bl. Rep. 774.) That case is not clearly settled to be law. And in an anonymous note in the margin of 11 Geo. 2. b. (which is apparently the same case) it is stated, that the court resolved, "that the grantee should have the next avoidance after the prerogative presentation, because that was the act of law, and the prerogative of the king, which excluded him from the first presentation, injures no one." But, admitting

admitting such a determination to have been made, the court may have gone upon the peculiar terms of the devise, which in Winch's Entries, p. 377. are, "*Dedit et legavit cuidam Johanni Bassett, filio suo primo et proximum advocatorem prædictæ ecclesiæ de L. quæ prius et proximi contingeret post mortem ipsius Arbury;*" and which seem expressly to confine the power of presenting to the first turn.

But, if the incumbent of a *donative* is made a bishop, the king shall not present to the donative, because such a promotion doth not make an avoidance by *cessio*, for the incumbent is the creature of the founder, and is not subject to ordinary and episcopal visitation.]

Agreed per cur. 4 Mod. 213.

3. Of his Prerogative in creating Officers.

The king as the fountain of justice hath an undoubted prerogative in creating officers, and all officers are said to derive their authority mediately or immediately from him: those who derive their authority from him are called the officers of the crown, and are created by letters patent; such as the great officers of state, judges, &c., and there needs no greater or stronger evidence of a right in the crown herein, than that the king hath created all such officers time immemorial.

Dyer, 178.
2 Rol. Abr. 152.
4 Co. 32.
2 Inst. 473.
540.
12 Co. 116.
Roll. Rep. 206.
Show. Pas. Ca. 111.

But, though all such officers derive their authority from the crown, from whence the king is termed the universal officer and disposer of justice, yet it hath been held, that he hath not the office in him to execute it himself, but is only to grant or nominate; nor can the king grant any new powers or privileges to any such officers, but they must execute their offices according to the rules established and prescribed them by the law.

Lev. 219.
Co. Lit. 3. 114.
2 Vent 270.
4 Inst. 123.
6 Co. 11, 12.

Neither can the king create any new office inconsistent with our constitution, or prejudicial to the subject.

Moor, 808.
4 Inst. 200.

And on this foundation it was held, that an office created by letters patent for the sole making of all bills, informations, and letters missive in the council of York, was unreasonable and void.

Jon. 231.
Moun. & V. Leister.

So it hath been held, that the king could not grant to any person to hold a court of equity, it being a special trust committed to the king, and not by him to be intrusted to any other except his Chancellor.

Hob. 53.

So, a commission to seize the goods and imprison the bodies of all persons who should be notoriously suspected of felonies or trespasses, without any indictment or legal process against them, was held illegal and void.

4 Aff. 5.
Br. Commission 3.
15. 16.
2 Inst. 54.

So, commissions to assay weights and measures, being of new invention, were condemned by (a) parliament.

4 Inst. 163.
(a) 18 E. 3.
c. 1. 4.

So, when one *Chute* petitioned the king to erect a new office for registering all strangers except merchant strangers, and to grant the said office to the petitioner with or without fees, it was resolved by all the judges, that the erection of such office for the benefit of a private person was against law.

Co. 116.

So, it is held by Lord Coke, that the king could not authorise persons to take care of rivers and the fishery therein, according to the method prescribed by the statute of *Wghm. 2. (13 E. 1. c. 1.)* & 47. before the making of that statute.

2 Inst 478.

[By stat. 22 G. 3. c. 82. if any office of the name, nature, description, or purpose of the offices thereby abolished, shall be established hereafter, the same shall be deemed and taken as a new office.]

Vide Head of Office and Officers.

4. Of his Prerogative in making War and Peace.

Hal. Hist.
P. C. 159.
7 Co. 25.

(a) The *jura gladii*, both military and civil, is one of the *jura majestatis*; and therefore no man can levy war in this kingdom without the king's commission. 3 Inst. 9.—(b) The disputes touching the disposition of the *militia* are now settled, and declared to be the right of the crown, by the statutes of 13 Car. 2. c. 6. and 13 & 14 Car. 2. c. 3.

Hal. Hist. P. C. 130.

The power of making war or peace is *inter jura summi imperii*, and in (a) *England* is lodged (b) singly in the king; though, as my Lord Hale says, it ever succeeds best when done by parliamentary advice.

Hal. Hist.
P. C. 163.

(c) When the courts of justice are open, and the judges and ministers of the same may by law protect men from oppression and violence, and distribute justice to all, it is said

to be time of peace; so, when by invasion, insurrection, and rebellions, &c. the peaceable course of justice is disturbed, then it is said to be time of war; and the trial hereof is by the records and judges of the courts of justice. Co. Lit. 249. (d) Owen, 45. [Cio. Eliz. 142. Freeman. 41.]

A general war, according to my Lord Hale, is of two kinds:

1. *Bellum solemniter denunciatum.* 2. *Bellum non solemniter denunciatum.* The first is, when war is solemnly declared or proclaimed by our king against another prince or state, which is the most formal solemnity of a war now in use. 2dly, When a nation slips suddenly into a war without any solemnity, which happens by granting the letters of *marque*, by a foreign prince invading our coasts, or setting upon the king's navy at sea: and hereupon a real, though not a solemn war, may and hath formerly arisen; and therefore to (c) prove a nation to be at enmity with *England*, or to prove a person to be an *alien enemy*, there is no necessity of shewing any war proclaimed; but it may be averred, and so put upon the trial of the (d) country, whether there was a war or not.

Hal. Hist.
P. C. 159.

(e) The difference between a league and truce is, that a truce is a cessation from war for a certain time, but a league is an absolute striking of peace. 4 Inst. 156. vide Molloy, c. 7, 8. (f) In all leagues the

Peace is of two kinds: 1st, Positive or contracted. 2dly, Such a peace as is only a negation or absence of war. A positive peace is such as ariseth by contracts, capitulations, leagues, or truces between princes or states that have *jura summi imperii*, and is of two kinds. 1. Temporary, which is properly (e) a truce, which is a cessation from war already begun; and then, the term being elapsed, the princes or states are *ipso facto* in the former state of war, unless it be protracted by new capitulations, or be otherwise provided in the instrument or contract of the truce. 2. Perpetual *sine termino* or indefinite, which regularly continues according to the tenor or conditions of the agreement, until some new war be raised between the princes or states upon some emergent injury supposed to be done by the one party or the other; and this is properly called a (f) league *fœdus*, and makes the prince and states *confederati*; and though this may be variously diversified, according to the capitulations, conditions, and qualifications of such leagues, yet they are ordinarily of these kinds.

1st, Leagues offensive and defensive, which oblige the princes not only to a mutual defence, but also to be assisting to each other in their military aggresses upon others, and makes the enemies of one in effect the common enemies of both. 2^{dly}, Defensive but not offensive, obliging each to succour and defend the other in cases of invasion or war by other princes. 3^{dly}, Leagues of simple amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes also liberty of mutual commerce and trade, and safeguard of merchants and traders in either's dominions.

2. A peace, which is only a negation or absence of war, is where no league or articles of peace intervene, nor yet any denunciation of war; as among divers princes in the world who never capitulated one with another, and yet there is no state of war between them; and the general rule is, *ubi bellum non est pax est*.

The king, in consequence of his power in making war and peace, hath a prerogative in the coin and royal mines, in salt-petre and gunpowder; may (a) enter into a man's lands to make fortifications; may lay on embargoes, grant (b) letters of *marque* and reprisal, prels (c) soldiers, sailors, &c.; and though in many instances relating to these matters, the strict letter of the law may be exceeded, yet from the necessity of order, government, and discipline, are they countenanced and allowed; *quod necessitas cogit defendit*.

mission from the king, the admiral, or those that are specially appointed thereunto. Hal. Hist. P. C. 162. Vern. 54. — By the law of the Admiralty, the property of a ship taken upon the high sea without letters of *marque*, vests in the king upon the taking. Carth. 399. — Clause in a charter which empowers the seizing the goods of every person is illegal and void. Show. 137. (c) 6 Co. 27. Hutt. 134. * As to the pressing of sailors, see Foster Rep. The case of Alexander Broadfoot, fo. 154. and 1 Black. Com. 418. and see also Comb. 245.

The king may declare war against one part of the subjects of a prince, and may except the latter part; as was done by King William in his declaration of war with France, where he excepted the French protestants; and of such proclamations all ought to take notice, because the war begins only by the king's proclamation.

5. Of his Prerogative as *Parens Patrie* in taking Care of Infants, Idiots, Lunatics, and Charitable Uses.

The king, as *parens patrie*, hath the protection of all his subjects; and in a particular manner is to take care of all those who by reason of their want of understanding are incapable of taking care of themselves and their affairs. By virtue of this high trust, infants, who by reason of their nonage are under incapacities, are under the protection of the crown; and hence arises allegiance, as a debt of gratitude, which can never be cancelled, though the subject owing it goes out of the kingdom, or swears allegiance to another prince.

This trust lodged in the king, and the jurisdiction exercised herein, originally belonged to the court of Chancery, and now, upon

municipal laws of each country are excepted. 2 Show. 369.

Hal. Hist. P. C. 160.

(a) 1 Roll. Rep. 152. (b) Molloy, 30. 2 Roll. Abr. 175. — No person can take the ship or goods of the adverse party unless he hath a com-

Hal. Hist. P. C. 162. Vern. 54. — Clause in a charter which empowers the seizing the goods of every person is illegal and void. Show. 137. (c) 6 Co. 27.

Ld. Raym. 283. per Treby, C. J.

Vide Head of Infants.

1 P. Wms. 103.

Prerogative.

upon the dissolution of the court of wards, is again devolved on that court. Hence it is every day's practice in that court to determine as to the right of guardianship, to punish abuses in relation to their persons, &c.

If a person appointed guardian is attainted, or otherwise becomes incapable, the trust devolves on the great seal as the general guardian of all infants.

See also, who was appointed guardian to the Duke of Beaufort.

In the like manner and for the same reason it is, that idiots and lunatics, who are incapable of taking care of themselves, are provided for by the king as *pater patrie*.

In the manner in the case of charities, the king *pro bono publico* has an original right to superintend the care thereof; so that abstracted from the Statute 43 Eliz. c. 4. relating to charitable uses, and antecedent to it as well as since, it has been every day's practice to file informations in Chancery in the Attorney-General's name, for the establishment of charities, &c.

6. Of his Prerogative in Pardoning.

This high prerogative is (a) inseparably incident to the crown, and the king is intrusted herewith upon a special confidence, that he will be those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case.

provision is made for a fountain of bounty and grace to his subjects, as he observes them deserving of it; & the king, which he can neither grant or otherwise extinguish; per Holt, Ch. J. 16 Rep. 214 & per Keble. J. As he cannot but have the administration of publick revenge, so he cannot but have a power to remit it by his pardons when he judges it proper. *Idem*.

Vide Title Pardon.

7. Of Dispensations and Non Obstantes.

The power and prerogative of dispensing with laws and granting non obstantes, hath always been looked upon with a jealous eye, and are said to have been first invented in Rome and brought into this kingdom by the pope and clergy.

But, though they have not been favoured in the courts of justice, yet it hath been always held, that the king had a prerogative in certain cases to grant dispensations and non obstantes, which is founded in *plenitudo potestatis*: and upon this reason, that it is impossible for law-makers by human prudence to foresee several particular cases that may happen, wherein a law that is good in general might be mischievous in some particular cases; and therefore and for the publick good the law intrusts the king (who is intrusted with the execution of the law) to judge of such circumstances; and when such particular case happens, to exempt it out of the penalty of the general law.

The prevailing distinction herein hath been, that the king cannot by any previous licence or dispensation make an offence punishable

punishable which is *malum in se*; but that in certain matters, which are only *malum prohibitum*, he may to certain persons and on some special occasions; and this distinction the Ch. J. (a) *Vaughan* admits, being well understood and rightly applied, is the best guide in these matters.

where this learning is fully discussed; and in Lev. 217. Sld. 6, 7. S. C.

On this distinction it was always held, that the king could not dispense with the laws against murder, adultery, stealing, incest, sacrilege, extortion, perjury, trespass, and others of the (b) like kind; and that a pardon for any such like offence that was *malum in se* before it happened was void.

that the king's grant to the Bishop of Salisbury and his successors having the custody of a prison, that they shall be quit of all escapes, &c. having been allowed in *1791*, should be a good discharge from any fine for a negligent escape out of such prison, is doubted of in 2 Hawk. P. C. c. 37. § 23.

But, where a thing lawful in its own nature is made unlawful by act of parliament only, as the carrying bell-metal or beer, &c. out of the realm, importing certain merchandizes in foreign ships, &c., selling wines beyond a certain price, exporting wool to any other place than *Calais*, coining money of a base alloy, and other matters of the like nature; it seems formerly to have been taken for granted, that generally the king might dispense with it as to a particular time or place, or person, or even corporation aggregate, so far as the publick was concerned in it.

Yet, where such dispensation could not but be attended with great inconvenience, as the introducing a monopoly, or frustrating the end for which the law was made, as, the licensing of a particular person to import foreign cards or wines prohibited by parliament, and *a fortiori*, if it tended to suspend the whole statute in general, it was commonly agreed to be void.

Also, wherever an act of parliament gives a particular interest or right of action to the party grieved by the breach of it, as the statutes of mortmain, which give an entry to the next immediate lord for an alienation to a corporation, the statutes against maintenance, forcible entries, carrying distresses out of the hundred, suffering one in execution to escape, &c. which give an action to the party grieved by the offence prohibited; it seems to have been always agreed, that no charter by the king can be of any force to bar the right of the party grounded upon such statute; because it is a settled rule, that the king cannot prejudice the interest of the party.

Also, where a statute is express, that the king's charter against the purport of it, whether with or without a clause of *non obstante*, shall be void; it is said by (c) Sir *Ed. Coke*, that no clause of *non obstante* can dispense with it, unless it tend to restrain some prerogative solely and inseparably incident to the person of the king; as the right of pardoning, or of commanding the service of the subject for the publick weal; which being, as he seems to argue, founded on the law of nature, are so far inseparable from the king, that by a clause of *non obstante* he may dispense with any statute whatsoever which tends to deprive him of them.

(a) In the case of Thomas and Sorrel, Vaugh. 330. to 359.

Vaugh. 334. (b) Hence the resolution in the Year-Book 11 H. 7. pl. 35.

2 Hawk. P. C. ubi supra, and several authorities there cited.

2 Hawk. P. C. ubi supra.

Hawk. P. C. ubi supra. Hob. 214. Hard. 110.

2 Hawk. P. C. ubi supra. (c) 12 Co. 13.

This is an action of debt for 500*l.* founded on a conviction of the defendant for exercising the office of a colonel of a foot regiment, after neglect to take the oath of allegiance and supremacy enjoined to be taken by the statute 25 *Car. 2. c. 2.* by which statute the defendant hath forfeited the sum of 500*l.* to him that sues for the same.

Anthony
Goden v.
Sir Ed.
Hale, Trin.
2 Jac. 2. in
B. R.

The declaration sets forth, that the defendant *Sir Ed. Hale*, the 20th of *Nov. ann. 1 regni* of this king, at *Hackington* in the county of *Kent*, was advanced to be a colonel of a foot regiment in the said county (which the plaintiff avers to be a military office and place of trust under his said Majesty, and by authority from him derived); and that the defendant held and exercised the said office for three months then next following, and to the time of exhibiting the bill of the plaintiff, and did and doth inhabit in the said parish and county, and did not either in the court of Chancery or in this court, in the next term or in the next quarter-sessions of the peace holden for the said county of *Kent* or place where he did reside, or within three months after his admission to the same, take the several oaths of supremacy and allegiance; but did wholly neglect to do the same, and did continue after his neglect to execute the said office, and yet doth execute the same, contrary to the form of the statute in that case made and provided.

The declaration further sets forth, that the said *Sir Ed. Hale* the defendant 29th *March* last, at the assizes held at *Rocheſter* in the county of *Kent* before the *Ld. Ch. J. Jones* and *Mr. J. Withens*, Justices of *oyer and terminer* for the said county, was indicted for the said neglect, and for executing the said office after the said neglect contrary to the form of the said statute; and thereon was in due form of law convicted, as by the record thereof may appear; and the plaintiff entitles himself to the said 500*l.* forfeited by the defendant by the said act on his said conviction, and saith the defendant hath not paid him the same.

To this declaration the defendant pleads in bar, that the king's Majesty that now is, after the defendant's admission to the said office, and within the three months next ensuing, and before the next term or quarter sessions of the peace after the same, and before the exhibiting the bill of the plaintiff in this court, viz. the 9th Day of *January* in the first year of the reign of his present Majesty, his said Majesty by his letters patent under the great seal of *England*, did dispense, pardon, remise, and discharge, to and with the said defendant, of and from taking the said oaths of allegiance and supremacy, and from receiving the sacrament according to the use of the church of *England*, and from subscribing the test mentioned in the act of 25 *Car. 2. (c. 2.)* or mentioned and contained in any other acts of parliament, and of and from all crimes, convictions, penalties, forfeitures, damages, and disabilities incurred or to incur at any time then after for executing the said office, after he should omit, neglect, or refuse to do and perform any of the said matters enjoined to be done by the said act; and further, that his said Majesty by his said letters patent did grant unto the defendant, that he should be enabled to hold the said

said office without taking the said oaths or subscribing the said test, as if the said act had never been made.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

Mr. Nor-
they.

I am counsel with the plaintiff in this case, and am humbly to shew your Lordship and the court the causes of this demurrer.

This action is grounded on the statute made 25 Car. 2. c. 2. which requires, that all and every person or persons, that should be admitted, entered, placed, or taken into any office or offices civil or military, or should receive any pay, salary, fee, or wages by reason of any patent or grant of his then Majesty, or should have command or place of trust from or under his said late Majesty, his heirs or successors, or by his or their authority, or by authority derived from him or them within this realm of *England*, &c., after the first day of *Easter term* 1673, and shall inhabit, be, or reside, when he or they is or are so admitted or placed, within the cities of *London* or *Westminster*, or within thirty miles of the same, shall take the several oaths of supremacy and allegiance in his Majesty's high court of Chancery or in the court of King's Bench in the next term after such his or their admittance or admittances into the office or offices, employment or employments aforesaid; and that all and every such person or persons to be admitted as aforesaid, not having taken the said oaths, shall, at the quarter-sessions of that county or place where he or they shall reside, next after such his admittance or admittances into any of the said respective offices or employments aforesaid, take the said several respective oaths as aforesaid, and shall receive the sacrament of the Lord's Supper, according to the usage of the church of *England*, within three months after his or their admittance into or receiving the said authority and employment, in some publick church on some *Sunday* immediately after divine service or service and sermon, and shall subscribe the test in the said act mentioned at the time when he shall take the said oaths.

And by the said act it is further enacted, that all and every the person and persons aforesaid, that do or shall neglect or refuse to take the said oaths and sacrament in the said courts and places, and at the respective times as aforesaid, shall be *ipso facto* adjudged incapable and disabled in and to all intents and purposes whatsoever to have, occupy, and enjoy the said office or offices, employment or employments, &c., and every such office and place, employment and employments shall be void, and is by the said act adjudged void.

Then comes the clause of forfeiture, by which the plaintiff is entitled to this action, which is, that all and every such person or persons that shall neglect or refuse to take the said oaths, or the sacrament as aforesaid, within the times and in the places aforesaid, and yet after such neglect and refusal shall exercise any of the said offices or employments after the said terms expired wherein he or they ought to have done the same, being thereupon lawfully convicted in or upon any information, presentment, or indictment in any of the king's courts at *Westminster*, or at the assizes, every

every such person and persons shall be disabled from thenceforth to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office within the realm of *England*, &c., and shall forfeit the sum of 500*l.* to be recovered by him or them that shall sue for the same, to be prosecuted by an action of debt, suit, bill, plaint, or information in any of his Majesty's courts at *Westminster*, wherein no essoin, protection, or wager of law shall lie.

In this case, my Lord, I shall lay down and endeavour to maintain these two things :

First, That the plaintiff hath well entitled himself by his declaration to recover the 500*l.* demanded by him against the defendant, according to the said act 25 *Car. 2. c.* of the late king.

Secondly, That the defendant hath not by his plea alleged any matter that can bar the plaintiff from the recovery of the same.

As to the first, I conceive, that by the said act four things are necessarily required before the informer can be entitled to bring an action for the 500*l.*

First, That such person hath been admitted into some office, place, or employment within the description and intention of the said act.

Secondly, That such person after his admission into such office hath neglected or refused to take the said oaths at the times and places by the said act directed.

Thirdly, That such person after such neglect or refusal hath continued to execute said office.

Fourthly, That such person be convicted thereupon in one of his Majesty's courts at *Westminster*, or at the assises, at the suit of the king, by information, presentment, or indictment.

The plaintiff hath shewn all these things in his declaration.

1. It is set forth, that the defendant was admitted to be colonel of a foot regiment, which is expressly averred to be a military office and a place of trust under his present Majesty, and by authority from him derived, according to the words of the said act of parliament.

2. It is expressly shewn, that the defendant did neglect to take the oaths of allegiance and supremacy in the next term in the court of Chancery or this court, or in the next quarter-sessions for the county or place where he did then inhabit, or within three months next after his admission to the same, which are times and places limited and appointed by the said act for the taking of the said oaths.

3. It is expressly averred, that the defendant did execute the said office after the times expired, and his neglect to take the said oaths.

4. Lastly, it is set forth in the declaration, that the defendant was by indictment at the assises in *Kent* before Sir *Tho. Jones* and Mr. Justice *Withens*, Justices of oyer and terminer for the said county of *Kent*, lawfully convicted for executing the said office after

Perrogative:

~~the defendant~~ to take the said oaths, contrary to the form of the
statute. which is a conviction by one of the means, viz. by
indictment, and is one of the courts, viz. at the assizes, in the said
county of Middlesex.

And by reason I conceive are made necessary by the statute,
that if the defendant on the informer to make them all appear
to the court, as to the three first, they must be proved on the in-
formation, indictment or indictment at the king's suit, before
the defendant can be convicted; but when there is a conviction, the
defendant may show the record thereof.

And the defendant hath entered himself to his action, the next
thing to be considered is the matter alleged by the defendant in
the defence.

I am now to consider I shall consider two things.

Whether the defendant shall be now admitted to plead
the statute in bar of this action, and whether he hath not
the statute in bar of the indictment of it in bar to the indict-
ment, and whether he hath been convicted.

Whether the defendant may plead the same now, whether the
statute is now in force to enable the defendant to execute the said
oaths, and whether the said oaths, so that he shall be exempted
from the statute, and whether the said act of parliament for execut-
ing the said oaths, and whether he neglecting to take the oaths.

And now I shall observe to your Lordship the times
when the defendant was before you: the defendant was
before the court of the 20th Nov. anno 1. of this
king, and he was then the said office after his neglect to
take the said oaths, and his negligence and supremacy, is alleged to be the
cause of the said offence of this king; and the conviction for the
said offence was given the 29th of March, anno 2.; and the dis-
pensation was granted to the defendant was granted to him the 9th
of June, anno 2. of this king, which was before the offence and
the conviction, and as to this point the case will be but this:

That the parliament hath enacted, that he who doth neglect to
take the said oaths of allegiance within the certain prefixed time, and
is convicted of the same by indictment, shall forfeit 500 l. to
the king, and be imprisoned for the same; the defend-
ant neglects to take the said oath, having a dispensation of the
king, and that before the time lapsed for taking the said
oaths, and which dispensation (as a case) is admitted to be a good excuse,
and shall be received in bar of any indictment for that neglect.

The defendant is after indicted for that neglect, and pleads not
guilty to the charge; and an action is brought by the plaintiff
against him for the 500 l. on the said conviction, and the defend-
ant pleads the said dispensation in bar. I conceive, with submis-
sion to your Lordship, for the defendant had his election to
take the said dispensation in bar of the indictment, and
he hath taken it; and that was his proper time to make use of
it, and to waive it, and insist on his innocence, and plead not
guilty; and when he pleads not guilty, and does not make use of
the statute for his defence, the law construes it to be a waiv-
ing

ing of it; and he shall at all times after be estopped by his plea and conviction thereon to say, that he did not waive the same.

To make this plain, I humbly submit to your Lordship's consideration, that after the conviction the defendant could never have made use of his dispensation to have staid the judgment on the same, which is the exprefs opinion in the 11 *H. 4. Bro. tit. Chartres de Pardon*, pl. 15. the words of the book are, "He who pleads not guilty cannot plead a pardon afterwards, unless the pardon be of a later date than the time of his plea."

In 3 *Cro. 4 Margaret and Marshall's case*, the difference there taken makes out the reason of it to be what I have before offered. *Marshall* in the reign of *Queen Mary* had committed petit treason; the 10 *Eliz.* there was a general pardon, notwithstanding which she was outlawed for the petit treason after, and she brought a writ of error to reverse the same; and it was there resolved, that she may assign the general pardon for error, because she had no day in court to have pleaded it, but always made default; but that it had been otherwise if she had ever appeared in court, and had not pleaded the same.

In a *scire facias* upon a recognizance, if the defendant appear, and having a release that he may plead, do not plead it, and judgment be given against him, he hath totally lost the benefit of his release, and shall not be relieved in an *audita querela* on the same against the said judgment, for he hath waived the benefit of it himself; but, if judgment had been given against him by default on a *nihil* returned, there, he should be relieved by *audita querela*; for that he never had any time before to have pleaded it: This is agreed, my Lord, in the case cited of *Marshall*, and in *Roll. Abr. 306.* where divers cases to this purpose are collected together.

By this I conceive it is very clear, that as to the king, the defendant by pleading not guilty to the indictment did thereby lose the benefit of his dispensation, and could not help himself by the same against the conviction on the said indictment, either in arrest of judgment, or by error. In the next place, I conceive, that the defendant shall be no more admitted to use the said dispensation against the plaintiff than he could against the king; for on the plaintiff's bringing his action for the 500 *l.* forfeited, the statute vests the benefit of the conviction in him, and creates a privity between the plaintiff and defendant as much as if the plaintiff had been party to the record of the conviction; by the words of the statute this appears very plain, for the words are, *and being thereof convicted shall forfeit the sum of 500 l. to be recovered by him who will sue for the same*; this action I take therefore to be in nature of an execution of that conviction, and therefore the defendant shall not be admitted to plead any matter precedent to the same in bar of this action.

The plaintiff in this action, may, I conceive, be resembled to an administrator *de bonis non*, who by the statute 18 *Car. 2. c. 8.* may sue forth execution on a judgment obtained by an executor or administrator before him; and certainly no man ever thought but that statute put the administrator *de bonis non*, to all intents and purposes,

THAT HE SHOULD NOT INTERFERE WITH A MINISTER ON HIS *offences* ;
WHICH HE DID NOT WHEN THEY WERE BRUGHT INTO THE WORLD ;
AND THAT HE SHOULD NOT EXERCISE, FOR THE KING'S HONOR, BY HIS PREROGATIVE,
A POWER OF REMOVAL WHICH THERE WAS IN MANY CASES ; AND IT
WAS NOT HIS INTEREST TO THE SUBJECT AS WELL AS TO HIMSELF,
AS IN SUCH CASE A POWER OF REMOVAL OF PARLIAMENTS PAID
THEIR OWN REMUNERATION THAT CAN BE, YET THE JUDGMENTS OF
THE PARLIAMENTS ARE THE KING'S AND NATIONAL, AND THEY CANNOT POSSIBLY
REPEAL ALL ACTS THAT MAY HAPPEN ; AND THAT WHICH WAS WELL
JUSTIFIED AND REASONABLE IN THE THEORY, MAY BE FATAL IN THE PRACTICE ;
AND IN SUCH CASES THERE MAY BE, WITHOUT THE AID OF THIS
COMPASSION, THE GREATEST INJUSTICE MANY TIMES DONE BY THE HELP OF
THE KING ; AND THOUGH THE KING HAVE SUCH A PREROGATIVE, YET THAT PREROGATIVE

prerogative is bounded by the law; and with some acts of parliament the king cannot dispense at all to any persons in any cases; with other acts though he may dispense, yet not to all persons nor in all cases.

That the king cannot dispense with some acts of parliament to any person, will appear from 11 H. 7. fol. 11, 12. the king cannot dispense with a law that prohibits an act that is *malum in se*, as the king cannot license a man to kill another, nor do any nuisance to the common highway; and if such licences be granted, they are void.

The king cannot dispense with an act of parliament which is of publick concernment, and in which the people have any interest; for that is so vested in them that the king cannot divest it. The statutes of 13 R. 2. c. 3. 15 R. 2. c. 5. and 2 H. 4. c. 11. being statutes declaring the jurisdiction of the court of the admiral, for that all the subjects of the realm have interest in them, cannot be dispensed with by any *non obstante*; this appears by Coke's *Jurif. of Courts*, fol. 135. Whether the law now dispensed with be not of publick concernment, and the people have not an interest in it, I shall leave to the consideration of the court, on consideration of the statute.

This I only offer to your Lordship, to shew your Lordship, that this great prerogative of the king may be bounded.

I shall confine myself in my further discourse touching the bounding of this great prerogative of the king, purely to the statute now before your Lordship; and I shall lay down this rule, that wherever an act of parliament doth absolutely and directly injoin and prohibit the doing of any action, and doth create a disability, to any purpose to fall on any person on the doing or not doing of such act, (let the concern of such statute be what it will,) the king, with submission I conceive, by reason of the clause of disability, cannot dispense with such law by a *non obstante*, either before the doing or not doing such action enjoined or prohibited or after; although he might have dispensed with the same if such action had been prohibited only *sub modo*, as on a penalty given to the king. This I shall endeavour to make out by authorities; for that clearing the same will, I conceive, determine the question on this statute now before your Lordship; which I shall then come shortly to consider.

By the statute 31. *Eliz. c. 6.* it is enacted, that every admission, institution, and induction, on any simoniacal contract to any ecclesiastical benefice, shall be utterly void; and the person so corruptly taking such benefice, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same. If a person be simoniacally inducted to any benefice, the same by this act immediately becomes void; and the incumbent is so absolutely disabled for ever after to be presented to that church, as that the king himself (to whom the law giveth the title of presentation in that case) cannot present him again to that living; for the act binds the king in that case, and he cannot dispense with the same; and this only by reason of the disability therein.

This,

where the
... and
... been
... against the
... are ex-
... *Mary*

... every person
... for any office
... for any office
... be adjudged
... have and
... to H. 7. an. 1.
... the same being
... and agreed to
... a grant
... a grant from
... to be void;
... to take
... with the said
... 386.

... dispense with an
... any action,
... is done, or
... if this dispens-
... to take the oaths,
... it had been in-
...

... the king may dispense
... or not doing
... to be done is
... to such failure; and I con-
... the reason why the king
... with these persons, is, not be-
... the king cannot controul
... against the ex-
... as much do when he
... to the offence, as when it is
... I shall enlarge on
... the statute now in question.

... any person who hath
... 5 & 6 E. 6. c. 16. to sell the
... the said statute of E. 6.
... although it were before
... such office; and such *non obstante* would
... the said office, and
... to hold such
... who argued for the
... in the case of
... wine-licences, which was in the Ex-
... about ten years since; and so it doth appear by

my Lord *Vaughan's* argument in his *Rep. fol. 354.* which cannot, I humbly conceive, be distinguished from this case now before your Lordship.

Now, my Lord, I shall consider this statute whereon this question arises; and with submission I conceive this dispensation of that statute, though granted before the offence committed, can no more be maintained to be lawful than can the dispensations in the cases before cited on the statutes of the 5 & 6 E. 6. c. 16. of offices, and 31 Eliz. c. 6. of simony; but this shall be ineffectual for enabling the defendant against this act, for the same reasons that those dispensations were useless against the disabilities created by those laws.

For by this statute it is directed and positively enacted, That every person admitted to any office, &c. shall take the oaths of allegiance and supremacy, either in the court of Chancery or in this court, in the next term after his admittance to the same, or at the quarter sessions for the county or place where he shall reside, next after such his admittance; and shall receive the sacrament within three months after his admission to the same.

Then comes the disabling clause, That every person that doth or shall neglect or refuse to take the said oaths and sacrament in the said courts and places, and at the respective times aforesaid shall be *ipso facto* adjudged incapable and disabled in law to all intents and purposes whatsoever, to have, occupy, or enjoy the said office; and every such office shall be void, and is thereby void.

Every man by the common law had a double capacity as to offices.

1. He was capable to take the same.

2. He had a capacity to hold the same for any time whatsoever.

The statute works not at all upon the first capacity, but every person remains notwithstanding as capable of taking as ever; but it quite changes his capacity of holding, and annexes a condition precedent to the same; on performing which condition only he shall be capable; and till that be performed, by judgment of this act he is incapable.

This, I conceive, may properly be called an incapacity; for that he, who is incapable to any one purpose, is as properly said to be a person incapable as if he was disabled to all purposes.

The intent of the statute appears to be the same as if it had been enacted in these words, That no man shall hold an office above three months, unless within the three months he take the oath of allegiance, in which case it would be plain, that a disability to hold beyond three months, would attach on every one who should accept an office so soon as he should accept the same; which could not be removed but by qualifying himself as the act directs.

If the dispensation pledged will enable the defendant to hold the office without qualifying himself by taking the oaths, then may the king enable a man in a point wherein he is disabled by act of

parliament; which is expressly contrary to the reason of the case I before cited; and here it doth appear the disability was attached in the defendant before the dispensation granted; for he was admitted to the office the 28th November, and the dispensation was not granted till January; and therefore, according to what I have offered, it comes too late.

By the statute 7 Jac. c. 6. for taking the oath of allegiance, it is enacted, That every member of the House of Commons, at any parliament or session to be assembled, before he shall be permitted to enter into the said House, shall take the said oath before the persons mentioned in the said statute.

By the opinion of Lord Vaughan, the king cannot dispense with that act; for that every member, so soon as chosen, is *persona inhabilis*, and shall not be permitted to enter the House without the oath taken.

My Lord, by the very dispensation it appears, that the king's counsel, who drew it, were willing to make what provision they could against the disability incurred by the taking the said office of a colonel, which the defendant had not three months when the dispensation was granted; yet he is thereby expressly discharged from all disabilities incurred by the said act; which seems to admit there was a sort of incapacity then on the defendant; to remove which the dispensation cannot be of any avail for the authorities I have before cited.

I shall humbly offer this farther matter to your Lordship's consideration, that this case as to the statute is *prima impressio*; and that this prerogative was never made use of herein since the making of the statute, although many persons at the time of the making of this act stood in need of the aid of it, and for want of which they lost their employments, and the late king the benefit of their services.

I shall in the next place consider the authorities of Sir Ed. Coke in his 12 Rep. 18. which I foresee will be objected to me, and I shall state it, and give such answer to it as occurs to me, and submit the whole matter to your Lordship's consideration.

There my Lord Coke saith, that no act can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*, as a sovereign power to command any of his subjects to serve him for the weal publick; and that this royal power cannot be restrained by any act of parliament; and for that he relies on a case 2 H. 7. fol. 6. which is on the statute 23 H. 6. c. 8. which enacts, that all patents made or to be made of any office of a sheriff, &c., for a term of years, for life or longer, shall be void and of no effect, any clause or parole of *non obstante* put or to be put in such patents to be made notwithstanding; and further, whoever shall take upon him or them to accept or occupy such office of sheriff, by virtue of such grants or patents, shall stand perpetually disabled to be or bear the office of sheriff within any county in England; yet, saith my Lord Coke, there the king by his royal prerogative may command any person to serve him for the weal publick as sheriff of any county

county for years or for life; so he saith it was resolved by all the judges of *England* in the Exchequer-chamber in that case.

This and some other matter of the like nature, which are put together by my Lord *Coke*, are, with submission, the only authorities in the law that seem to give countenance to this dispensation now before your Lordship. I shall very briefly consider, whether that be any authority or not; and if it be, whether it differs from the case now before your Lordship.

To the first, I conceive it is the single opinion of Sir *Ed. Coke*, but he is mistaken in the case on which he relies; for by the book 2 *H.* 7. 6. on which he relies, it appears plainly that there never was any such resolution as he cites, but a sudden opinion given, and at that time the judges declared they would not be bound by what they then said, but advised the king's counsel to consider well the point; and so they said they would; and by *Bro. Abr.* tit. *Pard.* 45. 109. where he rather repeats than abridges the cases, it appears, nothing more was ever done in that matter, but it rested and was never adjudged. The great foundation failing, the superstructure of Lord *Coke* thereon, and his opinion, must needs fall and be rejected as an opinion grounded on a palpable mistake.

But admit that case and the reason of it to be law, that the king cannot be deprived of the power of commanding any of his subjects to serve him, yet I think it differs quite from the case now before your Lordship; and the reason of it can now be no rule in this case, for these reasons.

The statute 23 *H.* 6. c. 8. was an act purely restraining that power the king had of commanding, and was rather a disabling the king than the subject; for it took away the power the king had of granting the office for years, life and inheritance, and by consequence was a total depriving him of the use of some of his subjects at some times; and I may very well allow, that such act of parliament did not, nor can bind the king; but, my Lord, in the act of parliament now in question, the prerogative nor the power of the king is not any manner touched; for the king may grant an office to any person, or may command any person to serve him, as he might have done before this law; and he is in no sort deprived of the use of his subject by any thing in the statute; for this statute is a direction and obligation on the subjects to qualify themselves according to the act, to obey the command the king shall lay on them; and there is nothing in this act that excuses any person from serving the king, when he by his royal command requires his service, but he is at his peril to qualify himself for that service and to do the same; and if he be one incapable, it is by his own voluntary neglect, and he is punishable by law for the same, as every other man is who without any reason refuses to serve the king in what station he is pleased to require his service in.

This, my Lord, will appear plain from the resolution of the case of Sir *John Read*, which was in the Exchequer *Hil.* 27 & 28 *Car.* 2. Sir *John Read* was by the late king made Sheriff of *Hertfordshire*,

fordshire, and Sir *John* was duly sworn into the said office; but after neglecting to take the oaths and receive the sacrament enjoined by the law now before your Lordship, the office became void; whereupon an information was exhibited against Sir *John Read* in the Exchequer, setting forth the statute of 25 *Car. 2. c. 9.*, and that he was appointed and sworn sheriff for that county, and did neglect to qualify himself by taking the oaths according to the said act, whereby the office became void by his voluntary neglect; and the publick justice in the administration thereof in that county, as to the office of sheriff, was obstructed. On this information the said Sir *John Read* was convicted and fined in the said court; for the court there was of opinion that the statute never intended to put it in the power of any man by his own act to discharge himself of that duty he owed the king, but hath positively enacted that every officer shall qualify himself for his duty, the not doing of which is an offence for which he is punishable; so that from hence it is plain there is no resemblance between the sheriff's case and any case on this statute.

There is likewise another difference between the sheriff's case and this case at bar. In the sheriff's case, the dispensation is in the very same patent that the office is granted, and in the same clause, and enables the grantee before the disabilities are in any sort attached on him; but here the office was granted in *November* to the defendant, by which immediately, for the reasons I have before offered, he is disabled by this act; and in *January* after is this dispensation granted, which, for reasons I have before offered, I conceive comes too late.

For these reasons and authorities I conclude therefore, that this dispensation, granted to the defendant, is void in law.

8. Of his Proclamations.

Fortesc. de
Laud. c. 9.
12 Co. 74.
75.
11 Co. 87.
Dalif. 20.
pl. 10.
2 Roll. Abr.
209.
3 Inst. 162.
12 Co. 74.
Hob. 251.

It is plain that the king by his prerogative may in certain cases and special occasions make and issue out proclamations for the prevention of offences, to ratify and confirm an ancient law, or, as some books express it, *quoad terrorem populi*, to admonish them that they keep the laws on pain of his displeasure; and such proclamations being grounded on the laws of the realm are of great force.

It is likewise clear, that the subject is obliged on pain of fine and imprisonment to obey every proclamation legally made; and that though the thing prohibited were an offence before, that yet the proclamation is a circumstance which highly aggravates it; and upon which alone the party disobeying may be punished.

Bro. Procla-
mat. pl. 1.
12 Co. 75.
Crom. jur.
41.

It is clearly agreed, that no (a) private person can make a proclamation of a publick nature except by custom, as is usual in some cities and boroughs; this being a prerogative act with which alone the king is intrusted.

(a) Sir Edmund Knightly, executor of Sir William Spencer, made proclamation in certain market towns, that the creditors should come in by a certain day and prove their debts; he was fined and imprisoned for this, because, as the book says, he did it publicly and without any authority. Bro. Proclamat. pl. 20.

But notwithstanding the king's prerogative herein, it seems clearly agreed, that the king cannot by his proclamation change any part of the common law, statutes, or customs of the realm; nor can he by his proclamation create any offence which was not an offence before; for that these things cannot be done without a (a) legislative power, of which in our constitution the king is but a part.

Dalif. 20.
pl. 10.
12 Co. 75.
12 Co. 87. b.
(a) By the
31 H. 8. c. 8.
(now repeal-
ed) it was
enacted,
That pro-

clamations made by the king and the greater part of his council, should have the force of acts of parliament; but there was a proviso that such proclamation should not cross any statute or laudable custom of the realm. N. Bacon's Hist. 2 Part. fol. 215.

And on this foundation it hath been held, that the king's proclamation prohibiting the importation of wines from *France* upon pain of forfeiture, was against law, and void; there being no war at that time subsisting between the two nations.

2 Inst. 63.

So, where an act was made by which foreigners were licensed to merchandise within *London*; and *Hen. IV.* by proclamation prohibited the execution of it, and ordered that it should be in suspense *usque ad proximum parliamentum*; this was held to be against law.

12 Co. 75.

Upon a conference between some lords of the privy council and the two chief justices (of which the Lord *Coke* was one) and Ch. B. and Baron *Altham*, the questions were, 1st, Whether the king by proclamation might prohibit new buildings in about *London*? 2^{dly}, If the king might prohibit the making of starch of wheat? And the judges were of opinion, that the subject could not be restrained in these particulars by the king's proclamation.

12 Co. 74.

But, notwithstanding the above-mentioned opinion, there are instances of persons who have been sentenced in the Star-chamber upon proclamations against the increase of buildings; and particularly in *Hob.* where a person was fined in the Star-chamber for building without brick, though upon an old foundation; and it is there said, that such buildings had an ill effect from the danger of fire, consumption of timber, and difficulty of feeding, cleansing, and governing the city; and it was said in general, that proclamations were so far just as they were made *pro bono publico*, and for publick utility.

Hob. 251.
Armed's
case.

The king by proclamation may call or dissolve parliaments, may declare war or peace; for these are prerogative acts with which he is intrusted as the executive part of the law: but (b), if there be an actual war between us and a foreign nation, it is not necessary in pleading to shew that such war was proclaimed.

3 Inst. 162.
Hal. Hist.
P. C. 153.
(b) Owen,
45. Rast.
Ent. 605.

The king by proclamation may legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation: he may legitimate base coin or mixt below the standard of sterling (c): he may enhance coin to a higher denomination or value; and may decry money that is current in use and payment (d); and in all these cases a proclamation with a proclamation-writ under the great seal is necessary.

Co. Lit.
207. b.
5 Co. 114. b.
Dav. 21.
Hal. Hist.
P. C. 198.
197.
[(c) This
value, Sir W.
Blackstone

thinks, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. 1 Bl. Com. 278. (d) By stat. 14 G. 3. c. 70. all officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight according to the king's proclamation.]

Comp. In-
cumb. 354.

The king by proclamation may appoint fasts and days of thanksgiving and humiliation; and issue proclamations for preventing and punishing immorality and profaneness; and injoin the reading of the same in churches and chapels.

Dec. 1780.

[The king by proclamation may authorise the lords of the admiralty to grant letters of marque and reprisal, as was done in the commencement of the late war against the *Dutch*.]

Cro. Car.
180. Keley
v. Manning,
& vide Roll.
Rep. 172.

A proclamation must be under the great seal, and if denied is to be tried by the record thereof: but, if a man pleads that he was prevented from doing a thing by proclamation, it seems the better opinion that he need not aver that such proclamation was under the great seal; for alleging that such proclamation was made, it shall be intended to have been duly made.

(E) How the Rules of Law differ with respect to the King and a private Person: And herein,

1. Of what Things incapable from the Dignity of his Person and Office.

(a) Cannot
do any
wrong, Co.
Lit. 19.
Co. 45.

11 Co. 72.
85. Bracton,
l. 3. c. 9.
Stamf. P. C.
102.

Hal. Hist.
P. C. 43, 44.

FROM the dignity of his office and person the law presumes him (a) incapable of doing any wrong*: but, if the king, command an unlawful act to be done, the offence of the instrument, as my Lord *Hale* says, is not thereby indemnified; for, though the king is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law; which, consequently, makes the act itself invalid, if (b) unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.

(b) If two men combat together at barriers in time of peace for trial of skill, and one kill the other, it is homicide; but if it were by the command of the king, not felony. 11 H. 7. 23. a. & vide 1 Inst. 56, 160.

* In his political capacity he is under the happy inability of doing wrong, because acting by his officers, and limited by law. Conf. on Law of Forfeiture, &c. 101.

2 Inst. 187.
2 Hal. Hist.
P. C. 131.

The king cannot arrest in person nor imprison, nor can he command another to imprison; but it must be done by some order, writ, or precept, or process of some of his courts.

— cannot sit in judgment upon any indictment. 2 Hawk. P. C. c. 1. — Cannot be a witness. 2 Hal. Hist. P. C. 282.

Bro. Prerog.
125.
Co. Lit. 3. b.
8 Co. 55.

The king cannot execute any office relating to the administration of justice, although all such offices derive their authority from the crown, and although he hath such offices in him (c) to grant to others.

2 Vent. 270
(c) If lands

with the office of forester be granted to J. S., remainder to the king in fee, this is a good remainder, though the king cannot be an officer to any man, because he may grant it over. 1 H. 7. 31. Bro. Done, pl. 51.

Bro. Feof. to
Uses, 338.
Poph. 72.
Dyer, 383.
H. 3.

The king cannot be seised to an use, because there is no means to compel him to perform it; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king, who is the universal judge of property, and who is equally

equally concerned for the good of all his subjects, ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee.

If one hath the nomination to a church, and another the presentation, and such right of presentation doth accrue to the king, he that hath the nomination shall have (a) all; by reason that it is indecent for the king to do any thing as servant to another.

nominate to the Lord Chancellor, who in the name of the king shall present to the ordinary.
Pop. 158.

Dyer, 48.
(a) But by Dodderidge, J. the nominator shall in such case

The king cannot be tenant, nor can he hold by any services from his subjects; for his possessions are called *sacra patrimonis* and *dominica corona regis*; and on this foundation it hath been adjudged, that where lands, holden of the subject, came to the possession of the king by the statute of 1 E. 6. c. 14. of *chantries*, and the king granted those lands over to another, though there was a saving in the statute to the donor, of the *ancient rents, services, &c.*, that yet the patentee should hold of the king, according to his patent, and not of the ancient lord; and that the saving in the statute, as to the services, was controuled and made void by the common law; so that the patentee was to pay the rent, by which the said lands were before holden, as a rent seck distrainable of common right, to the lord and his heirs, of whom the lands were before holden, but discharged of the services.

Co. Lit. 1.
Dav. 2.
4 Leon. 40.
Dyer, 313.
And. 45.
Stroud's case; & vide 1 Co. 47.
8 Co. 114. b.
Cro. Car. 82.
2 Roll. Rep. 246.
Jon. 234.
Lit. Rep. 43.

The king, in regard to decency and order, cannot suffer a common recovery; for in such recovery he must be either tenant or vouchee; and in both cases the demandant must count against him, and there must be judgment against him, which the law does not suffer; so, he cannot come in as tenant by receipt; but if the party have any warranty he must pray in aid.

Cro. Car. 96. 97.
Pigot, 74. 5.

The king cannot be tenant at will; so that if he takes a lease at will, though he may determine his will, yet the tenant cannot otherwise do it but by surrender.

Ld. Raym. 51.

The king may be appointed an executor; but, as it cannot be presumed that he has sufficient time and leisure to engage in a private concern, the law allows him to nominate such persons as he shall think proper to take upon them the execution of the trust; against whom all persons may bring their actions: also, the king may appoint others to take the accounts of such executors.

4 Inst. 335.
Godolph. Repert. 76.

2. What Things enure to him in his natural, what in his political Capacity.

The king has two capacities, the one natural the other politic; in which last he is considered as a sole corporation, capable of taking in succession, as a bishop or dean. In his natural capacity it is said, that he may purchase lands; to him and his heirs; and that such lands, as also lands descending to him from an ancestor, shall go to his heir, in case he is removed from the royal estate.

But my Lord Coke says, that all the lands and possessions whereof the king is seised *jure corona*, shall *secundum jus corona*, attend upon

Plow. 234.
in the case of Wilton v. Ld. Berkley.

Co. Lit. 15.
b. 7 Co. 10.
12. in Cal.

vin's case. and follow the crown; and therefore, to whomsoever the crown
9 Co. 123. descends, those lands and possessions descend also; and that the
lands and the crown are *concomitantia*.

Co. Lit. 16. If the king purchase lands to him and his heirs, he is seised
a. thereof *in jure corone*; à fortiori, when he purchases lands to him,
his heirs and successors.

Flow. 205. So, if lands in gavelkind descend to the king and his brother,
a. Co. Lit. the king shall take one moiety and his brother the other: but, if
15. b. the king dies, his moiety shall descend to his eldest son, and not
according to the rules of descent in gavelkind; for the king was
seised of his moiety *jure corone*, therefore it shall attend the crown,
and, consequently, go to the eldest son.

7 Mod. 78. The king can have nothing in his natural capacity, unless in
per Holt, right of his duchy, or an estate-tail, by the statute *de donis*, and
Ch. J. duchy lands would now be in the crown if not kept separate
(a) The sta- by (a) act of parliament.

2 H. 4. provides that when the duchy lands come to the king, they shall not be under such government and regula-
tion as the demesnes and possessions belonging to the crown; for the act says, *Quod taliter, & tali modo*
& per tales officarios & ministros gubernentur, ac si ad culmen dignitatis regie assumpti minime fuissent.
Raym. 90.

2 Roll. Abr. If the king has a title to present to a church which is void, and
211. dies before presentment, his successor shall have the presentment,
and not his executor.

2 Roll. Abr. So, if the king be seised of a ward and die, his successor shall
211. have it, and not his executor.

11 Co. 92. The treasure and other valuable chattels are so necessary and
2 Roll. Abr. incident to the crown, that in case the king dies, they shall go
211. with the crown to the successor, and not to the executors.

Co. Lit. 90. So, a lease for years to the king and his successors is good, and
a. 11 Co. shall go accordingly, and not to his executors and administrators.
92. a.

Co. Lit. 18. The ancient jewels of the crown are heir-looms, and shall de-
b. scend to the next successor, and are not devisable by testament;
(b) Cro. but, it hath been said (b), that the king may dispose of them in
Car. 344. his life-time by letters-patent.

14 Raym. If the king be seised in fee of an advowson, and he create the
26. incumbent bishop, he shall present as patron, that being a title
precedent to that of the prerogative.

3. Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.

Co. Lit. 47. The king may reserve rent out of inheritances which are incor-
Flow. 227. poreal, as commons, tithes, fairs, &c., because the king by his pre-
10 Ld. Berk- rogative may distrain in all (c) other the lands of the lessee for such
ley's case. rent; and having such remedy, the law adjudges the reservation
(c) That good.

this must be understood of all such other lands as his tenant has in his actual possession, and not in the possession of his lessee for
life, years, or at will. 2 Inst. 134. 4 Inst. 119. & vide 5 Co. 4. 56. 1 Rol. Abr. 670. 2 Rol.
Abr. 159. Lane, 59.—Whether he may distrain on other lands of the tenant that are under seques-
tration out of Chancery, vide 2 Vern. 714. 1 P. Wms. 306-7.—That this prerogative shall not
extend to the king's grantees. Bro. tit. Prerog. 68.

So, if a rent-charge is granted to the king to be issuing out of the manor of *D.*, the king may distrain in any other the lands of the grantee. So, the king may distrain for a rent-seck, which in the case of a common person is not distrainable by common law.

Bro. Prerog.
77.
3 Leon-124.
5.

The king may reserve rent payable to a stranger, contrary to the rule of law, which makes void such reservation in the case of a common person.

Moor, 162.
Co. Lit. 143.
2 Roll. Abr.
447.
Id. Raym.
36.

But, where the king made a lease of his house belonging to his house-keeper of *Whitehall*, reserving a rent to the house-keeper for the time being, it was held an ill reservation; for though the king may reserve rent to a stranger, yet such a reservation as this is ill, because he cannot reserve rent to an officer who is removeable at the will of the king.

The rule of *possessio fratris* does not hold in the descent of the crown or its possessions, neither is half blood any impediment in such case; for the brother of the half blood shall be preferred to the sister in the enjoyment of the crown, as the most capable person of the two, by the advantages and prerogative of his sex, to discharge the important and weighty business of the crown.

Co. Lit.
15. b.

So, if the king hath issue a son and a daughter by one *venter*, and a son by another *venter*, and purchases lands and dies, and the eldest son enters and dies without issue, the daughter shall not inherit these lands nor any other fee-simple lands of the crown, but the younger brother shall have them together with the crown.

Co. Lit.
15. b.

If lands are given to the king by deed enrolled, without the words (*a*) *successors* or *heirs*, a fee-simple passeth; for he is considered as a corporation that never dies.

Co. Lit. 9.
Plow. 250.
S. P. and
that the add-
Dyer, Ch. J.

ing of successors in grants to the king, was but of late time, and a new device; per Jenk. 209. 271. S. P. (a) So, a grant by the king, without mentioning successors, shall bind the successors. Plow. 176. Yelv. 13.

If the king gives lands to a man and a woman and the heirs of their bodies, and the woman dies without issue, the man shall be tenant in tail *apres* possibility, &c.; but, if the king gives lands to a man with a relation of his in frank-marriage, and the woman dies without issue, the man shall not be tenant *apres* possibility, &c., but his interest in the land ceases upon the death of his wife without issue. This is a privilege of the king's which is not extended to a common person; and the reason of it may be this; the wealth and demesne lands of the crown are not only necessary for the honour and credit, but also for the safety and protection of the nation; and therefore in this particular case it is but reasonable, that if land applied to such particular uses and purposes be granted away, such grant should bind the king no longer than the consideration and cause of the grant continues; and therefore, in the first case, the man may be tenant in tail *apres* possibility, &c., because the services, which were the cause of the gift, are still owing, and to be performed by the tenant to the king; but in the last case, where the woman, who was the cause of the gift, dies without issue,

Co. Lit. 21.
b.

issue, the cause of the gift, which was the provision for the descendants of that marriage, ceases; and, consequently, if the grant continued, the tenant would hold the land free from all services.

Dyer, 1.
pl. 7.
Cro. Jac.
179, 180.

The king may grant a *chose in action*, as an obligation forfeited to him upon an outlawry, &c., and the grantee may sue by action in his own name, or by extent in the king's name, although there are not the usual words in the grant to sue in the king's name.

31 H. 7. 19.
Bro. Prerog.
40.

So, a *chose in action*, as an obligation, may be granted or assigned to the king, and he may bring an action in his own name, though the deed of gift be not enrolled.

Bro. Prerog.
pl. 23.
Jenk. 65.
S.P. though
one of the
obligees

If a man enters into an obligation to two, and one of the obligees assigns to the king, or is outlawed, the king may bring an action in his own name, and shall recover the (a) whole debt to his own use.

might have released the obligation. Lucas Rep. 245. S. P. per Parker, Ch. J. (a) If lands descend to the king and a common person, the king shall have but a moiety; for to take the whole would be a wrong, which the king cannot do by his prerogative. Plow. 247. a.

Bro. Assur.
pl. 6.
Bro. int.
Recovery,
31. tit.
Tail, 41.
Co. Lit. 372.
Plow. 433,
553.
Dyer, 344.
Moor, 344.
Piggot of
Recoveries,
85.

(b) The act
of the party,
as a fine or
common re-
covery, shall
never divest
any estate,
remainder,

Before the statute *de donis*, when the king created a conditional fee, there was no reversion but a possibility; and if the donee had issue and aliened, the king's possibility was barred as well as that of a common person; but after the statute *de donis* had turned that possibility into a reversion, and after common recoveries were allowed to be common conveyances, and to bar remainders and reversions, it became a question, how far a recovery could bar a remainder or reversion vested in the king. And herein the judges determined, that though a recovery suffered by tenant in tail barred the estate-tail; that yet it did not (b) divest any interest the king had in the remainder or reversion, it being unreasonable to strip the king of any part of his revenue upon the consideration of an imaginary recompence; but they allowed that the estate-tail, as to the issue, was barred; for that otherwise the estate-tail in the subject must be perpetuated, which is against the policy of the law.

or reversion out of the king; but by act in law a remainder or reversion may be divested out of the king. — As, if there be tenant in tail, remainder to A. in fee, tenant in tail discontinue in fee, and take back an estate to himself for life, remainder to the king in fee; tenant in tail die; the issue is remitted, and the remainder pulled out of the king, and vests in A. — So, if a recovery be on a good title against tenant in tail, and the king have the remainder by a defeasible title, there, it shall divest the remainder out of the king, and restore and remit the right owners. — But, if a gift be made to A. in tail, remainder to B. in tail, remainder to the king in fee; if in this case A. suffer a common recovery, this bars A. and his issue, and the remainder to B., but not the king's reversion; for that cannot be discontinued or put to a right, or plucked out of him by the act of a third person. Piggot of Recoveries, 86, 87.

2 Joh. 252.

But in the reign of Hen. VIII. an act of parliament was made to invalidate even recoveries against the issue in tail, where the reversion or remainder was in the crown; the intention of which act was, to perpetuate those estates in families which the king himself had given, or for money or other consideration had procured to be given to any subject, as a reward for his services to the crown; that the descendants of that stock might never forsake the interest of

of the crown which had so liberally rewarded their ancestor's oyalty.

And therefore by the 34 & 35 H. 8. c. 20. it is enacted, that if the king give any of his own manors, lands, &c., or cause or procure another in consideration of money or other lands, to give any manors, &c., to any of his subjects or servants in tail, in recompence of their service, remainder to the king in fee-simple or fee-tail, such estates-tail are not to be barred; nor shall any feigned recovery to be had by assent of parties against any tenant or tenants in tail of any lands, &c., whereof the reversion or remainder at the time of such recovery had shall be in the king, bind or conclude the heirs in tail; but after the death of every such tenant in tail, against whom such recovery shall be had, the heirs in tail may enter, hold and enjoy the lands, &c. recovered, according to the form of the gift in tail, the said recovery notwithstanding.

In the construction of this statute, the following opinions have been holden:

That if a reversioner or remainder-man upon an estate-tail grant the reversion or remainder to the king, this is no security to the issue in tail, because the estate-tail was neither of the gift or other provision of the king, and consequently not within the act.

Moor, 195.
Yelv. 149.
2 Co. 15.
Wiffman's case.

So, if a man make a gift in tail, and the crown descend on him, or if the king's ancestor, not being king, make a gift in tail, and the reversion descend on him, the estate-tail may be barred.

2 Co. 15.
Co. Lit.
372.

If a man makes a gift in tail, remainder in fee, he in remainder grants his estate to another for life, remainder to the king in fee, on condition to be void on payment of money; recovery by tenant in tail bars the king's remainder and condition; for the grant was void.

2 Co. 52.
Noy, 232.
Yelv. 149.
Leon. 2.

If a subject by the king's provision or procurement makes a gift in tail, and then grants the reversion to the king for life or years only, in this case the estate-tail, remainders, and reversions may be all barred; for the reversion or remainder in the king, must be in fee or in tail.

Piggot of Recoveries, 88, 89.

If the king grant an estate-tail, reserving the reversion to himself, and after grant the reversion to another, tenant in tail may suffer a recovery, and thereby bar the reversion.

Piggot, 88.

Therefore where Hen. VIII. gave lands to *Michael Stanhope* and his wife and the heirs of their body, in consideration of services, &c. *Michael* died, and his son and heir petitioned the queen to grant the reversion to some persons in fee, to the intent that he might make a lease for ninety-nine years by way of mortgage; and entered into a recognizance to the queen, conditioned that nothing should be done whilst the reversion was out of the crown, prejudicial to the crown; and accordingly the queen conveyed the reversion to the Lord *Burleigh* and Sir *Walter Mildmay*, in fee; then the son made a lease for ninety-nine years, and suffered a recovery; and then the trustees reconvey to the queen; it was resolved, 1st, That the grant of the queen was good. 2^{dly}, That during

Raym. 288.
358.
2 Jon. 251.
Gardner v. Bambridge.

(a) 2. &
wide Hard.
409.

2 Jon. 250-
1. Earl of
Ormond's
case cited to
have been
adjudged by
eleven
judges, 13 Car. 1.

Raym. 260.
286. 319.
350.
2 Jon. 249.
Earl of Der-
by's case.

during the time the reversion was out of the crown, the son was not restrained from aliening within the statute, and so the recovery goed to bind the issues; but a fine or recovery, after the regnant to the queen, would not have been good to bind the issue, as it seems; because that act doth not require that the reversion should continue (a) always in the king, but it sufficeth if it be in him at the time of the fine levied or recovery suffered.

If tenant in tail of the gift of the king, makes a gift in tail, the second donee is not within the statute; for his estate, as far as it could, disaffirms the reversion of the king, though it could not take it out of him; and his possession was injurious to the estate given by the king.

King R. III. by letters patent gave several lands to the Earl of Derby and the heirs male of his body, in consideration of great services to the crown, &c. afterwards by a private act made 4 Jac. 1. several alterations were made in this estate; as that Charles then Earl of Derby, should hold and enjoy them for his life; and after his death, that they should go to James his son and heir apparent, and the heirs male of his body; and so to the second, third, &c. and seventh son of Earl Charles; and then to several others in tail male, who by the limitation of the letters patent would have succeeded to the estate upon failure of issue male of Earl Charles; with power for Earl Charles and the sons successively to make leases for lives or years, and jointures for wives. After Earl Charles's death, his son Earl James levied a fine of these lands and sold them to a stranger; yet upon special verdict in ejectment, brought after his death by his son, it was resolved by all the judges in the Exchequer-chamber, except three, that the fine was no bar; for that the reversion continued in the crown, and that these estates given by 4 Jac. 1. were no new estates, but all within the compass of the first tail created by the letters patent, and only a distribution of the enjoyment of them, and all to the same persons who would be entitled under the letters patent; and the power to make leases was with conformity to the power of tenant in tail; and that to make jointures was in lieu of dower; besides, there was a saving to the king, and all other persons, all such rights, &c. so as the prerogative of the king, by his reversion to restrain the tenant in tail from barring his issue, was saved; and the eighth, ninth, and all other sons inheritable by virtue of the entail let in, though the first, &c. and seventh only were named; and the alterations were only in accidents, not in the substantial parts of the limitations; and so within 34 & 35 H. B. c. 20.

Co. Lit. 372.
Piggot, 91.

If the king in consideration of money, or other consideration by way of provision, procure a subject to settle his lands on one of his servants in tail, for recompence of service, by deed of bargain and sale enrolled, with remainder to the king in fee; and all this appear on record; the tenant in tail cannot bar his issue, being protected by the express words of the statute.

It hath been held; that the latter words of the act, viz. *had done or suffered by or against any such tenant in tail*, must be intended where tenant in tail is party or privy to the act, be it by doing or suffering that which should work the bar, and not by mere permission. As, if tenant in tail of the gift of the king, reversion to the king, be disseised, and disseisor levy a fine, and five years pass, this bars the estate-tail; and so, if a collateral warranty be made by the ancestors of the donee; and the donee assigns the warranty to descend, without any entry made in the life of the ancestor, this binds; because he is not party or privy to any act either done or suffered by or against him.

If the king make a lease reserving rent, with a clause of re-entry for non-payment, the king (a) is not obliged to make any demand previous to his re-entry, but the tenant is obliged to pay the rent for the preservation of his estate; because it is beneath the royal dignity of the crown to attend a subject, to demand the rent; but the law for the support of that dignity obliges every private person to attend the king with the services due to him.

But, if the king, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for non-payment without a previous demand; because the privilege is inseparably annexed to the person of the king for the support of his royal dignity; and therefore shall not be extended to cases where the king is no way concerned.

So, if a prebendary make a lease rendering rent, and if the rent be arrear and be demanded, that it shall be lawful for the prebendary to re-enter; if the reversion in this case come to the king, the king must demand the rent, though he shall be by his prerogative excused from an implied demand; for the implied demand is the act of the law, the other the express agreement of the parties, which the king's prerogative shall not defeat; therefore in the case of the king, if he make a lease reserving rent, with a proviso that if the rent be in arrear for such time (being lawfully demanded, or demanded in due form) that then the lease shall be void; it seems, that not only the patentee of the reversion in this case, but also the king himself, whilst he continues the reversion in his own hands, is obliged to make an actual demand by reason of the express agreement for that purpose.

There can be no occupant of any of the king's possessions; and therefore if the king grants lands to *A.* during the life of *B.* and *A.* dies, living *cestui que vie*, the laws allows no man to gain the possession which is now vacant by the death of *A.* but preserves it for the king; for this reason, that he is presumed to be taken up in the publick affairs of the kingdom, and therefore not at leisure to attend his own private concerns: also, the king's grants proceeding from his own bounty and liberality, none ought to have any benefit from them but those for whom he first designed them; and therefore when he made the grant to *A.* during the life of *B.*, though he intended *A.* should have the benefit of it during the life of *B.*, yet if *A.* dies before *B.* none can make himself a title under

11 Co. 78.
Ahd. 46.
Co. Lit. 373.
Moor, 467.
Cro. Car. 13.
Cro. Eliz.
595.
Yelv. 72.
8 Co. 77.
Sld. 166.

2 H. 7. 8.
Bro. Prerog.
pl. 101.
(a) But this prerogative is not to be extended to the duchy lands.

Moor, 149. 154. 161.

4 Co. 73.
Moor, 404.
Cro. Eliz.
462.
Dyer, 87.
And. 304.

Moor, 210.
Dyer, 87.

Co. Lit. 41.
2 Roll. Abr.
150.

under the grant, because it was made only to *A.*, nor ought any one by way of occupancy to take advantage of a grant made to *A.* for his particular services; because that were to extend the king's bounty further than he designed it, whereas such a grant in the case of a common person ought to be taken most strongly against the grantor, because he parted with his land for the life of *B.* upon a valuable consideration, and therefore is no sufferer if he does not enjoy it during the time for which he granted it away. Also, no man can make himself a title to the king's possessions, without matter of record; and therefore none can claim any of them as occupant, because that is an act in *pais*, and no matter of record.

Co. Lit.
201. b.
Cro. Elis.
462.
Moor, 404.
4 Co. 73.
Dyer, 87.

If the king makes a lease reserving rent, the tenant must pay it without demand, either to his receiver for that purpose, or at the receipt of the Exchequer, as well as if by words of the lease the rent had been made payable at the Exchequer, or into the hands of his receiver; but, if the king grants the reversion, the patentee must demand the rent upon the land, that being the place appointed by law for a common person to demand it on.

Roll. Rep.
169.

If the king make a feoffment on condition, that upon payment by the king of 100 *l.* such a day, the feoffment shall be void; the feoffee must apply to the king at the day; for the king is not obliged to make a tender, as in the case of a common person.

Flow, 491.

The deed of a private person hath a relation only to the time of the delivery, and not to the time of the date; but the king's charter hath relation to the time of date; for being of record, it cannot be averred to have been executed on any time than that on which it bears date.

Vide Comp.
Incumb.
223, 224.
and several
authorities
there cited.
(a) Latch,
254.
2 Roll. Abr.
354.
Dyer, 392.
Gould, 163.

If the king presents to a church, and his clerk is admitted and instituted, yet before induction the king by his prerogative may revoke such presentation; nay the presentment of another is in law a repeal and revocation of such presentment, and that without any notice to the ordinary; but in the case of a common person, by presentation and institution he hath given up his power to the ordinary, and cannot afterwards vary, alter, or revoke his presentation. But some (a) books hold, that after a presentment only he may vary; and this seems to be the right distinction and better opinion at this day.

4. That his Rights shall be preferred to a Subject's where they happen to meet.

Co. Lit. 36. It is an established principle in law, that where the king's right
b. 4 Co. 55. and that of a subject meet at one and the same time, the king's
9 Co. 129. shall be preferred.
Hard. 24.—
In case of concurrent titles between the king and subject, the rule is *deus digniori*. 2 Vent. 252.

3 Leon. 252. Hence it is said, that if there be a lord mesne and tenant, and the tenant pay the rent at the day to the mesne, before noon; and after on the same day, the mesne die, his heir within age, the tenant shall pay it over again to the king.

If a woman marries and hath issue, and lands descend to the wife, and the husband enters, and after the wife is found an idiot by office, the lands shall be seized for the king, according to this maxim, that when the title of the king and a common person begin at one instant, the title of the king shall be preferred. Co. Lit. 30. b.

So, if the woman had been the king's niece, and one had married her without the king's licence, &c., and lands had descended before or after issue, yet the king, upon office found, shall have them. Co. Lit. 30. b. 4 Co. 55.

Baron and feme joint purchasers of a term for years, the husband drowns himself, the lease is forfeited, and wife surviving shall not hold it against the king or his almoner; because the title of the king and a common person coming together, the king's shall be preferred. Dyer, 108. Plow. 260. Dame Hale's case.

5. Of Acts of Parliament which extend to or bind not the King.

Herein a general rule hath been laid down and established, viz. that where an act of parliament is made for the publick good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such act, though not particularly named therein. Plow. 136, 137. in *Ld. Berkley's case*. 11 Co. 68. b. 5 Co. 14. 7 Co. 32.

But, where a statute is general, and thereby (a) any prerogative, right, title, or interest is devested or taken from the king, in such case the king shall not be (b) bound; unless the statute is made by express words to extend to him. 11 Co. 68. (a) And it seems that the usual saving of the king's right, (b) But may

&c. is only *ex abundanti cautela*, and not of absolute necessity. Show. P. C. 179. take advantage of an act of parliament, though not particularly named. 11 Co. 68. b. Leon. 159.

On this foundation and these distinctions it hath been held,

That the statute of *Westm. 2. (13 Ed. 1. stat. 1.) de donis* extends to and binds the king; as, where lands were given to the king and the heirs of his body, it was adjudged, that the king's prerogative had not given him a greater estate than in the case of a common person; and that an alienation by him would be a tort and an injury to the donor, which the king cannot do. Plow. 238. &c. Lord Berkley's case, cited in 11 Co. 72. 5 Co. 14. Co. 44.

So, it hath been adjudged and also held in parliament, that the king is bound though not named, by the (c) 13 *Eliz. c. 10.* which restrains ecclesiastical persons from making leases, &c., this being a general law, and for the publick good. 11 Co. 75. Case of Magdalen College. 5 Co. 15. b. Roll. Rep.

151. (c) The statute 1 *Eliz. c. 19.* which restrains bishops from making estates, &c. hath a proviso that it shall not extend to the king; which, my Lord Coke says, was of absolute necessity; for that otherwise the king would be bound by it. 5 Co. 14. b. — It seems the law was held otherwise on the stat. 13 *Eliz. c. 10.* and therefore where a lease was made to the king by a dean and chapter, and the king had assigned it over, after that the law came to be held, that the king was bound, the assignee had his lease made good to him in Chancery against the statute, because he could not know the law in a matter so dubious. Rol. Abr. 378.

So, the king is bound, though not named, by the statute 32 *H. 8. c. 28.* against discontinuances by husbands of their wives estates, &c., for this being an injury to the wife, it shall extend to the king, whose most immediate concern is to relieve his subjects from any injury or wrong. 2 Inst. 687. Show. Rel. 209.

So,

35 H. 6. 61.
 Plow. 236 b.
 2 Inst. 89.

Plow. 236.
 b.
 2 Inst. 99.

Co. Lit.
 120.

21 Co. 74. b.

So, the king, though not named, is bound by the statute of *Merton*, 20 H. 3. c. 5. made against usury in doubling the rent, in the case of an infant heir who has made default in payment.

So, the king, though not named, is bound by the 10 c. of the statute *Merton*, 20 H. 3. which ordains, that suit to the lord may be done by attorney, &c.

The king is bound by the 31 *Eliz.* c. 6 against simony; being a law made for the advancement of religion.

So, the king, though not named, is bound by the 27 *Eliz.* c. 4 against voluntary conveyances to defraud purchasers; so that a voluntary conveyance to the king is as much void against a subsequent purchaser for a valuable consideration, as in the case of a common person.

2 Inst. 169.
 4 Mod. 207.

Bound by the statute *West.* 1. (3 *Ed.* 1.) c. 5. that none shall disturb elections upon pain of great forfeitures.

2 Inst. 142.
 Show. Rep.
 209.

Bound by the statute of *Marlbridge*, (52 H. 3.) c. 22. that none may distrain his freeholders without the king's writ.

4 Mod. 207.
 Show. Rep.
 208 Crooke's
 case—at the
 end of the
 case it is
 said, that
 there were
 two instances
 in London
 where under
 colour of
 this prero-
 gative the
 king's pre-
 ference was
 preferred;
 but this is
 said to have
 been done by
 Jefferies,
 and never contested.

By an act of parliament 22 *Car.* 2. c. 11. the parishes of *St. Michael, Wood-street*, and *St. Mary, Staining*, in *London*, were united and established as one parish church; and it was provided, that the first presentation should be made by the patron of such of the said churches, the endowments whereof were of the greatest value; the king was patron of *St. Mary, Staining* (of far less value), and a common person patron of *St. Michael, Wood-street*, who presented *Mr. Crooke*; on a caveat entered against the institution, it was determined by civilians, by the advice of lawyers at Doctors-Commons, that this statute though in the affirmative, and without any negative words, extended to, and so far bound the king, as to deprive him of any preference he might have by his prerogative, as in cases where his interest is intermixed with others; and that the act of parliament giving a new estate to the king, and prescribing the manner of enjoyment, the method limited must take place of the king's prerogative.

Blow. 240.
 Hob. 146.
 7 Co. 32.
 Moor, 540.

But, as acts of parliament are to be construed according to the subject-matter, and not to be extended further than the intention of the legislature; hence in variety of cases we find it determined, that general words in an act shall not oust the king of his prerogative.

Lit. § 140.
 Co. Lit. 98.
 Plow. 240.
 11 Co. 68.
 b.

As, on the statute *quia emptores terrarum*, which enacts, *that null shall alien lands in fee to hold of himself*; yet it is held, that the king may give lands in fee to hold in frankalmoigne or other services.

Plow. 240.
 b. 244. a.
 11 Co. 68. b.

So, the 12 c. *Mog. Cha.* which provides, *quod communia placita non sequantur curiam nostram sed teneantur in aliquo certo loco*, does not bind the king; but that he may bring an action of debt or *quare impedit* in *B. R.*

Plow. 240. a.

So, of the statute *West.* 2. (13 *Ed.* 1. stat. 1.) c. 17: which provides, that where divers inheritances by knight's service descended, *quod ille dominus de eorum habuit maritagium de quo antecessor suus prius fuerit feoffat.*

Not bound by the statute of *Marlbridge* (52 H. 3.), c. 9.; but all coparceners, in respect of the lands descended on them, must each of them do service, as before the making of the statute. Flow. 240. b.

Not bound by the statutes of (a) limitation, nor by the statute of *Westm.* 2. (13 Ed. 1. Stat. 1.) c. 5. which makes a plenary for six months a good plea. 11 Co. 68.
Flow. 244.
Comp. Inc.
108.

(a) *Vide* 3 Inst. 188. [Though the crown is not bound by the statute of limitations, yet a grant may be presumed from great length of possession. It was so done in the case of the Corporation of Hull v. Horner, Comp. 102. : not that, in such cases, the court really think a grant has been made, because it is not probable a grant should have existed, without its being upon record; but they presume the fact, for the purpose and from a principle of quieting the possession. *Per* Lord Mansfield, Comp. 215.]

Nor by the statute 27 E. 1. (Stat. 1. c. 4.) which gives the trial by *nisi prius* in the country. 12 Co. 68.

Neither the statute merchant, those concerning the staple, the statute of frauds, nor those relating to bankrupts, extend to, or bind the king. Iren. 203.
Cro. Car.
148. Salk.
162. pl. 1.
Hob. 126.

There are also statutes, which, as my Lord *Hobart* says, were made to put things in an orderly form, and to ease a sovereign of labour, but not to deprive him of power, which cannot be said to bind the king.

As the 27 H. 8. c. 27. which enacts that all grants concerning the court of augmentations should be under the seal of that court; yet grants under the great seal have been held good. Dyer, 50. a;

So, the statute 25 H. 8. c. 21. which directs the manner of granting dispensations, though it says that dispensations shall not otherwise be granted; yet the king's power is not thereby restrained, but that by virtue of his prerogative he may grant them as before. Hob. 146.

So, on the statute 28 H. 8. c. 15. for the trial of piracy by commission, it hath been held, that the trial may be, though the Chancellor does not nominate the commissioners, as that act appoints. Dyer, 215.
Hob. 146.

So, on the statute 9 E. 2. Stat. 2. that the queen may make sheriffs without the judges. Dyer, 303.

So, on 31 H. 6. c. 5. the office of alnage was granted by the queen, without the bill of the treasurer; and held good. Hob. 146.

By a private act of parliament 1 Jam. 2. the parish of St. *James* was taken out of the parish of St. *Martin*, and made an independent parish; and it was provided by the statute, that Dr. *Tenison*, the then vicar of St. *Martin's*, should be the first rector of St. *James's* parish; and that the patronage of the advowson should belong to the Bishop of *London* and the Lord *Fermin*, alternis vicibus; the first rector, after vacation by Dr. *Tenison*, to be presented by the Bishop of *London*, and the next by the Lord *Fermin* and his heirs, and so on. Dr. *Tenison* was promoted to the bishoprick of *Lincoln*, by which the church of St. *James* became void; and it was adjudged, that although it was by the statute expressly appointed, that the Bishop of *London* should present upon the avoidance, yet the statute designed only to direct the methods and turns between the patrons, and not to exclude the king of his prerogative; and although this was a church newly erected, yet the king having the prerogative to present to all churches where the incumbent is promoted, shall have it in this church when it is erected. Show. P. C.
164.
4 Mod. 200.
2 Salk. 549.
pl. 2.
Show. Rep.
413. 441.
493.
3 Lev. 377.
382.
Ld. Raym.
23. S. C.
Lev. Ent.
344.
Comb. 205.
300, 301.
Carth. 313.
2 Salk. 557.
pl. 2.
Holt, 585.
pl. 1. be-
tween the
Queen, and
Bishop of London, and Dr. Birch.

6. That no Laches can be imputed to him ; and therein, of the
Maxim, Nullum Tempus occurrit Regi.

Stamf. Pre-
 rog. 32, 33.
 Plow. 143.
 7 Co. 28.
 Jon. 79.
 Hard 24.
 (a) *Vigilantibus & non dormientibus jura subve-*

From the presumption that the king is daily employed in the weighty and publick affairs of government, it hath become an established rule at common law, that no laches shall be imputed to him, nor is he any way to suffer in his interests, which are certain and permanent ; and this his privilege (a) *quod nullum tempus occurrit regi*, has been confirmed by the statute *de prerogativa regis*.

niant, is a rule for the subject ; but *nullum tempus occurrit regi*, is the king's plea ; for there is no reason that he should suffer by the negligence of his officers, or by their compacts or combinations with the adverse party. Hob. 347.

Lit. § 173.
 Co. Lit.
 118. a.

Hence it was held, that if the king's villein had purchased land, and aliened before entry by the king, yet, upon office found, the king might have entered, *quia nullum tempus occurrit regi* ; though it was otherwise in the case of a common person.

Co. Lit. 294.

So, in a writ of right of advowson brought by the king, the tenant shall not tender the *di mark*, because *nullum tempus occurrit regi* ; and therefore the king shall allege, that he or his progenitor was seised without shewing any time.

Co. Lit.
 90. b.

So, an action of account lay at common law against the executors or administrators of the king's debtor or receiver ; for being supposed busied and employed in the weighty affairs of the kingdom, it was not thought reasonable that he should suffer in his treasure by an omission occasioned perhaps by such his attendance.

Co. Lit.
 41. b.

For this reason it is that there can be no occupant against the king ; so that if the king grants lands to *A.* for the life of *B.*, and *B.* dies, no man by his entry can gain himself a title against the king ; though it was otherwise in the case of a common person.

Co. Lit. 57.

So, there can be no tenant at sufferance against the king ; but he who holdeth over is an intruder, because no laches can be imputed to the king for not entering.

Bro. tit. Dis-
 seisin (4).
 Hob. 322.
 Roll. Abr.
 659.

Therefore, if the king be seised in fee of the manor of *B.*, and a stranger erect a shop in a vacant plot of it, and take the profit of it without paying any rent to the king ; and after the king grant over the manor in fee, and the stranger continue in the shop and occupy it as before, this is no disseisin ; for the first entry of the stranger was no disseisin, but an intrusion on the king's possession ; for that the king's title appearing on record, the entry in *pari*, which is not an act of equal notoriety, will not divest it out of him : if then the king is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it ; and, consequently, cannot be said to be disseised by the stranger who has made no entry on him after the king's conveyance, but only continued the old interest which he had before the grant ; and so remains an intruder still, and liable to an action of trespass or ejectment for it.

A person cannot be indicted on the statutes against forcible entries for entering into the king's possessions, because he cannot be disseised:

Co. 69.
10 Co. 112.
Dalt. Juſt.
303.
Plow. 243. 4.
2 Leon. 31.

A descent cast is no plea against the king, nor does it take away his right of entry.

2 Inst. 168.
Plow. 243.

If the king's goods become wreck, the lord of the manor cannot take them, but the king may claim them after the year and the day; for this reason, that he is supposed employed in the publick affairs, and therefore no lapse of time shall injure him.

For this reason the lord of the manor cannot take the king's beasts, as strays; as also that this privilege of waifs and strays is derived from the crown, and cannot be supposed to extend farther than a liberty to take the goods and cattle of a common person.

49 E. 3. 4.
Kitchen, 82.

If a grant be made to the king of the next avoidance of a living, and a stranger upon the death of the then incumbent present, and his presentee continue in six months, and die, yet the king may present another, *quia nullum tempus occurrit regi*. So, if a grant had been made to the king of all such presentments as should happen within twenty years, and in the twenty years there happened ten presentments which are filled up by a stranger, yet the king shall present to them over again.

Plow. 243.
2.

If the king be patron of a church, and he omit to present within six months, the ordinaty cannot present for the lapse, but is only to sequester the profits, and serve the cure till the king thinks proper to present; but if in this case the ordinary collate his clerk, and afterwards the king present, the clerk so collated cannot be turned out without a *quare impedit*.

Bro. title
Presentment
(24) Comp.
Incumb.
118.

If the king presents to a church, and his clerk is admitted and instituted, yet the king may before induction repeal and revoke his presentation; and it is held in this case, that the presenting another is a repeal in law, without any other notice to the ordinary (a).

7 E. 4. 32.
Dyer, 200.
327. 360.
(a) But to
free the se-
cond pre-
sentation of
express men-

all suspicion of being obtained by fraud in deceit of the king, it is proper that it should make mention of the first presentation. Gibf. 795. Watt. c. 20.]

So, where a title by lapse comes to the king, if the king doth present, and his presentee is instituted, yet the king may revoke his presentation, and so null the institution at any time before his clerk is inducted; or, if his clerk be instituted upon such title, and die before his induction, the king may present another, his turn not being served by the institution only of his clerk.

Leon. 156.
Wright v.
Bishop of
Norwich.

But, though the king may remove the patron's or stranger's clerk that comes in upon his lapse, yet, if such clerk happens to (b) die incumbent of the church before the king doth present, the king hath lost the advantage of the lapse, and shall not present afterwards, or remove the patron's second presentee, because the king is to have but one turn, and that the next; and if the law should be otherwise, the king, by suffering divers usurpations upon his lapse, might even disinherit the very patron; and the rule *nullum tempus occurrit regi*, is not to take place where the king is limited to a time certain.

7 Co. 28.
Owen, 2.
And. 148.
Cro. Elis.
44. Cro.
Jac. 53.
216.
Hetley, 125.
Bull. 28.
Moor, 269.
Fitag. 30.

becomes void by resignation or deprivation, unless such resignation were by fraud or covin.

(b) Or, if
the church
Cro. Jac. 216.
Owen,

Queen, 39. 4 Leon. Cafe 351^o. — By stat. 9 G. 3. c. 16. (which is called the *Natum tempus ab* and was brought into parliament by Sir Geo. Saville) the king shall not sue, &c. any person, &c. for any lands, &c. (except liberties and franchises), or any title which has not first accrued within six years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *in super* of record, and the subject shall quietly enjoy against the king, and all claiming under him, by patent, &c. — This extends not to estates in reversion, or remainder, or limited estates. — These lands shall be held on the usual tenures, &c. — Usual fee-farm rents confirmed. — Putting in charge, standing *in super*, &c.: good only when on verdict, demurrer, or hearing, the lands, &c. have been given, adjudged, or decreed to the king. [And prescription is now pleadable against the crown, even in the case of franchises and offices; for by stat. 32 Geo. 3. c. 58. six years' possession of a corporate office gives the corporator a prescriptive title upon an information in the nature of a *quo warranto*, exhibited by the attorney-general or other officer on the behalf of the crown, by virtue of any royal prerogative, or otherwise. Neither is it competent to the crown to question any derivative title, where the person from whom it is derived was in exercise *de facto* of the office or franchise, in virtue of which he communicated the title for a like period of six years.]

7. Of his Prerogative in his Suits and Proceedings in Courts of Justice.

Theb. Dig.
1. 1. c. 3.
3 Inst. 136.
2 Roll. Abr.
373.

[The king, though the chief and head of the kingdom, may redress any injuries he may receive from his subjects by such usual common law actions as are consistent with the royal prerogative and dignity. He may too sue in Chancery for a matter in equity.]

2 Lev. 82.

A declaration for the king ought regularly to be in the name of his attorney-general; though where it was in the name of the king himself, *viz. coram domino rege venit dominus rex*, it was, upon demurrer for this cause, adjudged good.

3 Bl. Com.
238.

But the more effectual means of asserting the rights of the crown, and redressing its injuries, are those which are obtained by the prerogative modes of process. Such is that by inquisition or inquest of office: which is an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ sent to them for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number; being either twelve, or less, or more.

Stamf. Pr.
55. b.

Stamford lays it down, that in all cases where a subject shall not have possession, in deed or in law, without entry, the king will not be entitled without office found, or other matter of record.

Ibid.

As, if the king's tenant aliens in mortmain, or without licence, the king's title must be found by office.

Sembl. Lev.
2 R. Cro.
Car. 173.
Sir W. Jon. 78. 217.

So, if the king claims upon a forfeiture, or (b) a condition broken.

(b) **Sav. 70. 2 Ro. 215.**

Stamf. ubi
supra

So, if the king claims the lands of an idiot, lunatick, &c., the person ought to be found an idiot, &c. by office.

Ibid.

So, if he claims the year, day, and waste, of a felon attainted, or the temporalities of a bishop for a contempt.

Sav. 8.

So, if he claims a freehold or inheritance as forfeited for a contempt.

Attorney-General v.
Wheeden,
Park, 267.

So, if he claims as forfeited to the crown, *choses en action*, which belonged to an alien enemy. And in such case, a peace before the inquisition taken, discharges the forfeiture.

These

These inquests of office were devised by law, as an authentick means to give the king his right by solemn matter of record; without which he in general can neither take, nor part from any thing. For it is part of the liberties of *England*, and greatly for the safety of the subject; that the king may not enter upon, nor seize any man's possessions, upon bare surmises without the intervention of a jury. And although a defendant is now permitted to traverse these inquests (a), and therefore they are not conclusive evidence, yet, as the legislature has directed (b), that inquisitions shall be taken publicly and in an open place, and has empowered every one to give evidence openly before the inquest, the court will (c), in some cases, order reasonable notice to be given of the issuing of such commission.

Where an estate is given to an alien, or in trust for an alien, though such estate doth not actually vest in the king, until an office is found, yet he hath before office found such a right to it, as will entitle him to the assistance of a court of equity to enforce a discovery of the fact of alienage.

If the office be found against the king, a *melius inquirendum*, or farther inquiry under the former commission, may be awarded. But in good discretion no *melius inquirendum* shall be awarded in such case, without sight of some record, or other pregnant matter for the king, to shew the former was mistaken. And by pregnant matter for the king, is meant matter pregnant with evidence of the king's right.

part of the crown, and is given, because the crown cannot traverse, as the subject can.

But, if the *melius inquirendum* be found against the king, he is thereby precluded from having another *melius inquirendum*; for if this were allowed, it would lead to infinity, for by the same reason that he might have a second, he might have them without end. However, if the first writ of *melius inquirendum* were repugnant in itself, if it did not give authority to find such an office as was found, as, where the writ was to inquire, whether at the time of the death of a person who died in the reign of *Queen Elizabeth*, the manor of O. was holden of the lord the king that now is, another writ of *melius inquirendum* may be awarded.

If the king's title be found to lands and tenements, the king shall be in possession by the office only without seizure, if the possession be vacant, or if the title be found to a local office, or of which continual profit may be taken.

But, if the king's title be found by office to an incorporeal inheritance, (as, an advowson, &c.) the king shall not be in possession before seizure; for if the king, after office, presents, the defendant in a *quare impedit* may traverse the king's title without traversing the office.

And in all cases where a common person is put to his action, there, upon an office found, the king is put to his *scire facias*; for an office entitles the king to an action only, and not to an entry. But, where a common person may enter or seize, there, an office without a *scire facias* shall suffice for the king.

3 Bl. Com.
259.
(a) St. 2 &
3 E. 6. c. 8.
(b) Stat.
34 E. 3.
c. 13.
36 E. 3.
c. 13.
23 H. 6.
c. 16. 1 H. 8.
c. 8. 3 H. 8.
c. 2.
(c) The
King v.
Daly, 1 Ves.
269.

Attorney-
General v.
Dupleffis,
Park. 144.

Stoughter's
case, 3 Co.
168. Knight
ex parte
Dupleffis,
2 Ves. 555.
The *melius
inquirendum*
is grantable
only on the

3 Atk. 6.

Stoughter's
case, *ubi
supra*.

Stamf. Pr.
53. 54.
9 Co. 95. b.
4 Co. 58. a.

9 Co. 95. b.

9 Co. 26. b.
Stamf. Pr.
55. a.

Stamf. Pf.

54. b.

Id. 56. a.

Id. 54. a.

4 Co. 58.

Sav. 7.

3 Co. 95. b.

Sav. 8.

9 Vent.

970.

9 Bl. Com.

267.

If the king do not seize within a year and a day after office found, he ought to have a *scire facias* before seizure.

But no office is necessary, if the king's title appears by other matter of record.

So, if a possession in law be cast upon the king, no office is necessary, but the king may seize without it. As, if the king has a title by descent in remainder or reverter; for the freehold is cast upon him by law. So, if he is entitled by escheat; or is entitled to the temporalities of a bishop in the time of vacation.

So, where the king ought to have chattels or profits of lands for a contempt, he may seize without office; as, upon an outlawry the goods of a prior alien. So, in the case of simony the king shall present without office. So, he shall nominate to an office void by *β. 5 & 6 Ed. 6. c. 16.*

And by *β. 33 H. 8. c. 20.* in case of attainder for high treason, the king shall have the forfeiture instantly, without any inquisition of office.

Another prerogative process is an information, filed in the Exchequer by the Attorney-General. This is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It differs from an information filed in the court of King's Bench, in that *this* is instituted to redress a private wrong, by which the property of the crown is affected, *that* is calculated to punish some publick wrong, or heinous misdemeanour in the defendant.

The most usual informations are those of *intrusion* and *debt*: *intrusion*, for any trespass committed on the lands of the crown, as, by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and *debt*, upon any contract for monies due to the king, or for any forfeiture due to the crown upon the breach of a penal statute.

There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king. As antiently in the case of treasure-trove, wrecks, waifs, and estrays, seized by the king's officer for his use. Upon such seizure an information was filed in the Exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown. And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs, and excise, the same process was adopted in order to secure such forfeited goods for the publick use, though the offender himself had escaped the hand of justice.

An information of *intrusion* is in the nature of a trespass *quare clausum fregit*. It may be general therefore, that the king was seised of certain lands, without describing the particular species or quantity. So, on the other hand, it is sufficient for the defendant to plead only so much as shews that he has title to the possession: as, where the defendant shewed, that she had a jointure of a third part, without answering to the residue; for by that she had the possession of the whole in common with the king. Sav. 48. Seimb. Mo. 370. 376.

At common law, upon an information for *intrusion*, the king by his prerogative might put the defendant upon shewing his title specially. And, if he pleaded *not guilty*, he should be immediately put out of his possession: for that, regularly, the king's title appeareth of record, and therefore the defendant may take knowledge thereof, and the rather, for that in every information of *intrusion* it is specified of whose possessions the lands, &c. were. Dy. 238. b. 4 Inst. 116. Not guilty pleaded. Sav. 63.

If the defendant shews an insufficient title in form, the attorney-general may demur: but if the attorney-general in such case do not demur, but join issue on a fact alleged, which is found against him, he shall not afterwards take advantage of the defect. Dy. 238. b.

By *st. 21 Jac. 1. c. 14.* if the king, or those claiming under him, or those under whose title the king claims, have not been in possession, or received the profits within twenty years, the defendant may plead the general issue, and shall not be ousted of his possession, till the title be found or adjudged for the king.

If the plea allege several facts, the king by his prerogative may traverse them all, though a common person ought to traverse but one. Sav. 19.

So, if the plea allege a title, which avoids the possession in the king supposed by the information, the king needs not maintain the information, but may traverse the title alleged by the plea. Sav. 61.

And it is sufficient, if the king, by his replication, traverses so much of the title as encounters the information, without answering the whole title alleged by the defendant: as, if to an information for intrusion in the moiety of a manor, the defendant says, *A.* was seised of the whole, and died seised, by which there was a descent to the defendant; it is sufficient to traverse, *absque hoc*, that he died seised of such moiety. *Ibid.*

After judgment in an information for *intrusion*, execution shall be sometimes by injunction; or it may be by *amoveas manum*: and thereupon every party to the information, or claiming under him, shall be removed from the possession. But a stranger to the information shall not be debarred of his entry; for no judgment of seisin is given, nor does an *habere facias seisinam* go. Sav. 35. Hard. 460. 462.

As the king is the fountain of justice, and all courts of justice derive their authority from him, hence he is supposed to be always present in court; and therefore it hath become an established principle of law, that the king cannot be nonsuit in any action or information in which he is sole plaintiff. Co. Lit. 139. B. Non suit (68). Sav. 56.

Co. Lit.

739.

2 Roll. Rep.

53. 1:6.

But it seems that any informer *qui tang*, or plaintiff in a popular action, may be nonsuit, and thereby wholly determine the suit, as well in respect of the king as of himself*.

Co. Lit.

739.

Sid. 420.

Salk. 21.

Alfo the king's attorney-general may enter a *nolle prosequi*, which has the effect of a nonsuit to any information or action brought by the king only.

pl. 11.

like point,

where it is said by the Ch. J. that the crown, notwithstanding a *nolle prosequi*, may award new process upon the same indictment.

Venn. 33.

The King

v. Bampton.

In an information for extortion, issue was joined, and the day the jury were returned, the king sent a writing under his sign manual to Sir Thomas Fanshawe clerk of the crown, to enter a cesser of prosecution; and Palmer, attorney-general, affirmed, that the king may stay proceedings; yet notwithstanding the court proceeded to swear the jury, and said they were not to delay for the great or little seal; whereupon the attorney entered a *nolle prosequi*.

Ld. Raym.

721.

(a) That en-

No prosecutor upon an (a) indictment can enter a *nolle prosequi*, without leave of the attorney-general.

tering *nolle prosequis* upon indictments, began in Charles 2d's time. 6 Mod. 262. per Holt, Ch. J.

4 Inst. 17.

Plow. 243.

Roll. Rep.

290.

It is a rule of the common law, that the king by his prerogative may sue in what court he pleases; and therefore may bring a writ of right or a *quare impedit* in the court of King's Bench.

[And in an information upon a statute, the king's prerogative to lay it in any county cannot be taken away without express negative words in the statute. 4 Inst. 172. Cro. Car. 525. 2 Str. 749. Parker, 182.]

Vent. 17.

The King

v. Webb.

In an action for embezzling the king's goods, which was laid in the declaration to be in London, it was moved for the king, that the county might be changed; and the court held, the king might choose his county, and might waive that which he had seemed to have elected before, as he may waive his demurrer and join issue.

Hil. 6 G. 2.

in B.R. Rex

v. Hailam,

&c.

If a person be guilty of two capital offences, the king may elect which of them to try him on first; and accordingly, where two persons murdered the post-boy in Lincolnshire, and afterwards committed a robbery in Wilts, for which they were taken and in custody in Wilts; the attorney-general moved for a *habeas corpus* to the sheriff of Wilts, to deliver them to the sheriff of Lincoln, and another to the sheriff of Lincoln to receive them; which was granted; the court allowing the crown had such election.

Lamb v.

Gunman,

Parker, 143.

[Where the king's revenue is concerned in the event of a cause, it shall be removed from any other court where the action is brought, into the office of pleas of the Exchequer.

Thus, in an action between the Duke of Cleveland's bailiff and some other persons of the town of Rye, upon a demand of prisage of wine, an issue was joined upon this question, whether the town of Rye was entitled by charter to be exempted from this claim of prisage? The king had a reversionary interest in this prisage, because it was granted to the Duke of Cleveland in tail; and in respect of this interest it was holden, that the king had a right to desire that the cause might be removed into the Exchequer; and the cause was accordingly removed.

Again,

Again, an action was brought against a Mr. Pennington, who was the collector at Bristol, for money had and received by him, and it appeared that the action was brought for money received by him on account of the duties on glass, whereupon the court of Exchequer removed it, and ordered it to be tried in the Exchequer, and not in any other court; the question being, whether Mr. Pennington was entitled to retain that money so received as duties on glass, or not?

Jan. 29;
1754.
Anst. 214.

So, an action brought by Mr. Baring against Buslin, one of the principal officers in the port of London, in order to get back monies which had been charged to him for duties upon some goods which he thought he was not liable to pay, was removed into the court of Exchequer.

An. 1777.
Ibid.

So, in an earlier period, in the year 1702, two actions were removed. One was an action of trespass, the other of trover: one was for entering a ship and seizing goods for non-payment of duties, and the other was trover for the ship itself. Both these actions were removed; and the minute only says, "there being an information for the duties." Now an information for the duties is nothing more than the king's action of debt; and therefore there was nothing properly of prerogative in that, except merely the form of suing by information, instead of the common action of debt: but the ground of removal must have been, that a part of the question in those actions would be, whether the duties were payable or no. If the duties were payable, then it might follow, that the party might have a right to enter the ship and look for the goods, and might have a right to stop the ship and the goods till the duties were paid. If no duties were payable, this justification failed.

Ibid.

Per Eyre,
C. B.

An action of trespass for taking goods by colour of a warrant to levy a penalty of 100*l.* forfeited by the plaintiff, he having been convicted on an information before the commissioners of excise, for not making due entries of teas sold by him, was removed into the court of Exchequer, for that the action proposed to draw into question elsewhere that debt or forfeiture, wherein the king had an interest, a moiety thereof, as soon as it was fixed and vested by judgment, becoming a regular debt to the crown.

Cawthorne
v. Campbell,
Anst. 205.

Again, an ejectment was brought in 1710, in the court of King's Bench; and it was, as to part of it at least, for lands which were part of the queen's estate. There was an application to the court of Exchequer to stay the proceedings, and the parties were heard upon it. The attorney-general attended, and after the hearing, it was put off for a day or two; at length the entry is, that an injunction issued *pro domina regina*. So that the action was not removed, but, simply an injunction went to stay proceedings. And the reason was, if the action had been removed, the question could not have been tried, even in the office of Pleas, because the queen's title cannot be tried in an ejectment. The queen was in possession; her hands must be removed by some other course of proceeding than an ejectment; and therefore it

Anst. 215.

was fruitless to think of removing it, and it remained under an injunction. It may be said, that it might be as well left to the Queen's Bench to determine that the queen's lands could not be recovered in ejectment. To be sure they might, if the prerogative of the queen had not been, that the queen had a right to prevent that question from being discussed there.

Vaugh. 65.
R. 13.
E. 4. 8. 2.
2 Ro. 41. The king may amend his declaration in the same term, but not in another term.

The king may waive his replication in another term, when the defendant is ready to rejoin.

Cro. Car. And in an information he may waive his demurrer to the defendant's plea, and reply to issue.
347.
Vaugh. 65.
Hardr. 455. pl. 322. 2.

Cro. Car. A defendant cannot waive his plea, and plead the general issue without the consent of the attorney-general.
347.

Stamf. 65. b. But, after issue joined, the king may, in the same term, waive the issue and demur, or take another issue.
Vaugh. 65.
Hardr. 459.
pl. 322. 2. 13 E. 4. 8. 2.

Semb. But, if the king joins issue upon his title he cannot afterwards
Vaugh. 64. waive it, to traverse the title of the defendant.
1 Mod. 276.
R. 13. E. 4. 8. 2.

Vaugh. 62. Where the king's title appears to be no more than a bare suggestion, the king can, no more than a common person, (and for the same reasons,) forsake his own title, and endeavour only the destroying of the defendant's title; for the weakening of the defendant's title without more, can no more make a good title to the king, than it can to a common person.

Rex v. Where a defendant pleads a title against the crown, and the
Musters, attorney-general will not reply or demur in a reasonable time, the
Parker, 50. court will order judgment to be entered for the defendant, unless the attorney-general, upon being attended, will either enter a *nolle prosequi*, or proceed.

Rex v. If upon a *scire facias* out of the petty-bag office to repeal letters
Hare, patent, one defendant pleads to issue, and as to the other de-
1 Str. 266. murrer is joined, the king may bring on either the trial or the demurrer first, as he pleases.

Sav. 2. In the Exchequer, no *nisi prius* shall be granted where the king is a party, unless the attorney-general consents to it.

Cro. Car. So, the trial shall be at *nisi prius*, and not in bank, if the king
348. requires it, though it be upon an indictment removed by *certiorari*.

Cro. Car. If a title appears upon record for the king, the court *ex officio*
590. shall adjudge it for him.

Semb. Hardr. If the attorney-general confesses the plea of the party, and
770. thereupon he is discharged, where the plea is no bar in law, the king shall not be bound; for though a confession by the attorney-general in a matter of fact binds the king, yet it is not so in a matter of law.

It seems questionable, whether, after a *disfringas* and a jury re- Lake's case, turned upon it, the attorney-general can at his pleasure stay 4 Leon. 32. trial.

He cannot waive the issue after verdict.

The king cannot be sued by his subjects by writ, for he cannot Theil. Dig. issue a command to himself; though it is said in some books (a), 1. 4. c. 1. that before the time of *Edw. I.* the king might be sued as a com- (a) 22 E. 3. mon person, the form being, "*Præcipe Henrico Regi Angliæ.*" 3 b. pl. 25. 24 E. 3. 55 b. pl. 40.

43 E. 3. 22. Sed vide Stamford. Pr. Reg. 42.

Neither can any one vouch the king, for that is in nature H. 9 H. 6. of an action. So, if a fine is to be levied by the king of lands, 32 & 4 Theil. it must be by render, and not by writ of covenant. Dig. l. 4. c. 2. § 2. Cro. Car. 96-7.

The common law methods of obtaining redress or restitution 3 Bl. Com. 256. from the crown of either real or personal property, are, 1. By *peti- Though Sir W. Blackstone calls the Mon-* tion de droit, or petition of right. 2. By *monfrans de droit*, mani- frans de festation or plea of right; both of which may be preferred or pro- secuted either in the Chancery or Exchequer.

droit a common law remedy, yet Stamford's opinion is expressly, that the *monfrans de droit* was given by 36 E. 3. and did not lie at common law, and in Anderson's report of the Sadlers' case (1 And. 181.) it is affirmed by the court, that the *traverse* and *monfrans de droit* are both given by that statute. And of the same opinion is the Lord Keeper Sommers in his argument in the Banker's case. 11 St. Tr. 154.— It is said, that at this day a *monfrans de droit* lies only in the Chancery or Exchequer, except in a special case, as in Lady Broughton's case, where the *monfrans de droit* was brought in B. R. because the record of the conviction and seizure were there. Skin. 610.—A suit by petition may be to the king in parliament, or, according to Comyns (Dig. tit. Prerogative, D. 80.), in any other court. If it be in parliament, it may be established by act of parliament, or pursued as in other cases. Stamford. Pr. 72. b.

There is also a remedy given by statute 2 E. 6. c. 8. and that is by way of *traverse* to the king's title.

At common law, when the king was seised of any estate of 4 Co. 55. a. inheritance or freehold by any matter of record, were his title by matter of record judicial, as, attainder; ministerial, as, by office; or by conveyance of record, as, by fine, deed enrolled, &c.; or by matter in fact, and found by office of record on oath, as by alienation in mortmain, purchase by alien born, &c., he who had right was put to his petition of right in nature of a real action to be restored to his freehold and inheritance.

And this method of proceeding by petition is proper, where the Stamford. Pr. king seizes the goods or lands of a subject without due order of 72. a. b. law, or enters into the lands of another without title or office found.

So, if he does not pay an annuity granted by him, or issuing out Lord Som- of lands in his hands; or does not pay a debt, wages, &c. mers's Ar- gument, 11 St. Tr. 154. 5.

So, if the king be entitled by a record not traversable, as, by a Stamford. Pr. recovery in the king's court, by assent, without title; or by an 74. a. erroneous judgment; for error shall not be allowed without a petition.

And in all cases where the entry would be tolled, if the land Stamford. Pr. were in the hands of a common person; or, where the party 74. b. Pr. Holt, 608. controverts the king's title, the proceeding is by petition.

And

Stamf. Pr.
94. a.
Br. tit. Pe-
tition, pl. 35,
36. Lane,
32.

And where a traverse or *monstrans de droit* does not lie, suit ought to be to the king by petition: as, if the king be entitled by double matter of record. But, if *A.* be attainted in *B. R.* and it be found by inquisition in the Exchequer, that he was seised of the manor of *D.* this will not be in judgment of law a double matter of record; so as to force the owner of the land to his petition, the record of the attainder not being in the same court with the inquisition.

Sir W. Jon.
78.

Where an estate is forfeited by attainder, &c. none can sue by petition before office found, for till office, the estate is not vested in the king.

Finch's L.
256.

The party must be careful to state truly in the petition the whole title of the king, else the petition will abate. For upon an issue in the petition found against the king, he shall be concluded for ever to claim by any of the points contained in the petition.

Lord Som-
mers's Arg.
11 St. Tr.
349.

The manner of answering petitions, it should seem, was formerly very various: which variety did sometimes arise from the conclusion of the party's petition, sometimes from the nature of the thing; and sometimes from favour to the party; and according as the indorsement was, the party was sent into the Chancery, or the other courts. If the indorsement is general, *soit droit fait al partie*, which is now the usual indorsement, the petition must be delivered to the chancellor of *England*, and then a commission (*a*) issues to inquire of the truth of the suggestion; and that being found, so that there is a record for him, thus warranted, he is let in to interplead with the king: but, if the indorsement is special, then the proceeding is to be according to the indorsement in any other court. The case *Mish. 10 H. 4. 4.* is full as to this matter. The king recovers in a *quare impedit* by default against one who was never summoned, the party cannot have a writ of *deceit* without a petition. If then, says the book, he conclude his petition generally, *que le roy lui face droit*, and the answer be general, it must go into the Chancery, that the right may be inquired of by commission; and upon the inquest found, an original writ must go directed to the justices to examine the *deceit*; otherwise the justices, before whom the suit was, cannot meddle: but, if he conclude his petition especially, *that it may please his highness to command his justices to proceed to the examination*, and the indorsement be accordingly, *that will give the justices a jurisdiction.*

Finch. tit.
Traverse,
pl. 51.
Br. tit. Peti-
tion, pl. 34.
Menville's
case.
Moor, 639.
Stamf. Pr.
93. b.

But, where no office is found to entitle the king, the party may pursue a petition without an inquisition for him.

After a commission whereon a title is found for the party, before he can interplead with the king, there ought to be a writ to inquire of the king's title; and this, in all cases, where land is in the king's hands, or granted to another: and in this last case, there should be a *scire facias* also against the patentee.

Menville's
case,
Moor, 639.
The writs of

Where a petition disaffirms the king's possession, there ought to be four writs of search directed to the treasurer and chamberlains of the Exchequer: but, writs of search are not necessary,

where

where the petition affirms the king's possession : as, upon a petition of right of dower.

of the Attorney-General, that there are in the Treasury several records, charters, deeds, muniments, &c. touching the king's right to the estate in question. *Rast. Entr. 462. a.*

search issue upon the suggestion

Where the right of the party, as well as the right of the crown, appeared upon the same record, or the right of the party appeared by another record of as high a nature as that upon which the right of the crown appeared, the party was entitled by the common law to have a *monstrans de droit*. Thus, if a conveyance be to the king, upon condition to be void, if a fine be levied, or a recognizance given, or other matter performed, which must be upon record; he who has made the conveyance, levied the fine, given the recognizance, &c. may have a *monstrans de droit* by the common law; for the recognizance appears by a record as high as the conveyance. So he may, though the performance of the condition be not upon record, if it be afterwards found by office.

4 Co. 55. a. b.

So, if the title of the party be not found by the same or another record, whereupon he sues to the king by petition, and an inquisition is granted upon the petition finding his right, he afterwards may have a *monstrans de droit* by the common law.

4 Co. 57. b.

But, if the title of the party did not appear by the same record, which found a title for the king, or by a record of as high a nature, he could not have a *monstrans de droit* by the common law, but was forced to sue by petition. And this, though it appeared by the return of the sheriff, mayor, &c. to a *diem clausit extremum*, or other writ; for the return, though filed of record, is not so high as an office found *per sacramentum proborum hominum*.

4 Co. 55. b.

But by stat. 36 E. 3. c. 13. where lands are seized by inquest of office before the escheator, and any man will make claim to them, the escheator shall send the inquest, within a month, into the Chancery, and a writ shall be delivered to him to certify the cause of seizure; and then the claimant shall be heard to traverse the office, and shew his right. And therefore, where an office is found, which is traversable by that statute, the party may have a *monstrans de droit*; and this, though he be not put out of possession by the office, or, though the king be entitled by matter in pais found by record; as, by alienation in mortmain, &c.

4 Co. 53. a.

So, if the king be entitled by office, or matter of record, which is traversable, but, being true, cannot be traversed, the party may have a *monstrans de droit*.

Stamf. Py. 71. a.

But, where the king was entitled by double matter of record, the party could not have a *monstrans de droit* till it was given by the statute of 2 E. 3. c. 8.

The *monstrans de droit* recites the inquisition found for the king, and then shews the right of the party, which it offers to verify, and concludes with praying judgment, and an *amoveas manum*, and restitution of the land and tenements, and of the profits from the time of taking the inquisition.

Co. Entr. 402.

Co. Entr.
404. 406. b.
Finch's L.
460. 2 InR.
695.
Finch's L.
459. The
monstrans ma-
nus is the
end of every
suit, where
a man
comes to
interplead
with the king;
for without that
judgment, the
land will still
remain in the
king's possession.
Keln.
258. 2.

If the Attorney-General confesses the title of the party, or, if he replies, and afterwards confesses, or, if it be found for the party after verdict, or upon demurrer, the judgment is *quod manus domini regis amoveantur*, and that the party be restored to the possession of the premises, with the appurtenances, together with the mesne profits from the time of the caption of the inquisition not answered to the crown, *salvo jure domini regis*; which last clause is always added to judgments against the king, and is expressly required by *stat. 2 & 3 E. 6. c. 8.* And by this judgment the king is instantly out of possession.

2 Salk. 442.

But the party cannot have judgment in a *monstrans de droit*, though the king have no title, unless he can shew a title in himself.

Ibid.
If the party
suing the
monstrans de
droit may be
non-suited,
the whole of
this pro-

ceeding is quite anomalous. It is said, that the party who sues a *monstrans de droit* is a plaintiff, and may be nonsuit, 4 H. 6. 11. and if he fails in his own title, he is gone as effectually as if he were nonsuit, and no judgment need be given for the crown; and accordingly in *The Queen v. Mason*, the judgment was, *quod nil copiat per billam suam de monstratione predicta.*

For the party certainly appears upon the record in the character of a defendant: he shews his right in the form of a plea; the Attorney-General replies; and the other party when he takes the issue *ponit se super patriam*, as on the other hand the Attorney-General in that case *petit quod inquiretur per patriam*. And Lord Sommers in his argument, 11 St. Tr. 154. says, "I take it to be generally true, that in all cases where the subject is in nature of a plaintiff, to recover any thing from the king, his only remedy, at common law, is to sue by petition to the person of the king. I say, when the subject comes as a plaintiff. For, when upon a title found for the king by office, the subject comes in to traverse the king's title, or to shew his own right, he comes in in the nature of a defendant; and is admitted to interplead in that case with the king in defence of his title, which otherwise would be defeated by finding the office." And in another part he says expressly, "In this sort of proceeding (*viz. a monstrans de droit*) the subject is in the nature of a defendant, and comes in and pleads to a title found for the king." And note farther, that the case referred to in the Year-book (4 H. 6. 11.) is of a traverse to an inquisition. Now it has been expressly determined in the King v. Roberts, 2 Str. 1208. that the traverser of an inquisition for the king is properly to be considered as a defendant, who opposes the title found for the crown, without setting up any title in himself, as he might do in a petition of right. And indeed it would be absurd, say the court, to construe the liberty of traversing, to give a power of delaying the crown; which must be, if the party is considered as having the common right of a plaintiff. The court therefore held in that case, that the record was well made up and carried down for trial by the prosecutor of the commission.

Co. Entr.
405.

The proceedings upon a *monstrans de droit* are had in the Petty-bag office in the court of Chancery, and are not enrolled as in other courts, but remain upon files in that office.

4 Co. 56. a.
Stamf. Pr.
60. b.
23 E. 4. 8. a.

At common law, where the king was entitled by office, though untruly found, the party could not have a traverse to the office, nor could he avoid it without petition.

4 Co. 55. a.
56. a.

Nor, where the king was entitled by any matter of record, judicial or ministerial, conveyance of record, or matter of fact found by office of record, notwithstanding the office concerned only a chattel real.

4 Co. 56. b.

But, where the office did not give a seisin or possession to the king, but only entitled him to an action for the recovery of the land,

and, in such action the party might traverse the office by the common law. As, if an office finds, that the king's tenant has ceased for two years, or done waste, or made a feoffment by collusion, &c. whereby the king is entitled only to his action of *cire facias* against his tenant, in which the tenant may traverse he *ceffer*, waste, collusion, &c.

So, by the common law, an office or inquisition for goods and chattels personal might be traversed. As, if *A.* be attainted of reason, or felony, or outlawed in debt, trespass, &c. and an inquisition find, that he had such goods at the time of the felony or outlawry, a stranger, who has the property, may traverse it.

So, offices of instruction only were traversable by the common law, as, all offices under the Exchequer seal.

Offices, one of *intituling*, and another of *instruction*. The office of *intituling* was always by inquisition found, by commission under the broad seal, for the king could not take but by matter of record: and his was a part of the liberty of England, that the king's officers might not enter upon other men's possessions, till the jury had found the king's title; therefore where the king's title appeared on record, his officers might enter without any office found; as, where the lands are held of the crown, and the tenant dies without heirs, the officers of the king may enter, because the tenure whereby the king's title appears, is upon record; so, by the common law, where lands belong to no body, the king's officers may enter, because by the law the land is in the crown; for the law entitles the king, where the property is in no man: but if any body else were in possession, the lands cannot be devised without matter of record. But notwithstanding where the king is entitled by matter of record there is no need of an office to entitle him; yet, there were always offices of *instruction* found, (that is to say,) the escheator was bound, *virtute officii*, to hold an inquest, *by way of instruction*, and to return the same into the Exchequer: and this is by 34 E. 3. c. 13. as likewise 10 H. 6. c. 7.; and by that last statute such offices are to be returned either into the Chancery or Exchequer, within one month after the taking of the same, under the penalty of 40 l.; and by 1 H. 8. c. 8. the escheators were to sit in open places, and the sheriffs were to return jurors, and the inquisition was to be taken by indenture, whereof one part was to remain with the foreman of the jury, and the other part was to be returned into the Chancery or Exchequer, within one month; and from the Chancery it was to be transcribed into the Exchequer. The reason why it was returned into Chancery, was, because that was a court that was always open, since the Chancellour was always an itinerant with the prince. The office of *instruction* might either be taken by the escheator, *virtute officii*, or it might be taken by writ from the court of Chancery, and both were equally offices of *instruction*: but by 33 H. 8. c. 22. the escheator was not to sit *virtute officii*, where the lands were 5 l. per annum or above, on pain of 5 l., which statute was made, to hinder escheators from seizing lands by virtue of their office, without a writ directed out of the Chancery or Exchequer: and it seems, that the office to entitle the crown must be by writ out of Chancery. But, if the freehold was cast upon the crown, though the escheator could not seize, *virtute officii*, after the statute; yet he might have a writ of seizure from the Exchequer, and thereby take an office of *instruction*; because such lands, being in the king without office, were within the survey of the court of Exchequer.—These offices of *instruction* settled the annual value of the lands, and by that value the escheators accounted; unless the court, upon putting them up to auction, found any person that would give more for the lands, and then they let them by lease under the Exchequer seal. Gbb. Exchq. 109.

Stamf. Pr. 60. a.
13 E. 4. 8. a.
4 E. 4. 24. a.

Sav. 130.
There were two sorts of

By stat. 34 E. 3. c. 14. where lands or tenements were seized into the king's hands by office of the escheator, on account of alienation without licence, or the tenant *in capite* dying, and leaving his heir within age, it was to be returned into Chancery; and if the tenant would traverse the office so taken by the king's commands, and say, that the lands were not seizable, he was to be received so to do, and process was to be sent into the King's Bench to try it according to law.

But this act extended only to offices found *virtute brevis*, or 4 Co. 57. a. *commissionis*; for the words are (taken by the king's command) so that an office taken *virtute officii*, was out of the act.

It also extended only to the two cases above-mentioned of alienation without licence and ward.

And farther, it extended only to a traverse, and not to a *monstrans de droit*, by which although on the traverse, the issue was found for the party, yet the judges could not proceed to judgment without a writ *de procedendo ad judicium*.

To remedy these inconveniences the statute of 36 E. 3. c. 13. was made, by which it is provided, that if land be seized by an office before the escheator, returned into Chancery, any one, who challenges the land seized, shall be heard without delay to traverse the office, or otherwise to shew his right, and from thence sent before the king to make a final discussion without attending other commandment.

4 Co. 57. b.
Sumf. Pr.
61. 2.

This last statute allows a traverse to all offices found before the escheator, or before commissioners.

And by stat. 8 H. 6. c. 16. it is extended to all aggrieved by the inquest, though not put out of possession by the escheator.

But, notwithstanding these statutes, persons were still liable to be precluded of their rights, by the untrue finding of offices. As, for instance, persons holding terms for years, or by copy of court roll, were often put out of their possession by reason of inquisitions, or offices found before escheators, commissioners, and others, entitling the king to the wardship or custody of lands, or upon attainders for treason, felony, or otherwise, and this, because such terms for years, and interests in copyhold were not found: after which they had no remedy, during the king's possession either by traverse or *monstrans de droit*, because such interests were only chattels in customary hold, and not freehold. In like manner persons having any rent, common, office, fee, or other profit *apprendre*, if such interest were not found in the office entitling the king, they had no remedy by traverse, or other speedy means, without great and excessive charges, during the king's right therein. To redress these hardships on the subject, it is declared by stat. 2 & 3 E. 6. c. 8. that all persons in the above cases shall enjoy their rights and interests, the same as if no office or inquisition had been found, or as they might if their interest had been regularly found at the same time in such inquisition or office. Remedy was given where a person was found, untruly heir of the king's tenant, and the like. And where a person is untruly found lunatick, idiot, or dead, and in some other cases, it is enacted, that the party grieved shall have a traverse, and proceed to trial therein; and have like advantages as in other cases of traverse upon untrue inquisitions and offices. The same of untrue finding, where a person is attainted of treason, felony, or *præmunire*, the party grieved may have a traverse or *monstrans de droit*, without being driven to a petition of right. And in all traverses taken upon this act, it is directed, that the person pursuing his traverse shall sue out a writ of *scire facias*, one or more, as the case shall require, against such person as shall have an interest either by the king or by his patent,

tre,

tee, in like manner as upon traverses and petitions in other cases, with like pleas to the defendants in the *scire facias*.

If a term for years is found and sold on an inquisition on an outlawry, a mortgagee not in possession shall be allowed to plead to the inquisition.

Rex v.
Blunt,
Bunb. 104.

Upon outlawry, inquisition thereon returned, *Jevari* issued, and money levied, he who has a statute-merchant, and is in possession of the land, may, on motion, have time to plead to the outlawry and inquisition; and, on giving security, have the money in the sheriff's hands repaid to him.

Rex v.
Toller,
Id. 122.

Where on an inquisition a man was found possessed of a term *jure uxoris*, and after his death it was sold on a *venditioni exponas*, the widow was permitted to plead to the inquisition, though she had defended an ejectment brought by the purchaser, and filed a bill in Chancery.

Watts v.
Robinsons
Id. 220.

If a man traverses an inquisition, the usual course of the court is to take security to the value of two years' profits of the land, because in that time it is intended the right of the crown and party will be determined.

Per Baron
Montague,
Id. 25.

To an inquisition on an extent on an outlawry, the defendant as terretenant, may plead, that the party outlawed is dead, without setting forth a special title; for, upon affidavit of the fact, the attorney-general usually allows the plea, there being after the party's death no title subsisting in the crown.

Rex v.
Barnfield,
Id. 102.

Where by office, or statute without office, a particular estate is vested in the king, he in reversion or remainder dependant upon that estate may, upon the determination of it, enter upon the king without traverse, or *amoveas manum*.

Linch v.
Coote,
2 Salk. 469.

So, if it be found by inquisition that a person outlawed in a personal action was seized of lands, which *B.* claims, and the escheator take the profits by this false office; *B.* may disturb him without a traverse.]

Stamf. Pr.
67.

(F) Of the King's Grants and Letters Patent : And herein,

1. What Things the King may grant ; and therein,

1. Of Grants arising from his Prerogative of Power, and which are inseparably annexed to the Crown.

FROM the great trust and confidence reposed in the king, and the high authority with which he is invested, the law hath inseparably annexed to the crown a power of granting and disposing of divers rights and privileges, which cannot be granted or established by any less authority. Of these there are some that have no existence till created, such as franchises, liberties, fairs, markets, hundreds,

Bro. Pat. 162.
2 Roll. Abr.
287.
9 Co. 25. 87.
Co. Lit.
199.
Godb. 254.
Jenk. 79.
307.

case.
Moor, 474.
Palm. 78.
And. 87.
Mod. 232.

may grant; and between these and liberties and franchises, which have no existence till created, a distinction hath been established, viz. That if the first of these, and the possessions to which they are appendant or annexed, come to the crown, they sink in the crown, and the king is seised of them again *jure corona*; but, if the possessions, to which liberties or franchises, such as fairs, markets, &c. are appendant, come to the crown, yet these last are not extinct, but continue to exist according to their first establishment.

Cro. Elis.
463.
Heigham v.
Best.

If the king grants to *J. S.* felons' goods, or waifs and strays within his manor, *J. S.* shall have them in the lands of the freeholders; for they are liberties due to the king, which he may grant, and are not charges to the subject; for the king hath this right in every man's land, and therefore may grant it to another.

Yelv. 19.
Will. Rep.
690.

The forfeiture of goods and chattels in an outlawry in a personal action belongs to the king, which the king may, and usually does grant to the person who is at the expence of suing out the outlawry; yet this is but *ex gratia regis*, and not *debito justitiæ*.

Ld. Raym.
213, 214.

All fines for offences *de jure* belong to the king, because it is his correction, and the publick revenge is in his hands; but the king may grant them to others.

5 Mod. 46.
Comb. 270.
Skin. 601.
pl. 11. The
Banker's
case. 11 St.
Tr. 136.

It was agreed in the Banker's case, that King *Car. II.* having the revenue of excise vested in him, his heirs and successors, by act of parliament, might grant or charge the same or any part thereof; and that, accordingly, the letters patent and grant of 25,000*l.* *per ann.* out of the hereditary revenue of excise, for the payment of interest to Sir *Robert Vinor* and others, of whom the king had borrowed large sums of money, till such time as the principal debt should be discharged, were good and valid in law, and bound the king's successors; although it was objected, that this revenue was granted by act of parliament; that it arose out of the purses of the people, and that it was given in lieu of wards, liveries, purveyances, &c. which were inheritances unalienable. But to these it was answered and resolved, that being given in fee, though by act of parliament, it must have the same incidents as other inheritances in fee have, one of which is to be alienable at pleasure; and as to its being granted in lieu of inheritances which were unalienable, that was held not to be material, as those inheritances were extinct, and so could not affect inheritances of another nature newly given: besides, those inheritances of wards, liveries, &c. were in effect alienable, for they might have been released or discharged.

[It should seem, that before the Revolution there was properly no publick revenue, but that all the revenues both ordinary and extraordinary were the king's only, and wholly disposable at his pleasure. Upon the introduction of the funding system at the Revolution, appropriations became necessary, and therefore a certain portion only of the revenues hath been since that period subject to the immediate disposition of the crown, for the support of its honour and dignity. This, in the late reigns, consisted of an annuity granted by parliament, and the hereditary revenues of the crown, that is, the produce of certain branches of the excise, the

post-

post-office, the duty on wine licences, the revenues of the remaining crown lands, the profits arising from courts of justice, and in King William's reign, the 4 1-half *per cent.* duties arising from Barbadoes and the *Leeward Islands*. But his present Majesty having; soon after his accession, signified his consent, that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the publick; and having graciously accepted the limited sum of 800,000 *l. per annum* for the support of his civil list; the hereditary and other revenues were carried into and made a part of the aggregate fund; and the aggregate fund was charged with the payment of the whole annuity to the crown of 800,000 *l.* which being found insufficient, was increased in 1777 to 900,000 *l. per annum*.

The power of the crown with respect to grants out of the civil list was till lately wholly unlimited, that part of it, called the pension list, being totally discretionary in its amount. This occasioned great disorders in the administration of the civil list, and by exhausting too great a part of the revenues, disappointed the just claims of those who had liens upon them, and reduced the crown to the painful necessity of making application to parliament to supply the deficiencies. His present Majesty having therefore been graciously pleased to express to his parliament his desire to discharge the debt on his civil list, without any new burden upon the publick, and to introduce a better order and economy in the civil list establishment, it was proposed to reduce the pension list, both in its gross quantity, and in its larger individual proportions, to a certainty. It is therefore enacted by stat. 22 G. 3. c. 82. § 17. that "for the better regulation of the granting of pensions," (that is, of pensions chargeable upon the civil list, for this act affects only to regulate and reform the civil list establishment,) "and the prevention of abuse or excess therein, no pension exceeding the sum of three hundred pounds a-year shall be granted to or for the use of any one person; and that the whole amount of the pensions granted in any one year, shall not exceed six hundred pounds; a list of which, together with the names of the persons to whom the same are granted, shall be laid before parliament in twenty days after the beginning of each session, until the whole pension list shall be reduced to ninety thousand pounds; which sum it shall not be lawful to exceed by more than five thousand pounds in the whole of all the grants: nor shall any pension, to be granted after the said reduction, to or for the use of any one person, exceed the sum of one thousand two hundred pounds yearly, except to his Majesty's Royal family, or on an address of either house of parliament."

And by § 18. reciting that "it had been usual that persons who have served the crown in foreign courts, had, after the expiration of their service, at his Majesty's pleasure, received such proportion of their former appointments, as to his Majesty hath seemed expedient, it is enacted, That nothing in this act contained relative to pensions shall be construed to extend to

“ such allowance, either in present or in future, provided that
 “ the said persons do not severally enjoy some place or other pro-
 “ fit from the crown, to the amount of the pension usually allowed
 “ in such cases; provided that the list of the said pensions
 “ shall be laid, in the manner before mentioned, before parlia-
 “ ment.”

By § 19. reciting that “ much confusion and expence had arisen
 “ from having pensions paid at various places, and by various
 “ persons; and that a custom had prevailed of granting pensions
 “ on a private list during his Majesty’s pleasure, upon a supposi-
 “ tion that in some cases it may not be expedient for the publick
 “ good to divulge the names of the persons in the said list, or that
 “ it may be disagreeable to the persons receiving such payments
 “ to have it known that their distresses are so relieved, or for sav-
 “ ing the expence of fees and taxes on small pensions; by means
 “ of which usage, secret and dangerous corruption may hereafter
 “ be practised.” Reciting further, that “ it is no disparagement
 “ for any persons to be relieved by the royal bounty in their dis-
 “ tress, or for their desert, but, on the contrary, it is honour-
 “ able, on just cause, to be thought worthy of reward, it is en-
 “ acted, That no pension whatever, on the civil establishment,
 “ shall thereafter be paid but at the Exchequer, and in the same
 “ manner as those pensions which were then paid and entered at
 “ the Exchequer, under the head, title, and description of *Pensions*,
 “ and with the name of the person to whom, or in trust for whom,
 “ the said pension is granted; and that those which are transferred
 “ thither by this act shall be subject to no taxes or fees whatever, ex-
 “ cept the taxes and fees to which before this act they were sub-
 “ ject; any statute, law, or usage to the contrary notwithstanding:
 “ Nor shall any pension hereafter to be granted be charged at the
 “ Exchequer with further or other fees than were heretofore paid
 “ on pensions to the paymaster of the pensions.” It is, however,
 by § 21. permitted to the high treasurer, or first commissioner
 of the treasury for the time being, to return into the Exchequer
 any pension or annuity, without the name of the person to whom
 it is made payable, on his taking an oath, that according to the
 best of his knowledge, belief, and information, the pension or an-
 nuity so returned without a name by him into the Exchequer, is
 not, directly or indirectly, for the benefit, use, or behoof of any
 member of the House of Commons, or, so far as he is concerned,
 applicable, directly or indirectly, to the purpose of supporting or
 procuring an interest in any place returning members to parlia-
 ment: upon taking which oath, it is enacted by § 22. that the pen-
 sion or annuity shall be paid at the Exchequer to the order of the
 high treasurer, or first commissioner, whose receipt shall be ac-
 cepted and taken as an acquittance for the same. But by § 23. if
 any such secret pension shall continue in the list for more than five
 years, the high treasurer, or first commissioner of the treasury,
 or one of the secretaries, or one of the chief clerks of the trea-
 sury, for the time being, shall make oath before such pension
 shall

By R. 25 G.
 3. c. 81.
 Certain small
 pensions of
 the crown
 therein men-
 tioned pay-
 able to per-
 sons in law
 and indigent
 persons, are
 exempt from
 the operation
 of this
 statute, and
 the same are
 allowed to be
 paid as they
 formerly had
 been.

shall be paid at the Exchequer, that he believes that the person for whose use the said pension or annuity hath been granted is living.

In order to prevent, as much as may be, all abuses in the disposal of monies issued under the head of secret service money, or money for special service, the sum to be issued or paid from the civil list revenues for the purpose of secret service within this kingdom shall not exceed the sum of ten thousand pounds in any one year : And as to foreign secret service money, it is enacted, that when it shall be deemed expedient by the Treasury to issue, or in any manner to direct the payment of any money from the civil list revenues for that purpose, the same shall be issued and paid to one of his Majesty's principal secretaries of state, or to the first commissioner of the admiralty, who shall for his discharge at the Exchequer, within three years from the issuing of such money, produce the receipt of his Majesty's minister, commissioner, or consul in foreign parts, or of any commander in chief, or other commander of his Majesty's navy or land forces, to whom the said money shall have been sent or given, that the same hath been received for the purpose for which the same hath been issued ; which receipt shall be filed in the Exchequer to charge the said minister, commissioner, &c., with the same ; and the said receipt, on proof of the hand-writing, shall be sufficient to acquit and discharge the said secretary, &c., in their accounts at the Exchequer. And by § 26. any foreign minister, &c. charged at the Exchequer with the receipt of any secret service money, shall stand acquitted thereof, if within one year after his arrival in *Great Britain*, he shall either return the said money into the Exchequer, or make oath before the barons of the Exchequer, or one of them, that he has disbursed the money intrusted to him for foreign secret service, faithfully, according to the intent and purpose for which it was given, according to his best judgment for his Majesty's service. And by § 27. whenever it shall be necessary for the secretary or secretaries of state, or first commissioner of the admiralty, to pay any money issued for foreign secret service, or for secret service in detecting, preventing, or defeating treasonable or other dangerous conspiracies against the state in any place within this kingdom, then it shall be sufficient to acquit and discharge such secretary, &c. or such secretary or secretaries, or the under-secretary of state in the office to which such secret service money hath been paid, or for the first commissioner of the admiralty, or the secretary of the admiralty, to make oath, that the money paid to him for foreign secret service, or for secret service in detecting, preventing, or defeating treasonable or other dangerous conspiracies against the state (*mutatis mutandis, as the case may be*), has been *bonâ fide* applied to the said purpose or purposes, and to no other ; and that it hath not appeared to him convenient that the same should be paid abroad. By § 28. it is enacted, that no certain or stated sum shall be given or allowed out of the civil list revenues, under the name of secret service money, as had been theretofore the practice ; but when any monies for secret service shall be deemed necessary by the commissioners of the treasury, the same shall be issued by their direction,

as the occasion shall require, in the manner thereinbefore directed. And by § 29. whenever any money shall be issued for the purpose of any special service, or shall be given without provision of annual or other stated payment, but in a gross sum or sums, as to any secretary or secretaries of the treasury, or others, to be paid over to or for the use of any person or persons for special service, or as of royal bounty, the said money, together with the special service or services, or as of royal bounty, to which the same is applied, as also the name of the person or persons to whom it is paid, shall be entered in a book to be kept for that purpose in the treasury, in order to be produced to either house of parliament, if required. And for the better prevention of all practice by which such grants as of bounty may be made a colour under which pensions may be substantially granted, it is enacted by § 30. that any money so given as of royal bounty, to any person more than once in three years, the same is and shall be reputed a pension to all intents and purposes whatsoever.

The act next divides the payments of the civil list revenues into several distinct classes, and directs that no salary or pension shall be paid but in the order there prescribed. And it farther provides, that if any salary, fee, or pension, or any part thereof, remain in arrear at the usual time of payment, at the end of a period of two years, from want of cash belonging to the civil list revenues to pay and discharge the same, such arrear shall not be carried as a debt to the account of the year following, but shall be wholly lapsed and extinguished, as if the same had not been payable.

The statute of 1 Ann. c. 7. which provides for the civil list establishment of that reign, restrains the power of the crown in the disposal of its land revenue, and enacts that no grant shall be made by the crown of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments (advowsons of churches and vicarages only excepted), whether belonging to the crown in right of the crown of *England*, or as part of the principality of *Wales*, or of the duchy or county palatine of *Lancaster*, or otherwise howsoever, for any longer term than one and thirty years or three lives, or some term determinable upon one, two, or three lives, and unless it be made to commence from the date or making thereof; and if to take effect in reversion, it do not, together with the estate in possession, exceed three lives or the term of one and thirty years in the whole; unless the tenant be punishable for waste, and unless the ancient rent, or more, that hath been paid for the greater part of twenty years prior to the grant, be reserved upon it; and if no rent hath been paid before the grant, then unless there be reserved a reasonable rent, not under the third part of the clear yearly value of the estates comprised in the grant; and also such rents be made payable to the queen, her heirs or successors who shall make such grant, and to her or their heirs or successors, during the whole term of the continuance thereof. But, where the greatest part of the yearly value of any tenements or hereditaments

ments belonging to the crown shall, at the time of making any lease or grant thereof, consist of buildings thereon, which may want to be repaired or re-edified, in such case, to encourage the re-building or reparation thereof, it is provided that the crown may grant such tenements or hereditaments, for a term not exceeding fifty years or three lives, so as such grant be made to commence from the date or making thereof, or if in reversion, that it do not with the estate in possession exceed fifty years or three lives from the date or making thereof, and that it be under the other restrictions required in the grants of one and thirty years. But this proviso is repealed by stat. 34 G. 3. c. 75. except as to grants under the seals of the duchy and county palatine of *Lancaster*; and it is enacted, that where any land or ground belonging to the crown shall be deemed proper by the treasury for the erection of houses or other buildings thereon, or for necessary gardens, yards, curtilages, and other appurtenances to be enjoyed therewith, and shall be by their order directed to be appropriated to that use, and where the lessee shall agree and covenant to erect buildings thereon of greater yearly value than the land or ground so to be leased or granted, or where the greatest part of the yearly value of any tenements or hereditaments belonging to the crown doth or shall, at the time of making any grant thereof, consist of any buildings thereon, in any of those cases, the crown may grant the land or ground so directed to be set apart, or the tenements or hereditaments of the above description, for any term not exceeding ninety-nine years, or three lives to be computed from the date of the grant, or if in reversion, not exceeding, together with the estate in possession, the like term of ninety-nine years, or three lives, to be computed in like manner from the date of the grant, so as when there shall happen to be any substantial building upon the ground to be demised, or that the buildings thereupon shall not require, or not be intended and agreed to be rebuilt, there be reserved an annual rent not less than two-thirds of such annual sum as shall be deemed by the treasury a reasonable rent or consideration for such buildings and ground respectively, for the term intended to be granted, and so as there be paid to the use of the crown a fine to the amount of the remaining part of such annual sum, subject to a discount, which shall not be computed at a higher rate than the highest legal rate of interest at the time of making such grant; and when there shall happen to be no substantial building on such ground as the buildings thereon require, or shall be intended and agreed to be rebuilt, or other new buildings to be erected thereon, in that case there shall be reserved such annual rent as shall be deemed by the treasury a reasonable rent or consideration for such land and old buildings for the term intended to be granted, without taking any fine for the same; so as in every lease of land and buildings of this last description, there be contained a covenant or condition on the part of the grantee, for the erecting of proper and substantial houses and buildings thereon, within a reasonable time, to be in each case limited for that purpose, and such other covenants for keeping buildings in repair, and doing all such other
acts

acts as the treasury shall think reasonable; and so as all such rents be reserved to be paid free of all taxes and assessments during the whole term, except such rent or such part thereof, during such part of the term as the treasury shall think fit to be allowed, not exceeding in any case the term of three years: and so as every such grantee or lessee sign, seal, and deliver a counterpart of his grant or lease, which counterpart shall not be subject to any stamp duty.

§ 4. And it is further enacted, that on every grant, lease, or other assurance by the crown under the great seal, or seal of the Exchequer, of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowsons of churches and vicarages, and such tenements and grounds, with buildings erected thereon, as are hereby authorised to be granted for any term not exceeding ninety-nine years or three lives, and whereon any fine or fines shall be payable as aforesaid only excepted,) whereby any estate or interest whatever at law or in equity shall pass from the crown, there be reserved such clear annual rent as by the treasury shall be deemed reasonable, without taking any fine for the same; which rent shall be made payable to the crown during the whole term of the continuance thereof; but no such grant shall be good unless the grantee execute a counterpart thereof, such counterpart however not to be subject to any stamp duty.

§ 5. With respect to the renewal of the crown leases, it is enacted, that no lease or grant of any manors, messuages, lands, tenements, tithes, woods, or other hereditaments belonging to the crown, within the ordering and survey of the Exchequer in *England*, shall be renewed, until within five years of the period of the expiration thereof, except such tenements and hereditaments as are authorised by this act to be granted for any term not exceeding ninety-nine years, nor shall any grant of any such tenements and hereditaments so authorised to be granted be renewed, until within twenty years of the period of the expiration thereof, nor any grant for lives, so long as there shall be more than one of such lives in being. However, where it shall appear to the satisfaction of the Treasury, that any person, has, at any time before the passing of this act, entered into any covenants or engagements to obtain renewals at earlier periods, in confidence that the same could be renewed according to the ordinary practice in such cases, in that case, a renewal may be made at a greater distance of time from the expiration of the lease, so as to enable such person to perform his engagements: In like manner, where any person shall be the lessee of any tithes of any lands, or any profits issuing out of any lands, and shall be the owner of, or interested in such lands, the Treasury may order a renewal of such lease at such times as shall appear to them convenient for the most beneficial enjoyment of such tithes or other profits, together with such lands: and where it shall appear to the satisfaction of the Treasury, that any lessee of lands belonging to the crown, has, before the passing of this act, demised, or agreed to demise the same, for the purpose of improving them by building, and has entered into any covenants

covenants or engagements, in consequence whereof such person would, by reason of the improvements so made, be bound to pay, upon the renewal of any lease or grant of such lands, more than he would be entitled to receive from the under-lessees or lessee thereof; in such case, the Treasury may make an abatement in the rent and fine to be reserved and paid to the crown in consequence of such improvements, and such lease or grant as shall be made (regard being had to such circumstances) shall be good and effectual. It is also provided, that where any wastes belonging to the crown shall be inclosed by authority of parliament, or where any lands or grounds belonging to and held under any lease or grant from the crown under the great seal, or seal of the Exchequer, shall be deemed by the Treasury fit to be planted and appropriated to the growth of wood or timber, or any farm-house, or other substantial building, to be erected for the better management and improvement of any lands or grounds, or any pits, shafts, levels, watercourses, engines, or other works, to be made for the better working of any mines, quarries, or collieries belonging to the crown, and holden as aforesaid, and where the term or estate in possession therein shall be deemed by the Treasury to be insufficient to repay the costs and charges of such works and improvements, with reasonable profit and advantage to the parties making or causing the same to be made, or to their representatives or assigns, in all such cases, it shall be lawful at any time hereafter to grant any further lease of any such houses or other buildings, land, or ground, for any term not exceeding the term hereby authorized to be granted; provided that there be reserved and made payable to the crown the rents above required, and that covenants or conditions be inserted therein on the part of the lessees, for erecting such new houses or other buildings, and performing such respective works and improvements, at the costs and charges of such lessees, within a reasonable time to be in each case limited and appointed for that purpose, where such houses or buildings, or works and improvements, shall not have been previously erected or made. But no grant shall be made of any lands capable of survey until a survey shall be had, and estimate be made of the improved annual value of the estate proposed to be granted by a surveyor to be appointed by the Treasury or surveyor-general of the land revenue, which surveyor is to certify the same upon oath, and is also to state for what term of years it shall appear to him most beneficial for the interest of the crown, to grant such holding or ground, regard being had to the quality and condition of the building then standing upon such ground, and of the buildings proposed to be erected thereon. But where the tenements proposed to be leased, are of a fixed and unimprovable value, or where they are incapable of valuation by means of a survey or inspection, or where they are of such small value, as not to be worth the expence of a survey, a lease of them may be granted or renewed, under the direction of the Treasury, without any previous survey or estimate.

§7.

§8.

§9.

paid to the French king, between the 10th February 1763, the day the treaty of peace was signed, and the 7th of October 1763, the day on which the first proclamation bears date, his Lordship said, "It is left by the constitution to the king's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword, or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection, and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted, that the king may change part or the whole of the law or political form of government of a conquered dominion." His Lordship then went into the history of the conquests made by the crown of England, and in the course of his inquiry took notice of the opinion delivered by Sir Philip Yorke and Sir Clement Wearge respecting Jamaica. In 1722, the assembly of that island being refractory, it was referred to those two great law-officers to know, "what could be done if the assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If Jamaica was still to be considered as a conquered island, the king had a right to levy taxes upon the inhabitants; but, if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants, but by an assembly of the island, or by an act of parliament."

The forfeited estates in Scotland, which were annexed to the crown by the statute of 25 Geo. 2. c. 41. are disannexed therefrom by the statute of 24 G. 3. sess. 2. c. 57. for the purpose of enabling his Majesty to grant them to the heirs of the former proprietors.]

3. How far the King must have an Interest, in order to enable him to grant.

2 Co. 55. b.
56. a.

[(a) Grants of the crown lands are now re- strained by stat. 1 Ann. c. 7. *supra*.]

5 Co. 93.
Berwick's case.
Moor, 393.
S. C.

4 Mod. 275.
The King v. Kemp.
2 Salk. 465.
pl. 2.
Carth. 350.
Comb. 334.
S. C.
Ld. Raym. 49.
Skin. 446. pl. 4.
Dyer, 108.
1 Roll. Abr. 198.
Jenk. 246.

(b) Wards, liveries, purveyances, &c. were always in effect alienable, as they might be released or discharged. 5 Mod. 56. *Shin. 605. per Holt, C. J.* In his argument in the Banker's case.—But the

There are three kinds of inheritances which the king may grant, though different as to the manner; which differences arise from the nature of his interest. 1st, All his lands, tenements, rents, commons, &c. he may grant in possession, reversion or remainder (a). 2^{dly}, A corody in a religious house, or presentation to a church, which he can only grant in possession, or when the corody or the church become vacant; for of these he hath only the presentation or recommendation, and therefore cannot grant them in reversion. 3^{dly}, Offices which he may grant, but cannot himself occupy.

If the king grants for three lives, *habendum a die consecrationis litterarum patentium*, this is void; because an estate of freehold cannot commence *in futuro*, and letters patent under the great seal amount to a livery; and if the freehold should pass immediately from a day to come, then the king would have a particular interest in the mean time without any donor, which is against the rules of law.

Upon a grant of the office of a searcher in the post office, *Phymouth*, it was adjudged, that the king may grant an estate in an office to commence *in futuro*, or upon a contingency; for he hath no inheritance in the office or the execution of it, but in point of interest only to grant; and it was said in this case, that there was a diversity between offices in fee existing, and such as were granted only for life; which being as a new thing created might, as a rent *de novo*, be granted to commence *in futuro*.

The king may grant that which is not actually in him at the time of the grant; as the marriage of (b) a ward, *quando acciderit*; although he had the ward in right of his prerogative.

(b) Wards, liveries, purveyances, &c. were always in effect alienable, as they might be released or discharged. 5 Mod. 56. *Shin. 605. per Holt, C. J.* In his argument in the Banker's case.—But the

the king cannot grant land when it shall escheat. Raym. 241. — Whether he can grant land when it shall become derelict. Raym. 241. 2 Lev. 171.

The king cannot grant an annuity, for his person is not chargeable as the person of a subject; but, if he grant it out of his excise, or any branch of his revenue, it is good, for there is somewhat therewith chargeable. Salk. 58. pl. 1. per Barons Scaccar.

4. Grants tending to a Monopoly; and therein, of Things of a new Invention.

The king's grant of a monopoly, as of the sole buying, selling, working, making, or using of any commodity, is not only void by the common law, but the persons procuring such grants are said to be punishable by fine and imprisonment. *Vide tit. Monopoly.*

And indeed the freedom of trade and labour is of such consequence, that as no person can by his own act totally debar himself of this privilege, much less can he be restrained by the king's letters patent. 3 Mod. 128. Noy, 182.

But notwithstanding this, it is agreed, that the king may for a reasonable time grant to a person the sole use of any art first invented by him; and this it seems the king might do at common law, and is therefore a matter excepted out of the statute of monopolies, 21 Jac. 1. c. 3. by which it is provided, "That no declaration in the statute shall extend to any letters patent and grants of privilege for the term of fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use; so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patent or grants of such privilege; but that the same shall be of such force as they should be if the said act had never been made, and of none other."

In the construction of this branch of the above-mentioned statute, the following points have been held:

That no new invention concerning the working any manufacture is within the meaning of this exception, unless it be substantially new, and not barely an additional improvement of an old one (a). 3 Inst. 184. [(a) But quære of this, for where the question was,

Whether an addition to the old stocking-frame was the subject of a patent? Lord Mansfield said, that if the general question of law, viz. that there can be no patent for an addition, be with the defendant, that was open on the record, and he might move in arrest of judgment; but that that objection would go to repeal almost every patent that was ever granted: there was a verdict for the plaintiff, and 500 l. damages; which was acquiesced in. *Morris v. Branford*, 5 Str. West. E. 1776. Bull. N. P. 76. And since that case, it hath been the generally received opinion in Westminster-Hall, that a patent for an addition is good. But then it must be for the addition only, and not for the old machine too. 2 H. Bl. 489. and *Rex v. Elkes*, 5 Str. West. Mich. 1785, *coram* Buller, J. Bull. N. P. 78. last edition.]

That no old manufacture in use before, can be prohibited in any grant of the sole use of any such new invention. 3 Inst. 184.

That

30 Mod. 131.

That if a patent be granted in case of a new invention, the king cannot grant a second patent; for the charter is granted as an encouragement to invention and industry, and to secure the patentee in the profits for a reasonable time; but when that is expired, the publick is to have the benefit of the discovery.

3 Inst. 184.

[(a) This motion is now exploded.]

It is held by my Lord *Coke*, that a new invention to do as much work in a day by an engine as formerly used to employ many hands (a), is not within the said exception; because it is inconvenient in turning so many labouring men to idleness.

2 Salk. 447.

[2 H. Bl. 491. S. C. cited by Eyre, C. J.]

If the invention be new in *England*, though the thing was practised before beyond sea, the patent is good; because the act intended to encourage new devices useful to the kingdom; and it is not material whether the discovery be owing to study or travel.

3 Mod. 77.

Said argument.

If a man invent a new art, and another happen to learn it before the inventor can obtain a patent, a patent afterwards obtained, is void (b).

[(b) It will not be void, if the person who has learnt it, has not disclosed it.]

Skln. 204.

[Where a patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification. *Per Buller, J.* 1 Term Rep. 607.]

If a person obtains a patent for a new invention, and another makes use of the invention without the licence or consent of the patentee, an action lies against him.

On his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification. *Per Buller, J.* 1 Term Rep. 607.]

2 H. Bl.

470.

[It will not impeach the validity of a patent that another person first made the discovery which is the subject of it, if in truth the patentee were the first who made it publick, for it was the disclosure of new inventions which the statute meant to encourage. It is therefore a provision, and indispensable condition in all patents, that the patentee shall ascertain the nature of his invention, and in what manner it is to be performed. The specification is the price which the patentee is to pay for his monopoly. It hath been laid down, therefore, that the patentee must disclose the secret and specify the invention in such a way, that other artists of the same trade may be taught to do the thing for which the patent is granted, by following the directions of the specification, without any new addition or invention of their own. He must describe it so that the publick may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it, and therefore, if the specification describes many parts of an instrument or machine, and the patentee uses only a few of them, or does not state how they are to be put together and used, the patent is void. And if the specification be in any part materially false or defective, if there be any ambiguity affectedly introduced into it, or any thing which tends to mislead the publick, if the patentee say, that by one process he can produce three things, and fail in any one; or the specification direct the same thing to be produced several ways, or by several different ingredients, and any one of them fail, in these cases the patent is against the law, and cannot be supported. In a

Rex v. Arkwright,
Sitt. West.
Trin. 1785.
Bull. N. P.
78. last edit.

case

case before Lord *Mansfield* for infringing a patent for steel trusses, it appeared that the patentee, in tempering the steel, rubbed it with tallow, which was of some use in the operation; and because this was omitted, the specification was holden to be insufficient, and the patent was avoided. So, in an action for infringing the plaintiff's patent for making patent yellow; three objections were made to the patent: 1st, That after directing that lead should be calcined, it directed another ingredient, namely, *minium* to be taken, which would not answer the purpose, as it did not say whether it was to be calcined or fused, and by reference to the preceding words it would be to be calcined, which would not answer, as fusion was necessary. 2^{dly}, That it directed any kind of fossil-salt to be taken, whereas only one kind of fossil-salt, namely, *sal gem*, would answer the purpose, because it must be a marine salt. 3^{dly}, That all the things together did not produce the effect; for the patent was to do three things, but this produced but one only. These were allowed to be decisive objections to the patent, and that it was void.

Liardet v. Johnson,
Sitt. West.
Hil. 1778.
Bull. N. P.
79. *Turner v. Winter*,
1 Term Rep.
602.

The above act of parliament having excepted only patents of the sole working or making any manner of *new manufactures*, it hath been said that the foundation of all patents must be the *manufacture* itself; that there can be no patent for a mere principle, nor for the mere application or mode of doing a thing, for a method only, without having carried it into effect, and produced some new substance. On the other hand it hath been said, that though there can be no patent for a mere principle, yet for a principle so far embodied and connected with corporal substances, as to be in a condition to act, and to produce effects in any art, trade, mystery, or manual occupation, there may be a patent; that a *method* may of itself be the subject of a patent: that Mr. *Hartley's* patent was solely for a *method* of securing buildings from fire: that it was not for making the plates of iron, for those were in use before: that it was not for the effect produced, for that was merely negative; but it was for his *method* of disposing the plates of iron so as to produce the proposed effect: that new methods of manufacturing articles in common use, for which a variety of patents have been granted, where the sole merit and the whole effect produced, are the saving of time and expence, and thereby lowering the price of the article, and introducing it into more general use, may be said to be *manufactures* in one of the common acceptations of the word, as we speak of the manufactory of glass, or any other thing of that kind: that the patents in these cases cannot be for the effect produced, for it is either no substance at all, or, what is exactly the same thing, as to the question upon a patent, no new substance, but an old one produced advantageously for the publick: that it cannot be for the mechanism, for there is no new mechanism employed: it must then be for the *method*; that is, in the words of Lord *Mansfield*, for *method* detached from all physical existence whatever. Such were some of the topicks of argument discussed in the court of Common Pleas in the following case, upon which the judges of that court were equally divided.

Boulton and Watt v. Bull, 2 H. Bl. 463. In consequence of the difference of opinion in the court of Common Pleas upon this case, it was afterwards moved to dissolve the injunction which had been obtained, for the purpose of trying the validity of the patent in an action; but the Chancellor

A patent was granted to the plaintiff *Watt* for a new invented method of lessening the consumption of steam and fuel in fire-engines. The specification stated, that the method consisted of certain principles, and described the mode of applying those principles to the purposes of the invention. And an act of parliament, reciting the patent to have been for the making and vending of certain engines invented by *Watt*, extended to him for a longer term than fourteen years, the privilege of making, constructing, and selling the said engines. The jury found that this invention was a new and useful invention, and that the privilege vested in *Watt* and his assigns by the act of parliament was infringed by the defendant as charged in the declaration. They also found that the specification was of itself sufficient to enable a mechanick acquainted with the fire-engines previously in use, to construct fire-engines producing the effect of lessening the consumption of fire and steam in fire-engines, upon the principle invented by the plaintiff *Watt*. The questions proposed for the opinion of the court were, 1st, Whether the patent was good in law, and continued by the act of parliament? 2d, Whether the specification was in point of law sufficient to support the patent?]

said, that there must be another action, and that the injunction in the meantime must be continued, and that he could not impose any terms upon the patentees in bringing the action. 3 Ves. jun. 140. Accordingly, another action was brought in the court of Common Pleas, which came on to be tried at the sittings in London Dec. 16th, 1796, before the Lord Chief Justice Eyre, when a verdict was found for the plaintiff with nominal damages.

5. Grants of the sole Liberty of Printing.

Carter, 89. Mod. 256. Skin. 233. pl. 3. 3 Mod. 77. Vern. 275.

The king's prerogative in granting letters patent for a privilege of printing, hath in many instances been disputed, and his power herein greatly doubted, on this foundation and these reasons, that grants of this kind which exclude all other persons, and confine this liberty or privilege to the patentees, tend to a monopoly in enhancing the prices of books, restraining trade, discouraging industry, and in making the patentees careless and remiss in their duty.

(a) Carter, 90. it is said, that fifty such patents have been granted since E. 6.'s time.— And that before such grants, this business was

But notwithstanding these reasons, and the uncertainty that appears in some of the cases in the books on this subject, it seems the better opinion, that the king hath a peculiar prerogative in printing, which hath been countenanced and allowed in all (a) ages, and seems established on the fundamental maxims of government, as being a matter of a (b) publick nature, first (c) introduced by the kings of *England*; and in which an (d) unrestrained liberty might be of dangerous consequence to the publick.

managed by the king's servants. (b) In 3 Mod. 75. a difference is made between things of a publick nature, and those only of publick use; and on this distinction the court inclined to think, that the letters patent granted for the sole printing of blank warrants, bonds, and indentures, were not good, these being only of publick use, and not so in their nature. (c) The art of printing was first at *Harlem*, the news of it came to *Hen. 6.* who at the desire of the Archbishop brought it over at his own charge, at the expence of 1500 marks; the person assigned for this service was a merchant. Carter, 91. Said to be introduced by *Hen. 6.* Skin. 234.— And that the king printed the Bible at his own charge, Vern. 275. (d) Printing is a conveyance by which men communicate their notions in the most publick manner, and with the most lasting impression; and therefore if they are good, this is a means to spread them and to give them a more diffusive influence; and if they are bad notions, this is likewise a method to spread the mischief wider. Skin. 234.

Accordingly we find this prerogative admitted in the case of *Moor, 637.*
Darcy v. Allen, the great case of monopolies, and the reason *Noy, 173.*
thereof given by *Dodderidge*, who argued against monopolies, be-
cause it is necessary for the peace and safety of the realm.

It seems agreed, that if a book has no certain author, the king *Mod. 146.*
has the property of the copy (a), and may grant it to whom he *[(a) But, if*
pleases; hence (b) almanacks are deemed prerogative copies. *there was no*
author, the property would not be the king's, but common. *certain au-*
4 Burr. 2407.] (b) So, of the translation *thor*
of the Bible, Year-books, Common Prayer, and Statute-book. *Lucas, 105. 2 Chan. Ca. 76.*

In the 15 year *Jac. 1.* a patent for printing law books was *Carrier, 89.*
granted to one *Moor*, which came to Colonel *Atkins* on his mar- *M. 18 Car. 21*
riage with *Moor's* daughter. The Company of Stationers obtained *10 Mod.*
copies of *Roll's* Abridgment, which they printed; and this being *106. S. C.*
complained of in Chancery by Colonel *Atkins*, an injunction was *cited to have*
awarded, not only against those of the company (*viz. Tylon* and *been decreed*
Roper) who were principally concerned, but against every member *in Chancery*
thereof; and this matter coming afterwards before a committee of *in favour of*
parliament, it was there likewise determined in favour of the pa- *the patent-*
tee. And in this case it was said, that the king hath a particular *tees, and af-*
prerogative over law books, and that so he would have had, if the *firmed in*
art of printing had never been known. *the House of*
Lords.

Upon this occasion invented the fiction that printing was a flower of the crown acquired by H. 6. by *[It was this*
purchase, the first printer in England having been brought to Oxford by Archbishop Bouchier, at that *Colonel At-*
king's expence. *1 Bl. Rep. 113.]* *kings, who*

But the case of the greatest weight on this head, is that of *Skin. 214.*
Roper and *Streater*, which was this: *Roper* bought of the execu- *S. C. cited*
tors of Justice *Croke*, the third part of his reports, which he *and said to*
printed; Colonel *Streater* had a grant for years from the crown *have been*
for printing all law books, and printed upon *Roper*; on which *determined*
Roper brought an action on the statute 13 & 14 Car. 2. c. 33. *in B. R.*
Streater pleaded the king's grant; and on demurrer it was adjudged *M. 22 Car. 21*
in B. R. for the plaintiff against the validity of the patent on *but reversed*
these reasons: that this patent tended to a monopoly; that it was *in the House*
of a large extent; that printing was a handicraft trade, and no *of Lords.*
more to be restrained than other trades; that it was difficult to *2 Show.*
ascertain what should be called a law book; that the words in the *260. S. C.*
patent, *touching or concerning the common or statute law*, were loose *cited as ad-*
and uncertain; that if this were to be considered as an office, the *judged,*
grant for years could not be good, as it would go to executors and *M. 24 Car. 2.*
administrators; and that there was no adequate remedy in the *and there*
way of redress in case of abuses by unskilfulness, selling dear, *the judg-*
printing ill, &c. But this judgment was reversed on a writ of *ment given*
error in parliament, for the following reasons: that the invention *in B. R. is*
of printing was new; that this privilege had been always allowed, *called a sud-*
which was a strong argument in its favour, although it could not be *den judg-*
said to amount to a prescription, as printing was introduced within *ment, and*
time of memory; that it concerned the state, and was matter of *said to be*
publick care; that it was in nature of a proclamation, which none *reversed in*
but the king could make; that the king had the making of judges, *parliament.*
Serjeants, and officers of the law; that as to the uncertainty, *10 Mod. 106.*
these words in the patent were to be taken *secundum subjectam ma-*
teriam,

S. C. cited, and said it was not now to be shaken.

(a) Though it cannot properly be called an office, yet it is a trust, and

a *sci. fa.* will lie to repeal the grant. 3 Mod. 77.

teriam, and not to be extended to a book containing a quotation of law, but where the principal design was to treat on that subject; that as to its being an office, it was not so properly an office as an employment, which may well enough be managed by executors or administrators; and that, as to abuses, these like all others were punishable at common law, or the patent itself might be repealed (a) by *sci. fa.*

Mod. 256.
3 Keb. 792.
S. C.

2 Show. 260.
3 Mod. 76.
S. C. cited, and a like judgment said to be given in the case of the Stationers' Company v. Wright, for printing psalters and psalms. Hil. 35 Car. 2; Skin. 234.
10 Mod. 106. like point, but no judgment.

In an action of debt by the Company of Stationers against *Symour*, for printing *Gadbury's* almanack, it was adjudged that the letters patent, granted that company for the sole printing of almanacks, were good; and though the jury found, that the almanack so printed contained some additions; yet having likewise found, that the said almanack had all the essential parts of the almanack that is printed before the Book of Common Prayer, the additions were looked upon as immaterial.

2 Show. 258.

(b) An injunction was refused to stay the sale of English Bibles, and

So, an injunction was granted against *Lee*, on the application of the Stationers Company, to restrain him from selling primmers, psalters, almanacks, and singing psalms imported from *Holland*; the sole privilege of printing these belonging to that company; and that (b), without any trial directed as to the validity of the patent.

to quict the right of patentees, because not a plain right; and therefore an issue directed. Vern. 120. — So, where the University of Oxford claimed by patent a right of printing Bibles, though the Lord Keeper was of opinion, that the University patent extended to no more than were for their own use, or to some small number to compensate their charge; yet he refused to grant an injunction until the right was settled by a trial at law. Vern. 275. & vide 2 Chan. Ca. 76. 93. & 2. as to these cases; for injunctions seem frequently to have been since granted in favour of patentees and owners of books, upon producing the patent in court under the great seal.

10 Mod.

105.

4 Burr.

2402.

2 Bl. Rep.

1004.

In consequence of this decision, an act was passed, which, after reciting,

“ that the
“ power of
“ granting a
“ liberty to
“ print
“ alma-

[But, notwithstanding the above decisions, this prerogative right to the printing of almanacks was strongly inclined against by the court of King's Bench in the case of the Stationers Company against *Patridge*. No judgment indeed was given in that case, but it stood over, that the company might see if they could make it like the case of the Common Prayer Book, whether they could shew that the right of the crown had any foundation in property; and it was never moved afterwards. However, in a later case of the Stationers' Company against *Carnan*, the question hath been again brought forward, and the right of the crown to make such exclusive grant to the company hath been expressly denied by the court of Common Pleas on a case sent out of Chancery for their opinion.

“ nacks and other books was heretofore supposed to be an inherent right in the crown; and that the
“ crown had, by different charters under the great seal, granted to the Universities of Oxford and Cam-
“ bridge, among other things, the privilege of printing almanacks; and that the Universities had de-
“ mised to the Company of Stationers of the city of London, their privileges of vending almanacks and
“ calendars, and had received an annual sum of one thousand pounds and upwards, as a consideration for
“ such privilege: and that the sum so received by them had been laid out and expended in promoting
“ different branches of literature and science, to the great increase of religion and learning, and the gene-
“ ral benefit and advantage of these realms: and that the privilege or right of printing almanacks had
“ been, by a late decision at law, found to have been a common right, over which the crown had no
“ control

"controll, and consequently the Universities no power to demise the same to any particular person or body of men, whereby the payments so made to them by the Company of Stationers had ceased and been discontinued;" enacts, that 500*l.* a year shall be paid to each of the Universities, out of the monies arising by the duties upon almanacks. Stat. 21 G. 3. c. 56. § 10.

In the case of *Baskett v. University of Cambridge*, the prerogative right of printing acts of parliament was sanctioned by a decision of the court of King's Bench. That case arose upon a bill filed by the plaintiffs for an injunction to restrain the defendants from printing or selling a book, entitled "An exact Abridgment of all the Acts of Parliament relating to the Excise on Beer," &c. Both parties claimed under letters patent from the crown, the plaintiffs as the king's printers. The court were of opinion, that during the term granted by the letters patent to the plaintiffs, they were entitled to the right of printing acts of parliament, and abridgments of acts of parliament, exclusive of all other persons, not authorised to print the same by prior grants from the crown. But they thought that by the letters patent granted to the University they were INTRUSTED with a concurrent authority to print acts of parliament. and abridgments of acts of parliament, within the University, upon the terms in those letters patent.

1 Bl. Rep.
105. 2 Burr.
661.

And the following case establishes the exclusive right of the crown to print acts of parliament and books of divine service beyond all controversy. We are enabled to lay before our readers the judgment of the court as delivered by the Lord Chief Baron Skinner.

This is a case in which *Charles Eyre* and *William Strahan* are plaintiffs, and *Thomas Carnan* is the defendant.

Eyre and
Strahan v.
Carnan, in
the Exche-
quer, May
7th, 1781.

This bill was brought to restrain the defendant from printing and publishing a Form of Prayer, which had been ordered by his Majesty to be read in all churches; and for an account of the profits which have arisen from his sale of it.

The bill states, that the plaintiffs held the office of king's printer, which was granted the 19th of December, the 2d of King George the First, to *John Baskett* for 30 years in reversion after two terms which were then existing, the last of which expired the 21st of January 1770, when the grant to *Baskett* took effect in possession. The grant, which was read, imports to be a grant to *John Baskett* of the office of Printer to his Majesty, and his successors, of (among other things) all Bibles and Testaments in the English language; and all Books of Common Prayer and Administrations of the Sacraments, and other Rites and Ceremonies of the Church of England, in all volumes whatsoever heretofore printed by the king's printer, or to be printed by his command; and of all other books which he, his heirs or successors, should order to be used for the service of God in the Church of England.

The interest in this grant was assigned by *Baskett* to *John Eyre*, under whom the plaintiffs claim the benefit of it; the plaintiff *Eyre* in two-thirds, and the plaintiff *Strahan* in the other third.

The bill states, that in December 1779 a Form of Prayer was ordered by his Majesty to be used in all churches and chapels throughout England and Wales upon the 4th Feb. 1780; that it was printed by the plaintiffs, and a sufficient number thereof cir-

culated for sale at sixpence each, which was a reasonable price, and at which they had been formerly sold.

That the defendant *Carnan* had printed and sold a great number of them; and upon this ground the plaintiffs pray an injunction and account. The defendant *Carnan*, in his answer, admitted the printing and selling, and he submitted to an account if the plaintiffs had the exclusive right of printing such Form of Prayer.

An injunction was granted upon filing the bill to stop the publication.

The question now is, Whether the court ought to direct the account which is prayed by the bill, for as to the continuance of the injunction in such a case, it is a mere matter of form?

Two objections are made by the defendant to this part of the relief: One is, that the price for which the plaintiffs have sold it was not a reasonable price; the second, that the right is doubtful.

As to the price, though it is proved that it might be afforded at a cheaper rate, yet it is likewise in proof that the price which has been taken by the plaintiffs is the same which had been used to be taken for like Forms of Prayer so printed; and therefore we think this not a sufficient ground for denying the account.

The next objection is to the plaintiffs' right. It has been said that courts of equity never proceed in such cases to decree accounts but upon clear and undoubted rights.

That the present right, if it be one, has never received the sanction of any legal determination. That though in the great question concerning literary property the Judges considered and treated the exclusive right of the crown to print acts of state and books of divine service as an acknowledged right, yet they put it upon different grounds, some upon the grounds of prerogative, others upon the ground of property; and as it is now determined that property cannot be the ground of such a right, the right itself consequently becomes doubtful. In the argument of the question respecting literary property in the House of Lords, in the case of *Millar and Taylor*, it was assumed by all the Judges that the king's copy-right continued after publication, and from thence some of them drew arguments in support of that right of an author after publication, insisting that property in the composition was the foundation of both; others denied that property, in the strict legal sense of the word, was the foundation of the right of the crown; but they all agreed that the crown had this right. The right therefore seemed to have been in effect recognized and established in this memorable case by the unanimous opinion of the Judges, though they differed respecting the origin of it. This is certain respecting such origin, that it has ever been a trust reposed in the king, as executive magistrate, and the supreme head of the church, to promulgate to the people all those civil and religious ordinances which were to be the rule of their civil and religious obedience. There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king's officers transmitted authentick copies of

of them to the sheriffs, who caused them to be publickly read in their county court. When the demand for authentick copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with copies by the king's command by his patentee. This seemed a very obvious and reasonable extent of that duty which lay upon the crown to furnish the people with the authentick text of their ordinances. Our courts of justice seem to have so considered it when they established it as a rule of evidence, that acts of parliament printed by the king's printer should be deemed authentick, and read in evidence as such. As to the promulgation of religious ordinances by the king's command, or by his patentee, it is not to be expected that instances should be found of the execution of this trust by the crown during the papal usurpation of the supreme authority over all ecclesiastical matters in this kingdom. It appears, however, by a grant made in the 34th year of King *Henry the Eighth*, to *Richard Grafton* and *Edward Whitchurch*, of the sole right of printing the Mass-book and certain other books of divine service, that such books had never at that time been printed in *England*, but had been brought into this kingdom from other countries, probably from *Rome*; though, as the grant recites, printing was at that time arrived at great perfection here. This grant, which bears date the 28th *January*, the 34th year of *Henry the Eighth*, is to be found in *Rymer*, vol. 14. p. 766. The period between the time of the re-establishment of the supremacy of the crown and the completion of the Reformation under Queen *Elizabeth*, considering the fluctuating state of religion, was not likely to afford, and in fact has not afforded, any instance of the superintending care of the crown in printing books of divine service, except that which I have alluded to, and which I have referred to chiefly to shew how the demand of the publick for such books had been supplied before that time, namely, from foreign countries, and under the direction of a foreign power; but in the first year of Queen *Elizabeth*, the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the acts of parliament, which had some time before been granted, and from that time they have been regularly granted together, and enjoyed by the king's patentee. Long usage, referable to such an origin, ought not to be shaken lightly, if there was no authority to support it; but in the case of *Baskett* against the University of *Cambridge*, the right of printing acts of parliament received the sanction of the court of King's Bench; and in the case of *Millar* and *Taylor*, before alluded to, both the rights, as well that respecting acts of parliament as that respecting books of divine service, were fully acknowledged. The privilege of the patentee has in fact been always executed with the exclusion of all other printers: it is therefore, in consideration of law, a monopoly; but it is a monopoly supported by long usage, and standing upon very special grounds of necessity and publick utility; for it is of manifest publick utility to place in proper hands the right of such publication, as well upon account of the

special care and superintendence which a trust of such importance necessarily requires, as because the exclusive right of doing or authorizing any acts in which the publick is interested implies an obligation to exercise that right in such manner as to answer the purposes for which it was given; and, consequently, the right now in question imposes upon the crown an obligation to publish and disperse as many books of divine service as the interest of religion and the demands of the publick require. It appears, then, that the right claimed by the plaintiffs, under the grant to *John Byfield*, is founded in publick convenience, is supported by long usage, and that it has been acknowledged by the unanimous opinion of all the Judges. Under such circumstances, we think it is not now to be considered as a doubtful right. If it is not doubtful, the plaintiffs are entitled to the account which is prayed; and which the court must accordingly decree. It is a matter of form to direct the continuance of the injunction; for in a case of this kind there is an end of all the effects of it; the defendant, therefore, must be decreed to account according to the prayer of the bill; and as the defendant has by thus printing the books of divine service invaded the rights which the plaintiffs and the king's patentees have been long in the uninterrupted possession of, the account must be with costs.]

2 Inst. 744. Here it may be proper to take notice of the acts of parliament relative to this matter, and the rather as they have been urged as arguments for the king's prerogative in these concerns. The first statute is that of 25 H. 8. c. 15.^o, which expressly provides in cases of books, that the Lord Chancellor, Lord Treasurer, or any of the Chief Justices, may set and limit the prices as well of books as of binding.

• Repealed
by 12 G. 2.
c. 36. §. 3.

In the statute 21 Jac. 1. c. 3. (s. 10.) against illegal and mischievous monopolies, it is particularly declared, that this statute should not extend to, or any ways impeach patents for sole printing then-
tofore made or then after to be made.

Mod. 257. The statute 14 Car. 2. (now expired) recites, that printing is a matter of publick care, and every where countenances the sole privilege of printing, and seems to be founded on the king's prerogative; but was a hard law, and injurious to the liberty of the subject, in restraining the number of presses, licensing books, and imposing penalties and forfeitures.

2 Show. 260. [By this statute (which expired in 1692) it was enacted, that no private person whatsoever should print or cause to be printed any book or pamphlet, unless the same should be first entered in the book of the Registrar of the Company of Stationers in London; except acts of parliament, proclamations, and such other books and papers as should be appointed to be printed by virtue of the king's sign manual, or under the hand of one of the Secretaries of State; and unless the same should be first licensed by the several persons therein directed; that is to say, all books concerning the common law were to be printed by the allowance of the Lord Chancellor, the Lords Chief Justices and Lord Chief Baron, or one of them; of history concerning the state of this realm, or other books concerning any affairs of state, by one of the Secretaries of State; of heraldry, by appointment of the Earl Marshal, or, if there should be no Earl Marshal, then by two of the Kings of Arms; all other books, whether of divinity, physick, philosophy, or other science or art whatsoever, by the Archbishop of Canterbury, or Bishop of London, or by their appointment respectively; or, in the universities, by the Chancellor, or Vice-Chancellor there, provided that the said Chancellours or Vice-Chancellours should not meddle either with books of common law, or matters of state or government, nor any book the right of printing which solely and properly belonged to a particular person. And the printers were to set their names, and declare the name of the author if there was a proviso, that nothing therein should extend to infringe any the just rights and privileges]

privileges of either of the said Universities, touching the licensing or printing of books therein; nor should extend to prejudice the just rights and privileges granted by the king, or any of his royal predecessors, to any person or persons under the great seal or otherwise, but that they might exercise such rights and privileges according to their respective grants.]

By the 8 *Ann. c. 19*. "The author of any book not yet printed, and his assigns, shall have the sole liberty of printing it for fourteen years, to commence from the day of publishing thereof; and (a) if any person within the said time shall print, reprint, or import any such book without the consent of the proprietor in writing signed in the presence of two credible witnesses, or shall knowingly publish it without such consent, the offender shall forfeit the books and sheets to the proprietor, who shall forthwith damask and make them waste paper, and shall forfeit 1*d.* for every sheet found in his custody, either printed or printing, one moiety to the crown, the other to him who will sue in any court at *Westminster*."

(a) It seems also a good foundation for an action at common law, or for an application to a court of equity; but in order to entitle the party to the penalty in the statute, the terms of the act as to registering the book in the Stationers' Company, &c. must be complied with. [For the property does not vest before the book is registered. 2 *Atk.* 95. See also *stat. 15 G. 3. c. 54. § 6.*]

[And the act further directs, that, if at the end of that term, the author himself be still living, the right shall then return to him for another term of the same duration.]

[It was determined by the court of King's Bench in the great case of *Millar v. Taylor, Yates, J. dissent.* that an exclusive right in authors existed by the common law. But afterwards in the case of *Donaldson v. Becket*, before the House of Lords, which was finally determined 12th February 1774, it was holden, that no copy-right subsists in authors after the expiration of the several terms created by the above statute of Queen Anne. In consequence of this decision an act was passed in the following year for enabling the two Universities in England, the four Universities in Scotland, and the Colleges of *Eaton, Westminster, and Winchester* to hold in perpetuity their copy-right in books given or bequeathed to them by authors, or their representatives, upon trust that the profits arising from the printing or re-printing of such books, shall be applied as a fund for the advancement of learning, and other beneficial purposes of education.]

Although a plaintiff should establish his right only as to a part of a work, yet the court of Chancery will grant an injunction to restrain the publication of such part. If an author has sold all his interest in the copy-right, he has no resulting right at the end of the first fourteen years, as against his own assignee, and will be enjoined from re-publishing.

If there are several invasions of a copy-right by different persons, the proprietor cannot join them all in one bill, but must file separate bills against each.

See farther on this point, tit. "Injunction," vol. 3. 651.]

2. Of the Construction of the King's Grants and Letters Patent, as to their being good or void ; and herein, of the King's being deceived in his Grant.

Freem. 332.

12 Co. 44.

5 Co. 99.

10 Co. 12.

8 Co. 16.

12 Co. 24.

3 Co. 145.

Mod. 222.

Palmer. 122.

12 Co. 44.

12 Co. 44.

12 Co. 44.

As the king's grants proceed chiefly from his own bounty, and his letters patent are records of a high nature, they ought to contain the utmost truth and certainty, and have in all times been construed most favourably for the king (a) contrary to the grants of common persons ; and accordingly in a great variety of cases we find uncertainty, misrecitals, false suggestions, and all such matters as shew that the king was deceived in his grant, held such reasons as have been sufficient to vitiate the grants.

being necessary by and with the advice of parliament, is in that situation, in respect of which he is under the special protection of the law, and can be considered to be deceived in his grant ? 2 H. Bl. 500.]

In a matter therefore in which such great exactness has been required, it may be necessary in the first place to lay down the following general rules:

(a) 12 Mod.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

First, That in the construction of letters patent every false recital in a part material will not vitiate the grant, if the king's intent sufficiently appears ; this was so held in the case of (b) *The King and Bishop of Chester*, where the grant was made to a person as a knight, who in truth was no knight ; and though the grant was held void for this reason in *B. R.* yet the judgment was reversed in parliament.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

Secondly, That if the king is not deceived by the false suggestions of the party, but only mistaken by his own surmises, this will not vitiate his grant ; and so was the resolution in the case of (c) *The King v. Kemp*.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

(c) *The King v. Kemp*.

12 Co. 44.

12 Co. 44.

12 Co. 44.

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12 Co. 44.

12 Co. 44.

12 Co. 44.

Thirdly, That though the king mistakes either in matter of law or fact, yet if this is not any part of the consideration of the grant, it will not vitiate it ; and so is (d) Lord *Chandos's* case, which was thus : *Henry VII.* granted to Lord *Chandos* a manor in tail, and the same king by other letters patent reciting the former grant, and that the said Lord *Chandos* had surrendered the same to be cancelled, and that the same had been cancelled, by reason whereof the king was and is seised in fee, did grant the said manor to husband and wife, and to the heirs of the husband, &c. Now, though by the surrender of the first letters patent, the estate-tail was not determined ; and so the king not seised of the manor in fee as he recited he was in the second grant ; for he had only a reversion in fee expectant upon the determination of the estate-tail ; yet the clause, viz. by virtue whereof we are seised in fee, being what the king collected to be the consequence of the surrender, and not at all owing to the misinformation of the party, either as to the entail or surrender, the mistake which he made being no part of the (e) consideration, the grant was held good.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

12 Co. 44.

It will vitiate the grant ; but not in a consideration personal executed. *Freem. 332.* For this reason, vide 5 Co. 93. *Jenk. 304.* 10 Co. 67. but in 5 Co. 94. *Berwick's case*, it is said to be void, that if the consideration which is for the benefit of the king, be it executory or executed,

guled, or be it of record or not of record, if it be not true or not truly performed, or if any prejudice may arise to the king, by reason of the non-performance thereof, the letters patent are void, &c. *Moore*, 393. *Hob.* 211. *Leon.* 248. *Flow.* 454. *Skin.* 663. *Lane.* 3. 76. *Dyer*, 252.

Fourthly, That the words *ex certa scientia & merito motu*, in the king's charters and letters patent, do occasion them to be taken in the most benign and liberal sense, according to the intent of the king expressed in his grant.

— But, where the king in his grant recites a thing which is false, that shall not make the patent good, although the words be *ex certa scientia & merito motu*. 10 Co. 112. 3 *Leon.* 249. *Flow.* 502. 3 Co. 4. *Savil*, 5. 37. *Dyer*, 300. 2 *Salk.* 561.

Fifthly, That though in some cases, general words of a grant may be qualified by the recital, yet if the king's intent is plainly expressed in the granting part, it shall enure according to that, and is not to be restrained by the recital. *Chester*, which is grounded on *Legatt's case*, 10 Co. 112.

In a *quare impedit*, it was found by a special verdict, that King *H. VIII.* was seised in fee of the manor of *Leyburn* in *Kent*, to which the advowson of the church of *Leyburn* is appendant (which manor came to the king by the dissolution of monasteries, having been part of the possessions of the abbot of *Gray Church*), and that he granted the manor to the archbishop of *Canterbury* and his successors, saving the advowson; afterwards the archbishop regranted the manor and the advowson to the king, his heirs, and successors; after which the king grants the manor with the appurtenances, and this advowson (naming it in particular) which lately did belong to the archbishop of *Canterbury* and to the abbot of *Gray Church*, together with all privileges, profits, commodities, &c., in as ample manner as they came to the king's hands by the grant of the archbishop, or by colour or pretence of any grant from the archbishop, or by surrender of the late abbot of *Gray Church*, or as amply as they are now or at any time were in our hands, to Sir *Edward North* and his heirs; and the question was, Whether by this grant the advowson did pass? and adjudged that it did; for though here was a falsity or misrecital, the advowson never having been in the hands of the archbishop, yet that not being material, as the king could not be said to be deceived, having granted the advowson expressly by name, it was adjudged *ut supra*.

In the argument of the above case, the following points were laid down as supported by the authorities in the margin:

1. Where a particular certainty proceeds, it shall not be destroyed by an uncertainty or a mistake coming after. *Cro. Eliz.* 34. 42. *Yelv.* 42. 3 *Leon.* 162. *And.* 148. 2 *Godb.* 423. *Markham's case*. 10 Co. *Legatt's case*.
2. That there is a difference when the king mistakes his title to the prejudice of his tenure or profit, and when he is mistaken only in some description of his grant, which is but supplemental, and not material nor issuable. 21 E. 4. 49. 33 H. 7. 6. 36 H. 8. 37. 9 E. 4. 11. 12. *Lane.* 111. 2 Co. 54.
3. That distinct words of relation in the king's grant are good to pass away any thing. *Bulf.* 4. *Dyer*, 350. 9 Co. 24. 10 Co. 4. *Whitler's case*.

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So, a grant of a manor, *habend.* to the grantee and his heirs *adeo pleni & integri*, as it came to the hands of the king by the attainder of *J. S.* or as is contained in such letters patent, or the like, is good according to the rule, *id certum est quod certum reddi potest.*

10 Co. 63.
Whistler's
case.

King *Ed. VI.* being seised of the manor of *Cleobery*, then late parcel of the possessions of the late Earl of *March*, whereof a great wood was parcel, grants this wood to the Lord *Paget* in fee; from the Lord *Paget* it came to the Lord *Seymour*, and by his attainder it returned to *Ed. VI.* again; from *Ed. VI.* the manor and wood came again to Queen *Mary*, and from her to Queen *Elizabeth*, who grants to the Earl of *Leicester* this manor, *nuper parcell. possessionum nuper comitis Marchize, et omnia al' ter' bos' & hereditamenta manerio prad' spectant', vel ut pars, parcell' sine membrum inde antehac habita, cognita sine reputata existen'*; and it was adjudged that these woods did pass.

Dyer, 382.
Co. Ent.
383. The
Queen v.
Thornton.

Sir *Francis Fortescue* being seised of a manor, grants the same to the Earl of *Denbigh* except such lands as were then held for life by copy; afterwards the inheritance of this copyhold was granted to the Earl of *Denbigh*, and then the copyholder dies, and the Earl grants by copy again, and afterwards forfeited all to the king, who granted the manor and every part and parcel thereof, or that is reputed parcel thereof, to the Earl of *Clarendon*; and the question was, Whether this copyhold, having been thus severed, passed by the words *reputed parcel*, or not? and adjudged that it did.

Pollard 438.
Freem. 207.
Lee v.
Browne.

If the king grants to *J. S.* lands and the mines therein contained, and royal mines are found in them, they shall not pass; for the king's grant shall not be taken to (a) a double intent; and the most obvious intent is, that they should only pass the common mines that are grantable to a common person.

Plow. 336.
(a) Mines
royal,
amercements
royal,
escheats
royal, shall

not pass by general words, of all mines, amercements, and esch-ats.

Dav. 27. 57.

So, a grant of *bona filium*, &c. will not pass, the goods of one who stands mute and will not plead.

3 H. 4. 2.
pl. 2.
Raym. 242.
Sand. 275.

cited, & vide Rol. Rep. 399. 12 Co. 75. Jenk. 325. 2 Rol. Abr. 194. Owen, 155. Vent. 32. Sid. 142. 2 Mod. 107.

[The king granted to a ranger of a forest all manner of wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees and wood in the forest, cut off or thrown down, and bouse-bote and fire-bote, for himself and the foresters and keepers. It was adjudged, that under these words, branches cut from trees felled for his Majesty's use did not pass.]

Attorney-
General v.
Lord Sta-
well, Anst.
592.

By the statute of 17 E. 2. (stat. 1.) *de Prerogativa Regis*, the king's gift or grant of land, manors, *cum pertinentiis*, conveyeth not knight's fees, advowsons, or dowers, without express words, though it be otherwise in case of a common person.

10 Co. 64.

But, if a manor with an advowson appendant be in the hands of the king by escheat or by purchase, and he at this day give it as entirely as *J. S.* held it before it came into our hands by way of escheat, or as *J. S.* held who enfeoffed us, in such case the advowson

10 Co. 64.
Plow. 232.

advowson shall pass without saying in the charter *cum feodis & advocatibus*; because the law in such case intends, that the king is apprised of his right.

Land 298. So, if the king grants *ecclesiam*, the advowson passes, the (a) in-
40- The tent, and not the precise words, being to be regarded in the king's
king's grant grants.
of the man-

age of B. will not pass the advowson of the vicarage of which the king was seized. Cro. Eliz. 163.

9 Co. 45- A grant of stewardship of several manors by name, without
4 Mod. 279- mentioning in what county, has been held good, though uncer-
clerk. tain; notwithstanding it was objected that the king may have
in plant- divers manors of the same name, and no issue can be taken which
ing is ought manors the king intended to pass *.
to be seized
in what

question the warrors &c., as the plaintiff did in the Earl of Shrewsbury's case, and if the other party
 plead one county, upon trial of the issue, the circumstances (mentioned by the court) may be given in
 evidence, to prove what manor was granted. Vide 9 Co. 47. 2.

8 Co. 45- So, a grant to the Earl of Rutland, *a tempore plene etatis*, when
4 Mod. 279- in truth he was of age long before, was adjudged a good patent,
clerk. because it was the intent of the king that it should commence
 from that time; and if that could not be, then for the time to
 come.

Co. 46. If the king, being tenant in tail or for life, grants *totum statum*
suum, nothing passes.

Don. 43- So, if the king, being seized in fee, grants the lands or a rent,
42. Rot. and limits no particular estate in the gift, the grant is void, and
acc. 343. the patentee has no freehold either for his own life or for the life
Co. 43- of the king, nor even an estate at will; because most grants pro-
 ceeding from the application of the subject, they ought to know
 what they ask; and if that do not appear, nothing shall pass from
 the king by reason of the uncertainty.

Co. Lib. 27. So, if lands are given by the king's letters patent to a man and
a. Jack. his heirs male, this is void, for there can be no such tenure; and
494. therefore the king is deceived in his grant *.
4. Q. 204
 of services or acres granted by the king to a man for reward of service, as the same is descendible to the
 heirs male fiscal or collateral. Co. Lit. 27. 2.

2 Co. 224. So, if the king possessed of a chattel interest grants it in fee,
11 Mod. 103. this is void.
Gatesden.

3. Where the King's Grantee shall partake of his Prerogative.

Don. 41. A *chase in action* may be assigned to the king, as also granted or
11 Mod. 103. assigned by him; and in this latter case, the grantee may either
11 Mod. 103. sue in his own or in the king's name. But it is (b) said to be most
11 Mod. 103. usual to sue in the king's name, in order to take advantage of his
4 Mod. 279. prerogative.

Y. S. attainted of treason, and being possessed of certain obli-
 gations which became forfeited, the king granted them to the
 wife (c) without any words enabling her to sue for them in her
 own name; and she having sued in her own name, it was held,
 that the well might; for the law allowing the grant good, gives
 by

by implication the grantee the necessary means of attaining the benefit of it.

So, where J. S. in an action on the case recovered 4000 l. damages, and afterwards became outlawed in a personal action; and the king having granted this 4000 l. it was held, that the grantee may levy this debt by action in his own name, or by extent in the king's name; though he has no words in his grant to sue it in the king's name, as is usual in such case; but in this case an (a) assignment by the king's patentee was held void.

If the king enters without title, or seizes lands by a void or insufficient office, he is no disseisor: but (b), if the king by letters patent grants lands so seized, and the patentee enters, he is a disseisor; because he has time to inquire into the legality of his title, which the king is supposed to want leisure for.

nullum tempus occurrit regi. Poph. 26.

The king may distrain for his rent-service in any lands of his tenant: so, if he hath a rent-charge issuing out of certain lands, he may distrain in any other lands of the party; but his grantee cannot do so.

Originally all wrecks were in the crown, and the king has a right to a way over any man's ground for his wreck; and the same privilege goes to the grantee thereof.

Privilege.

PRIVILEGE is an exemption from some duty, burden, or attendance, with which certain persons are indulged, from a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their time and care; and that therefore without this indulgence it would be impracticable to execute such offices to that advantage which the publick good requires.

Under this description we shall consider,

- (A) The Duties and Offices from which certain Persons by reason of their Privilege are exempt.
- (B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,

1. Who are the Officers entitled to Privilege.

2. Of

he court held it a reasonable privilege, the office being ancient, and the attendance necessary elsewhere. They said, that if there were not persons sufficient besides to serve, this might have been hewn, and it would be a good reason to suspend his privilege; and though aldermen were not mentioned in the charter, yet, as superior and inferior officers were mentioned, as, mayor, sheriff, scheator, collector of tenths, &c., they said the middle were included; and accordingly he was discharged.

But, where some persons belonging to the custom-house, *London*, were indicted for not keeping watch and ward, though they pleaded a special privilege granted them by the king to exempt them from this duty; yet, as they did not aver that there were sufficient persons besides, the plea was over-ruled.

The king by his charter may exempt some persons from serving on juries if there be enough besides. But such charter of exemption does not extend to the court of King's Bench, unless particularly named; nor to any case where the king is concerned, unless it has these words, *licet tangat nos*. And the sheriff must not return such privilege, but the persons who would have the benefit of it must claim it.

A juror surmised at the bar, that he was tenant in ancient demesne, and had his charter in his hand, and prayed to be exempted from serving on the jury; but the court did not regard it, but caused him to be sworn. It was said (a), he might have his remedy against the sheriff; or, if he had made default and lost issues, he might shew his charter in the Exchequer upon the amercement estreated, and there he should be discharged.

Where a peer is party, either plaintiff or defendant, two or more knights * must be returned on the jury; and it was said, that in *Cumberland* there was but one freeholder who was a knight, besides *Sir Richard Stote*, a serjeant at law; and the court were of opinion, that rather than there should be a failure of justice, a serjeant at law ought to be returned a jurymen; for that his privilege would not extend to a case of necessity.

If a sworn (b) attorney or other officer of any of the courts of *Westminster-hall* be chosen constable, he may have a writ of privilege for his discharge. And it is held, that such officers shall have this privilege, not only where there is no special custom concerning the election of constables, but also where they are chosen by a particular custom in respect of their estates or otherwise; for that no such custom shall be supposed to be more ancient than the usage of those courts, and therefore shall give way to them.

So, an attorney, being chosen church-warden of a parish, may have a writ of privilege: so, a writ of privilege was signed by all the court of C. B. for G. a clerk under the *custos brevium*, to free him from being a soldier. And it is therein recited, that it is the privilege of the court, that neither the attorneys nor clerks of it

Sid. 272.
Keb. 933.
The King
v. Clark.

Sid. 243.
Lev. 159.
Raym. 113.
Keb. 840.

Leon. 207.
Mills v.
Snowballs.
Vide title
Ancient De-
mesne.
(a) Q. &
vide Co.
Lit. 130.
Sid. 243.

2 Mod. 182.
Mod. 226.
Dyer, 107.
pl. 27.
See 24 G.
2. c. 18.
f. 4. No
challenge to
the array, for want of a knight.

March, 30.
Noy, 112.
Cro. Car.
389.
2 Keb. 477.
(b) This
privilege is
thought to
extend to
barristers
at law,
c. 10. § 39.

2 Rol. Abr.
272.
Palm. 392.
Lev. 265.
Vent. 16. 29.
Raym. 180.

should be elected to any office without their consent, but ought to attend the service of the court.

§ 56. the like writ of privilege.

Gale, an attorney of *B. R.*, was elected one of the twenty-four burgeses in the town of —, and because he refused to serve was fined ten pounds: then he procured a writ of privilege, which he shewed; after which debt was brought for the ten pounds in *B. R.*, and it was prayed after imparlance to stay the action against *Gale*, because that after imparlance he could not plead his privilege to the action; and *Stone's* case was cited, who was elected reeve to collect the rents of the lord at *Harrow the Hill*, and was discharged by his writ of privilege. The court held, that the privilege of an attorney was a good discharge in this case: they likewise held, that the writ of privilege had a retrospect to the whole, and that being discharged from the office, he was discharged from the fine also.

It seems to be the better opinion, that if a captain of the king's guards, a gentleman of quality, or practising (a) physician, be chosen constable in a parish, where there are persons sufficient to serve, and in which there is no special custom directing such election, that every such person may be relieved or discharged by the court of King's Bench, which hath a supreme and mandatory power in cases of this nature: but, in case of a special custom in respect of estate or otherwise, it hath been holden, that such persons are not to be excused; and the rather, because they may execute the office by deputy.

H. 8. c. 40. [But the equity of this act, it should seem, does not extend to other not mentioned in it. 2 Hawk. P. C. c. 10. § 44.]

§ 58. By the statute 5 H. 8. c. 6. surgeons are exempt from serving parish offices.

By the 6 W. 3. c. 4. "All persons using the art of an apothecary, who shall be brought up and serve in the said art as apprentices seven years, shall be exempted from the offices of constable, scavenger, overseer of the poor, and all other parish, ward, and leet offices, and from serving on juries."

If an alderman of *London* has a house in the manor of *R.* in the county of *Essex*, (in which manor the lord has by prescription a leet,) and he as an inhabitant is chosen constable there, yet he is not compellable to serve; for that as an alderman he is bound to be present in the city for the good government thereof*.—And a writ was awarded to the lord of the manor to discharge him.

1777, Lord Mansfield refused to fine Mr. Plumbe, returned as a special jurymen in a case of ship, because at that time he was one of the sheriffs of *London*.

§ 59. One *Price*, being high constable for the hundred of *Wanslead*, was elected overseer of the poor in the parish of *St. Peter the Poor* in *London*; and upon producing the certificate of the justices of the peace of the county, and their certifying that his service in the office of constable was of great use and importance to

to his Majesty, he was by the court of *B. R.* discharged from the office of overseer till such time as his office of constable expired.

But, where *A.* was indicted for not taking on him the office of high constable, and the question on a special verdict was, Whether a tenant in ancient demesne may be made constable of an hundred which reaches further than the demesnes? it was adjudged, that he might.

Doctor *Lee*, archdeacon of *Rochester*, having lands within the level, was made an expeditor by the commissioners of sewers; whereupon he prayed his writ of privilege, which was granted; for the register is, *vir militans deo non implicetur secularibus negotiis*; and the ancient law is *quod clerici non ponantur in officia*—Clergymen are not to serve in the wars.

because the land was in lease, and the tenant, if any, ought to do the office. [The like point was determined in the vicar of Dartford's case, 2 Str. 1107. more fully reported in Andr. 353. under the name of Chambers' case. The court in delivering their judgment in this last case said, that upon the authority of Dr. Lee's case, and 6 Mod. 140. (*infra*), they were clearly of opinion, Mr. Chambers, the vicar, was not compellable to exercise the office: the first case being directly in point, and standing upon both the reasons given in the books; and the other being contrary to the distinction taken between an office at common law, and under act of parliament. And Lee, C. J. added, that the usage which had been offered of several clergymen having actually served the office since Dr. Lee's case, had no influence on the present question; for the exemption being claimed as a privilege, any person entitled to it may certainly waive it, if he pleases.]

A writ of privilege was moved for to have a clergyman, who appeared to have no cure of souls, privileged from the office of overseer of the poor, which three judges thought reasonable; but *Holt*, Ch. J. seemed against it, who thought that their privilege of exemption was only extendible to their spiritual revenues; and if in any case they were personal, it was only from common law offices, especially if they were without cure, as in the present case; and in deference to his opinion it was directed to be moved for again.

conditions, exempted from serving all county, ward, and parish offices, and therefore a clergyman of the church of England may be supposed to be exempted; for it cannot be imagined, that the legislature meant to confer greater privileges upon *seculars*, than the regular clergy were understood to possess: but there does not appear to be any adjudged case precisely to this point. See note to last edition of 6 Mod. *supra*.]

In the case of *Evedon* an attorney of *B. R.*, it was determined that he was not obliged to serve in the train-bands, or to find a deputy for that purpose, although the array and muster of these is directed by several acts of parliament which contain general words; for his privilege shall exempt him from offices, as well those created by statute as those at common law, if there be not an express clause for taking away his privilege.

c. 20. § 42. the militia acts having allowed a commutation of service into a payment of 10*l.* it hath been holden, that an attorney is not entitled to his writ of privilege to exempt him from serving in the militia, it being no longer deemed to be a *personal* service, upon which ground alone he could be entitled to it. Gerard's case, 2 Bl. Rep. 1123.—By 26 G. 3. c. 170. § 27. "No peer of the realm, nor any person who shall serve as a commissioned officer in any regiment, troop, or company in his Majesty's other forces, or in any one of his Majesty's castles or forts, nor any non-commissioned officer or private man, serving in any of his Majesty's other forces, nor any commissioned officer serving, or who hath served four years in the militia, nor any person being a member of either of the universities, nor any clergyman, nor any teacher of any separate congregation, nor any constable or other peace-officer, nor any attitled clerk, apprentice, seaman, or seafaring man, nor any person mustered, trained, and doing duty, or employed in any of his Majesty's docks or dockyards for the service thereof, or employed and mustered in his Majesty's service in the Tower of London, Woolwich Warren, the several gun-wharf

Vent. 344.
2 Show. 75.
pl. 59.
The King
v. Bettel-
worth.

Vent. 105.
Lev. 303.
Dr. Lee's
case, and
Mod. 282.
S. C. where
it is said, the
reason was,

6 Mod. 140.
[By 1 W. &
M. c. 18.
§ 11. *distin-*
gishing minis-
ters,
and by
31 G. 3.
c. 32. *Ro-*
man catho-
lick priests,
are, under
certain con-

M. 9 G. 2.
in B. R.
Evedon's
case. 2 Str.
1143.
[Heaton's
case, Barnes,
1143. S. P.
But, since
the 2 G. 3.

“ Portsmouth, or at the several powder-mills, powder magazines, or other storehouses belonging to his Majesty under the direction of the Board of Ordnance, nor any person being free of the Company of Watermen of the river Thames, nor any poor man who has more than one child born in wedlock, shall be liable to serve personally, or provide a substitute to serve in the militia; and no person having served personally, or by substitute, according to the directions of this, or any former act, shall be obliged to serve again, until by rotation it shall come to his turn: but no person who has served only as a substitute shall by such service be exempted from serving again, if he shall be chosen by ballot.”]

Mayer of
Norwich
v. Berry,
4 Burr.
2113. 1 Bl.
Rep. 636.
S. C.

[An attorney, it hath been holden, is exempted by the privilege of the court to which he belongs, from serving the office of sheriff in a corporation; though he be a member of the corporation, and resident in the corporate town, before and when he is admitted an attorney.

Delamotte's
case, 2 Str.
698.

A. who was a justice of peace, and resided at *Blackheath* in *Kent*, and in *London*, being appointed constable in *London*, moved for a writ of privilege. But the court denied it, saying they had nothing to do with it, but the proper method was under the statute of *Car. 2.* to apply to the sessions.

Per Lord
Mansfield,
4 Burr. 2114.

Barristers are considered as exempt from serving the office of sheriff.

It is permitted by 1 *W. & M. c. 18.* and 31 *G. 3. c. 20.* to dissenters and *Roman* catholics to serve the office of constable by deputy.

Anstr. 216.

The officers of the excise and customs claim, and have been allowed in several instances, their writ of privilege from the court of Exchequer, as officers of the court, to be discharged from offices. One of these writs of privilege, that are now in use, was settled by Lord Chief Baron *Comyns* himself.

Harrison's
case, Banb.
24.

So, the foreign apposer was allowed his writ of privilege to exempt him from serving the office of constable.

Bishop v.
Lloyd,
Banb. 255.

One *Martin*, who was deputy to the usher of the customs, being chosen head-borough for *Westham* in the county of *Essex*, moved for a writ of privilege to discharge him from that office, which was granted. Upon the authority of this precedent it was moved for a writ of privilege for the chief accountant to the commissioners for victualling the navy, who was chosen churchwarden of the parish of *Saint Botolph, Aldgate*, his attendance upon the king's business and the revenue of the crown being, it was urged, equally concerned as in the other case. But the court thought this case not like the other case, for it did not appear here, that there was a clause of exemption in the patent constituting the commissioners of victualling, as in the other case there was for all officers, &c.; and the true reason they went upon in the other case was, for that all officers in the customs are bound to an attendance in the court of Exchequer, which, in this case, the party applying for this writ of privilege is not.]

(B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,

1. Who are the Officers thus entitled to Privilege.

THE officers, ministers, and clerks of the courts in *Westminster-hall* are allowed particular privileges in respect of their necessary attendance on those courts: they are regularly to sue and be sued in the courts they respectively belong to, and cannot, except in certain cases, be empleaded elsewhere; which privilege arises from a supposition of law, that the business of the court or their clients' causes would suffer by their being drawn into any other than that in which their personal attendance is required:

1 Inst. 55c.
4 Inst. 71.
Vaugh. 154.
Dyer, 377. a.
pl. 30.

Anderson, Ch. J. of the C. B., brought trespass by bill for breaking his house in the city of *Worcester*, against a citizen of the said city; the mayor and commonalty came and shewed a charter granted by E. VI. and demanded connuance of pleas; but it was refused, because the privilege of that court, of which the plaintiff was a chief member, is more ancient than the patent; for the justices, clerks, and attorneys of this court ought to be here attending to do their business, and shall not be empleaded or compelled to emplead others elsewhere; and this privilege was given this court upon the original erection of it.

3 Leon. 149.
Lord Anderson's case.

An attorney, so long as he remains on record, shall have his privilege; and therefore where it was moved, that J. S. should put in special bail, being an attorney at large, and having (a) discontinued his practice, the court said, that attorneys at large have the same privilege with the clerks of the court, and are to appear *de die in diem*; and they were not satisfied that he had discontinued his practice.

Bro. title Attorney, 67, title Bill, 24.
Vent. 1.
Sir John How v. Walley.

an attorney absents himself for a year, by the new rules he loses his privilege. a Lill. Reg. 371. per Glyn, Ch. J. See acc. 4 Burr. 2114.

(a) That if

But, where J. S. was arrested in B. R., and after the arrest he procured himself to be made an attorney of C. B., and prayed his privilege; it was disallowed, because it accrued *pendente lite*.

2 Rol. Rep. 115.

In debt returned the warden of the Fleet, by bill of privilege, he refused to appear; the court doubted how they could compel him, as they could not forejudge him the court, he having an inheritance in his office; but it being surmised that he made a lease of his office, it was held, that he should not have his privilege, for that the lessee, and not he, was the officer during the lease.

2 Leon. 173.
Gittinson v. Tyrrel.

So, if the marshal of B. R. grants his place for life, the grantor has no privilege during that time.

Vent. 6c.
2g. if he can now

grant it? Vide the stat. 27 Geo. 2. c. 17. whereby the power of appointing the Marshal is vested in the Crown.

Palm. 403. A clerk of *B. R.* was sued in an inferior court for a debt under five pounds, and had a writ of privilege allowed; for the stat. 21 Jac. 1. c. 23. never intended to take away the privilege of attornies.

Hard. 365. In the court of (a) Exchequer there are three sorts of privilege:
(a) Where an officer 1st, As debtor. 2^{dly}, As accountant. 3^{dly}, As officer.

or Minister of the Exchequer is one of the parties in a personal action, he shall be sued in that court, because his absence might hinder the king's affairs: so, a prisoner of this court, or any accountant that is entered into his account, shall have the like privilege; and a farmer or one indebted to the king, for the king's more speedy satisfaction of his debt or duty, may sue his debtor by a *quo minus* in the Exchequer. 2 Inst. 531. [That officers of the revenue, as such, are privileged to be sued in the Exchequer in all cases, is a doctrine and opinion which has been supposed to obtain in the Exchequer. However, the general privilege to be sued in all personal actions in that court hath been doubted by very great authority; for it seems that the court has always confined the privilege of removing the action, to those cases in which the action hath been brought for something which hath been done by them in the execution of their office. Lord C. Baron Eyre's argument in *Cawthorne v. Campbell*, Anstr. 216. And this doubt of the learned Judge is supported by the case of *Barkley v. Walters*, Bunb. 306. where a custom-house officer had seized two cables, one of which only was forfeited; and an action being commenced against him in the court of King's Bench, the court of Exchequer refused to remove it, because it did not appear, but that the action was brought in *B. R.* for the other cable only.]

Noy, 40.
Walkend v.
Winroll.

J. 8. was sued in an action of battery in *London*, which he removed into *B. R.*, and afterwards prayed his privilege in the court of Exchequer; and upon the puisne baron's coming into court, and bringing the red-book of the Exchequer, which shewed that he was an escheator, and so an accountant to the king, the privilege was allowed.

2 Leon. 21.
Lightfoot v.
Butler.

(b) In 2
Leon. 146.
It is said,

If one holds of the queen as of her manor, he shall not have the privilege of the Exchequer for that cause; but (b), if the king grants tithes, and thereupon reserves a rent *nomine decime*, and a tenure of him, there he shall have privilege.
that the tenant of the king in chief, or he who pays first fruits, or he who holds of the queen in fee-farm, shall not have privilege. 2. & vide 3 Leon. 258. — That commencing a suit in the Exchequer on a *quo minus* as debtor to the king, is not such a privilege as will oust an inferior jurisdiction; for it is now grown the common method of suing in those courts. Hard. 316. 2 Vent. 362.

2 Show.

299.

pl. 301.

Lampen v.

Sir Edward

Deering &

al.

(c) Difference between officers that are of record and not.
Hard. 164.

On a *latitat's* being sued out against the commissioners of the treasury, the puisne baron of the Exchequer came into the court of *B. R.*, and brought into court the red-book of the Exchequer, which is deemed a record in that court; and thereby it appeared, that the treasurer had privilege of being sued only in that court; and the patent being produced in court which constituted the defendants, &c., and granted them the office of treasurer of *England*, their privilege was allowed them without putting them to bring a writ of privilege, the court grounding themselves on the (c) record before them.

Hard. 316.
vide Moor,
753. 2 Inst.
23. 551.
Bro. Privi-
lege, 16.

(d) But, if an accountant has finished his

It hath been held, that the treasurer of the navy is *eo ipso* an accountant; and that an accountant's privilege will hold against a special privilege in another court, as officer of the court or otherwise; though it be not alleged that such an accountant is (d) entered upon his account; for that every accountant may be attached by the court to make up his accounts, and must attend for that purpose *de die in diem*.

account and reduces it to a debt, he shall have no privilege but as a general debtor. Hard. 365.

Raym. 2.
K. 1.
Bar. 1.
v. A. 1.

(a) 2. 1.
1. 1.
4. 1.
2. 1.
— 1.
fer. 1.
fe. 1.
law. 1.
C. 1.

T. 1.
S. 1.
G. 1.
c. 1.
B. 1.

Payre v.
Fry. 1.
5. 1.
old 1.
of 1.
that 1.
is 1.
one 1.
pro. 1.
ries. 1.
that 1.
em. 1.
eng. 1.
rec. 1.
aff. 1.
cl. 1.
the 1.
R. 1.
b. 1.
1. 1.
the 1.
K. 1.

2. 1.
2. 1.
pl. 1.
Ward v.
Law. 1.

In debt in *B. R.* against *J. S.*, he pleaded to the jurisdiction, that none of the privy-chamber ought to be sued in any other court, without the special licence of the lord chamberlain of the household; and that he was one of the privy-chamber; on demurrer to this plea, the court over-ruled it with great resentment, and awarded a *respondeas ouster*.

It was agreed in Serjeant (*a*) *Scrogg's* case, that the privilege of the court of *C. B.* which serjeants claimed, extended only to inferior courts, not to the courts in *Westminster-hall*; and that a serjeant may be sued in any of these, because he is not confined to that court alone, but may practise in any other court: but it is otherwise as to attornies or filazers, who cannot practise in their own name in any other court but such as they respectively belong to. A serjeant at law therefore is to be sued by original, and not by bill of privilege.

So, in an action by bill brought in *C. B.* against a serjeant at law, for work done, he pleaded that he ought to have been sued by original, and not by bill. [Upon arguing the demurrer, a case was quoted, *Baker* against *Swindale*, in the court of *C. P.* *Mich.* 10 *G. Roll.* 360. It was an action brought against a prothonotary's clerk by original, to which he pleaded, that he ought to be sued by bill; whereupon the plaintiff demurred, and the court gave judgment that the defendant should answer over. *Per cur.* 'This case is in point; serjeants, prothonotaries' clerks, and all others not obliged to attendance in court, are upon the same foot. Judgment *quod billa cassetur*.

The defendant pleaded in abatement, that he was one of the clerks of Sir *J. Cooke*, prothonotary in *C. B.* Upon a rule to shew cause why it should not be set aside, the affidavit annexed to the plea was produced, wherein the defendant swore, that he served his clerkship with a Common Pleas attorney, and that he had for many years acted as an attorney or solicitor; and followed no other employment. After consideration the court set aside the plea, being all of opinion, that such clerks had no privilege at all, they not being sworn as attornies are, nor ever acting as clerks in the prothonotary's office; and that it was not sufficient for the prothonotary to enter their names in his book. As to such clerks as were actually employed under him, for so long as they continued in that employment, they would be privileged, but no longer; as in the case of a judge's clerk; and an old rule 8 *Car.* was cited, where they were restrained from practising as attornies.]

late years an affidavit has been required to that effect. *Cooke v. Latimer*; *Reade v. Chambers*, 10 *Clift.* 342. and in the case of one *Worthington*, 1 *Ld. Raym.* 399. *Clift.* 572.

J. S. being arrested by a writ out of *C. B.* brought his writ of privilege as clerk of the Crown-office; but it appearing that he was only a clerk to Mr. *Ward* (clerk of that office) and not an immediate clerk of the office, a *superfedeas* to the writ of privilege

(a) That an attorney was granted on motion; the court having agreed, that he had more privilege than an (a) attorney's clerk.
 clerk has no privilege. Comb. 12. adjudged.—But the clerk to the clerk of the Pells in the Exchequer is entitled to the privilege of that court. Comb. 482.

Still. 460. A serjeant at law, (b) barrister, attorney, or (c) other privileged person, whose attendance is necessary in *Westminster-hall*, may (d) lay his action in *Middlesex*, though the cause of action accrued (b) Though in another county; and the court on the usual affidavit will not change the venue.
 he hath discontinued his practice for some time. 2 Show. 176. pl. 172. [Vide *supr. contr.* But he does not lose his privilege by residing in the country. 2 Bl. Rep. 1065.] (c) This privilege extends to judges clerks, and also to the clerk of assize. Salk. 670. pl. 9. 671. 2 Ld. Raym. 1253. (d) It is the common right of any gentleman at the bar to have a trial at bar; and it has never been denied in the case of an officer of the court. 6 Mod. 123. *per cur.*

Carth. 126. But it hath been held, that if a privileged person be sued, and the action brought against him in the right county, his privilege will not entitle him to have it tried in *Middlesex*.
 Ld. Raym. 338. Bisse v. Harcourt.—But in Salk. 668. in Wilcocks's case, Trin. 2 Ann. the venue is said to have been changed where an attorney was defendant. [And the like was done in the case of *Wigley v. Morgan*, 2 Str. 1049. Ca. temp. Hardw. 285. Andr. 384. However, this case hath been since overruled, and the law is now settled agreeably to the doctrine in the text. *Pope v. Redfearne*, 4 Burr. 2027. *Yeardly v. Rowe*, 3 Term Rep. 573.]

2 Vent. 77. If an attorney lays his action in *London*, the court will change the venue on the usual affidavit; for by not laying it in *Middlesex*, he seems regardless of his privilege, and is to be considered as a person at large.
 2 Salk. 668. pl. 1. [So, an attorney suing by original, waives his privilege. *Hetherington v. Lowth*, 2 Str. 837.]

2 Ld. Raym. 1556. On a motion to discharge a rule which had been obtained for changing the venue, it appeared, that the plaintiff was a barrister and Master in Chancery; and the court held, that he had a privilege by reason of his attendance, to lay his action in *Middlesex*, and therefore discharged the rule.
 Fitzg. 40. S. C. Burroughs v. Willis. 2 Stra. 822. *Barnard. K. B.* 14.

2. Of the Privilege and Protection allowed those whose Attendance is necessarily required.

Brownl. 15. The law not only allows privileges to the officers of the court, but also protects all those whose attendance is necessary in courts; so that if a suitor is arrested either in the face of the court, or out of the court, as he is coming to attend and follow his suit, or upon his return, it appears upon complaint made thereof, that the fact was so, the court will not only discharge the party from the arrest, but will punish the officers or bailiffs, as also the (e) plaintiff who procured the arrest, as for a contempt to the court.
 (e) If he knew that the party was prosecuting or defending any suit; because an affront to the court, as well as an injury to the party arrested. 2 Lil. Reg. 369.

Serjeant Scroggs, entering his coach at the door of *Westminster-hall*, was arrested upon a *latitat* out of *B. R.*, and complaint being made thereof in *C. B.*, it was agreed, that not only serjeants at law, but all other persons whatsoever, are freed from arrests so long as they are in view of any of the courts at *Westminster*, or if near the courts, though out of the view, lest any disturbance may be occasioned to the courts or any violence used, which in such cases is very penal. In this case the serjeant was discharged of the arrest by rule of court, and the Judges said, that if the plaintiff should bring an action against the sheriff for an escape, they would commit him. The bailiffs who made the arrest were committed to the *Fleet*, but the next day, upon their submission and acknowledgment, were discharged, paying their fees.

M. 26 Cas.
2. in C. B.

So, where one *Long* an attorney of *C. B.* was arrested in *Palace-yard*, not far from the Hall-gate, sitting the court, he together with the officer was brought into court, and the officer committed to the *Fleet*; and because the plaintiff was an attorney of *B. R.* who informed the court of *C. B.* that his cause of action was 200*l.*, the court ordered that another of the sheriff's bailiffs should take charge of the prisoner, and that the prothonotary should go with him to the court of *B. R.*, and that court being informed how the case was, discharged the defendant on common bail. The writ upon which he was arrested was an attachment of privilege, which the court supposed to be designed to oust him of his privilege; for there was another writ against him at the sheriff's office, at the suit of another person.

2 Mod. 182.
Long's case.

If process hath issued against a husband, and in coming to defend it, he and his wife are both arrested, the wife shall have privilege as well as the husband; for they are considered as one person in law, and the wife cannot answer without her husband.

Dyer, 377.
2. pl. 30.
Bro. Priv.
17. & vide
Noy, 68.

If the court give either plaintiff or defendant leave to inquire after evidence in any cause depending in that court, and he be arrested, he shall have privilege; but it is otherwise, if he go without the permission of the court. So, if one on the day he has been attending his cause be arrested at ten o'clock at night, by one noway engaged in the cause, he shall not have privilege (a).

2 Rol. Abr.
272.
[(a) But
quere of
this, for the
returning
has never
been very

nately scanned, so as to require a man to go the direct road. *Bro. Privilege* 4. allows that the protection is not forfeited by the plea of *extra viam*, because it may be, the party went to buy a horse, victuals, or other necessaries for his journey. Neither is the law so strict in point of time as to require the party to set out immediately after the trial is over, as in the case of *Hatch v. Blisset*, *infra*, and *Gill. Rep.* 308. The defendant, an old woman, had a trial at Winchester assizes, which was over on Friday at four in the afternoon: she staid there till after dinner on Saturday, and in the evening at seven was arrested going home to Portsmouth, which is twenty miles: and the court held, that she ought to be discharged, that her protection was not expired, and a little deviation or loitering would not alter it. And in a later case, where the defendant was attending his cause at the sittings, and though it was put off early in the day, staid in court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, where he was arrested during dinner; the court held, that such a necessary refreshment as this ought not to be looked upon as a deviation, so as to cancel the defendant's privilege *redempta*. *Highfoot v. Cameron*, 2 Bl. Rep. 1113.]

A. has a suit against B. in *C. B.*, and afterwards B. is arrested in an inferior court, when he was not coming to or returning from the defence of his suit, he shall not have privilege.

Jenk. 173.

A person

Comb. 29.
The King
v. Fielding.

A person coming to give security of the peace, it was held he was privileged; if he had come to have sworn the peace, the arrest would have been allowed.

2 Salk. 544.
pl. 6. *See*
vide infra.

So, where one came to confess an indictment, the court held he had no privilege *eundo & redeundo*, because there was no process against him.

Vent. 11.
Mod. 66.

The courts not only protect the parties themselves, but all witnesses are protected *eundo & redeundo*; for since they are obliged to appear by the process of the court, they will not suffer any one to be molested whilst he is paying obedience to their writ.

Meekins v.
Smith.
1 H. Bl.
636.

[And it hath lately been laid down by the court of *C. P.* as a general rule, that all persons who have relation to a suit which calls for their attendance, whether they are compelled to attend by process or not, are entitled to privilege from arrest *eundo & redeundo*, provided they come *bonâ fide*. And in this description bail and barristers upon the circuit are included.]

20 H. 6. 4.
Bro. Priv.
55. 2 Rol.
Abr. 273.

Also, the courts not only protect the persons of their attendants, but likewise all those things that are necessary for their journey or the defence of their suit; but not merchandizes or goods for sale or traffick.

Kinder v.
Williams.
4 Term
Rep. 377.
But see *Ex*
parte Ker-
ney, 1 Atk. 55.

[The court of *B. R.* hath refused to discharge a person in custody by process of the sheriff's court in a cause afterwards removed into *B. R.* because he was arrested whilst attending commissioners of bankrupt to prove a debt.]

Ex parte Dick, and *Ex parte Stow*, 2 Bl. Rep. 1142.

3. In what Cases this Privilege is to be allowed.

Sand. 67.

The privilege allowed officers of the court, is to be understood as extending only to such cases where the party who sues them has sufficient remedy in their own courts: therefore, if a writ of entry or other real action be brought against an attorney of *B. R.* he cannot plead his privilege; because, if this should be allowed, the plaintiff would have a right without remedy: for the King's Bench hath not cognizance of real actions.

Sand. 67.

So, if an attorney of *C. B.* be sued in an appeal, he shall not have his privilege; for his own court hath not cognizance of this action.

Sid. 362.

Sand. 67.
2 Keb. 346.
Turbill's
case, & *vide*
2 Leon. 156.

So, if money be attached in an attorney's hands by foreign attachment in the sheriff's court in *London*, he shall not have his privilege; because in this case the plaintiff would be remediless; for the foreign attachment is by the particular custom of *London*, and does not lie at common law.

4 Leon. 81.
2 Rol. Abr.
274.
Lit. Rep. 97.

In indictments, informations, or suits, in which the king alone is concerned, the officer shall not have privilege; for it would be unreasonable that the court should allow protection to those who offend against the publick peace of the community and the king's interest.

3 Lev. 398.
Comb. 319.
Lutw. 193.
Skin. 549.
pl. 10.

But it seems the better opinion, that in an action *qui tam*, as on the *stat.* 23 H. 6. c. 7. against an attorney, for continuing sheriff longer than a year, the defendant ought to have his privilege;

for

For though it be brought in the king's name, and the king is to have part of the money, yet it is to be considered as the mere suit of the party, in which the party may be nonsuit. Besides, the party may have a *take*, without the warrant of the Attorney-General.

Salk. 30.
Ld. Raym.
27. 2 Salk.
543. pl. 1.
1 Bl. Rep.
373.
Cowp. 367.

Also, the privilege the courts allow their officers, is restrained to those suits only which they bring in their own right, or are brought against them in their own right; for if they sue or are sued as executors or administrators, they then represent common persons, and are not entitled to privilege.

Hob. 177.
Dyer, 24.
pl. 150.
2 Sid. 157.
Latch, 199.
Godb. 10.
Brown and
Goldsb. 47. Sav. 20.

As, where a clerk of the King's Remembrancer in the Exchequer married a woman who was executrix to J. S., and having brought an action of debt by privilege, for a debt due to the testator, it was held, that he was not entitled to privilege.

So, in an action against an attorney, who was executor to J. S. who pleaded his privilege, it was over-ruled, though it was urged, that there was a difference where the attorney was plaintiff, and where defendant; but the court held it the same in both cases.

Salk. 3.
pl. 4.
Ld. Raym.
533. New-
ton v. Row-
land.

Also, if a privileged person brings a joint action, this destroys his privilege; because those with whom he joins are not officers of the court, nor entitled to the attachment which the court grants to its own officers.

2 Rol. Abr.
274.

So, if an action be brought against a privileged person and others, he shall be ousted of his privilege; for if otherwise, he would destroy the plaintiff's action, as he would be obliged to sue the others by original writ, and him by petition. But some opinions are, that this must be understood where the action is joint in its nature, and cannot be severed; and that if the action can be severed without doing any injury to the plaintiff, the officer shall have his privilege.

14 H. 4. 21.
20 H. 6. 32.
Dyer, 377.
2 Rol. Abr.
274. 275.
Godb. 10.
Noy, 68.
2 Sid. 157.
Vent. 298.
2 Lev. 129.
Vern. 246.

But this matter came fully to be considered in a late case where trespass was brought in *B. R.* against an attorney and another person, the attorney pleaded his privilege as an attorney of *C. B.*, and concluded *quod non intendit quod cur. cognoscere velit, &c.*; and on demurrer, though it was admitted that the nature of the action was several, yet the court on consideration of the above cited cases held, that the rule was general, and that the plaintiff was not bound to bring separate actions; and thereupon awarded a *respondeas ouster*.

Hil. 8 G. 2.
in B. R.
Pratt v. Salt.

4. Of claiming and allowing Privilege; and therein, that it must be set forth and pleaded.

Privilege is to be claimed and allowed of in courts in such (a) manner as the law directs, and in most cases it is a matter to be taken (b) strictly.

Dalf. 16.
Vaugh. 154.
2 Bull. 36.

be allowed on motion. Still. 373. vide 2 Chan. Ca. 69. — An attorney must plead his privilege, and cannot be discharged on motion. Salk. 544. pl. 3. [1 Will. 306. 2 Str. 864. 2 Ld. Raym. 1567. Barnard, B. R. 300. But where an attorney is arrested by *latitat* in his own court, it is a motion

(a) Not to
(b) Not to

tion of course to discharge him on filing common bail. *Wheeler's case*, 1 Will. 298. Imp. K. B. 498 ed. 1791. In the case of *Croftley v. Shawe*, 2 Bl. Rep. 1035. the court of C. P. held, that an attorney arrested by capias upon a special original out of that court was not entitled to his discharge upon serving the sheriff with a writ of privilege, but must plead his privilege. If indeed the arrest were upon process out of an inferior court, his writ ought to be allowed *instantaneè*. *Rawlins v. Parry*, Six Geo. Cooke's notes, p. 2.] (b) 2 Sid. 164.

3 Co. 141. If an inferior court will proceed after a writ of privilege is delivered, it is a nullity; and the courts at *Westminster* will discharge the party.

—A writ charge the party.
off privilege disallowed by an inferior court, held error. Cro. Eliz. 157.

Hil. 26 C. 2. One *Fletcher* was sued in the Marshal's Court, and he procured a writ of privilege as attorney of C. B. upon which the plaintiff in the Marshal's Court surmised, that he was forejudged before, and produced the record of his forejudger; upon which the Marshal's Court proceeded; and upon complaint thereof in C. B. the court held, that the writ of privilege ought not to have been questioned there, but ought to have been allowed; and that if it was not duly obtained, it was a matter examinable here; therefore all the proceedings in the Marshal's Court were set aside, and the plaintiff ordered to pay all costs of the proceedings since the writ of privilege, otherwise an attachment to issue.

6 Mod. 305. A clerk to one of the Barons of the Exchequer being sued in *B. R.* pleaded, that *tempore quo memoria non extat* all the clerks of the king's court of Exchequer were privileged from being sued elsewhere than in that court; and that the defendant was clerk to *R. P. un' Baron' de Scaccario nostro predict'*: upon demurrer, the court said, there were two ways of pleading privilege; one was, to go to issue, and at the trial, if the party be an officer of record, to shew it by producing the record; if he be not an officer of record, but is attendant on one of the Barons, that must be tried by a jury; because the court of Exchequer, as a court, cannot take notice of it any more than the court of King's Bench: the other way is, if he be an officer on record, to produce a writ of privilege at the time of the plea pleaded, and then no issue can be joined upon it; and here the custom is ill pleaded, for *tempore quo non extat memoria* is nonsense, it should be *cujus cond' memoria*, &c.; and because that he did not aver to one of the Barons of the King's Exchequer, but *de Scaccario nostro*, a *respondens* *super* was awarded.

In an action against *A.*, he pleaded his privilege thus. And the said *A.*, in his proper person, says, that he is, and at the time of exhibiting the bill was, one of the clerks of *T. W.* one of the prothonotaries of the court of C. B. at *Westm.* in the county of *Middlesex*, and attending his office every day, and concluded with an averment generally, without annexing any writ of privilege to his plea; and this on demurrer was held ill, because the defendant did not say *venit* as well as *dicit*; and for that he did not lay any *venue*, so as the fact of his being a prothonotary's clerk might be tried; for it is a matter issuable, for their clerks are not (a) enrolled.

Carth. 362. Skin. 582. pl. 2. Stephens v. Squire. (a) *Mard.* 364. 7 Mod. 97. But the privilege of an attorney or officer on record is not traversable, nor triable *per pais*. Salk. 30. 2 Salk. 543. pl. 1. *Ld. Raym.* 27. 2 Sid. 164. 2 *Lotw.* 2466. *Vent.* 264. 3 *Keb.* 352. Skin. 582. pl. 2. [2 Bl. Rep. 1033.]

To an action brought in *B. R.*, the defendant pleaded his privilege of an attorney of *C. B.*, without producing any writ of privilege, and without saying *prout patet per recordum*; and two exceptions were taken: 1st, The want of averment, *prout*, &c. 2^{dly}, That there was no place laid where the defendant was an attorney. And *per Holt*, Ch. J. there are two ways of pleading this matter so it cannot be denied, *viz.* with a *profert* of a writ of privilege, or of an exemplification of the record of his admission; or it may be pleaded as it is here: and as to the averment by the record, it is ever pleaded as a matter of record, which is always pleaded with me, *viz.* of such term, &c.; but never any plea was seen that the defendant of such term was admitted attorney, &c. As to the second exception he said, that it was not necessary to lay a *venue*; or that this being a matter concerning the person of the defendant, it should be tried where the writ was brought.

An attorney of *C. B.* being sued in *B. R.*, pleaded his privilege; to which it was demurred specially, for not concluding his plea with a *profert* of a writ of privilege testifying his being an attorney, &c. And *per Holt*, Ch. J. the difference is, if privilege of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; if without, he may; and then a *certiorari* shall be awarded to certify whether he be or not.

An attorney of *C. B.* pleaded to the jurisdiction of the court of *B. R.* And *per curiam*, he shall not be (a) sworn to his plea, nor need the writ of privilege be set forth at large; and if matter of fact be pleaded in abatement, and found against the defendant, judgment (b) final shall be given.

Writ of privilege to his plea, tested after the action brought, but made no affidavit of the truth of his plea; and on a motion of Mr. Parker, the plea was set aside for want of the oath; and because it did not appear by the writ, that the defendant was an attorney at the time of bringing the action. *M. & G. 2. Wicks v. Dagley. 2 Barnard. K. B. 216. S. C.* [Whether it is necessary to annex an affidavit to the plea seems to be a matter of some doubt. See 2 Bl. Rep. 1088. It must appear by the plea, that the defendant was an attorney at the time of bringing the action. A mere clerical mistake in the statement of this fact, was holden to be fatal. 2 Str. 864.] The defendant pleaded his privilege that he was an acting clerk to Sir George Cooke, and annexed an affidavit to his plea, that he solicited causes in the court of *C. B.*, but because he did not swear that he entered causes in that office, or that he did business as an entering clerk, the plea was set aside. *Hil. 2 G. 2. in B. R. Edmund and Thomas. Barnard. K. B. 141. S. C.* may be pleaded without a venue. 2 Ld. Raym. 1173. (c) That it is peremptory. Bro. Perempt. pl. 48.

In *assumpsit* by *A.* against *B.* for 1000 yards of black cloth, for which the defendant promised to pay, &c.; the defendant pleaded his privilege as an auditor of the Exchequer, in these words, that the Barons of the Exchequer, their clerks, or other officers of that court, have not been empled elsewhere; to which plea there was a demurrer: 1st, Because it was pleaded in the (c) negative. 2^{dly}, Because it was general, that the Barons and their clerks; which doth not shew but that one of their clerks might be sued elsewhere. 3^{dly}, That the conclusion was, he hopeth, &c.; and for these reasons the plea was thought ill: it was likewise said, that he ought to have concluded *hoc paratus est verificare*, unless the puiſne brings into court the (d) red book of the Exchequer.

of the Exchequer allowed. 1 Keb. 236. 2 Keb. 103. 2 Lutw. 46. — An accountant of king's Exchequer allowed his privilege in *B. R.* on a Baron's coming into court and shewing his accounts, and this without any plea or prayer of the party. 2 Bull. 36. — Where one en

2 Salk. 545. pl. 8.
2 Ld. Raym. 1172.
Scaven v. Gamet.

2 Salk. 545. pl. 7.
Dillon v. Harper,
2 Ld. Raym. 898. S. C.
vide 7 Mod. 106. Clifton v. Sweseland, like case.

6 Mod. 114.
(a) An attorney of *C. B.* pleaded his privilege in *B. R.* and annexed a

2 Sid. 164.
Hard. 164.
Forster v. Barrington.

(c) Vide
2 Ld. Raym. 869. Lutw. 1466.

(d) The privilege of an officer of the Exchequer may be pleaded, or by shewing the red book

to the privilege of the court of Exchequer is sued in C. B. the court sends a *superfedeas*; but if it be in B. R. no *superfedeas* is sent, for that would be to supersede the king; but the practice is, to send up the *resd.* book by the Puisne Baron. 2 Salk. 546 *per* Walter, Ch. Baron. [The practice here *resd.* is gone into disuse, and the method now used of asserting the privilege is by an order from the court of Exchequer to remove the action, whether commenced in the King's Bench, Common Pleas, or any other court, into the office of pleas of the court of Exchequer, and that it shall be there in the same forwardness as in the court out of which the action is removed: but this order does not operate as a *cessantari* to remove the proceedings, but as a personal order on the party to stay his proceedings there, with liberty to commence his action in the office of pleas, and of course calls upon the defendant in that action to appear, to accept a declaration, and to put the plaintiff in the same state of forwardness in the office of pleas as he was in the other court. So that the order is simply an injunction to stay proceedings in the other court, qualified and softened by a liberty given to sue here; and is to be enforced, as all injunctions are, by attachment. Lord C. B. Eyre's argument in *Cawthorne v. Campbell*, Anstr. 207-8.]

Ld. Raym. In *assumpsit*, the defendant *venit & dicit*, that he is an officer of the Exchequer, and pleads privilege; and on demurrer two exceptions were taken: 1st, Because he pleads his privilege by writ, but not under the seal of the court. 2^{dly}, That it is not said, that the court ought not to have consuance in the beginning of the plea. *Per Holt*, Ch. J.—If a man pleads privilege, and at the time of pleading he produces a writ testifying that he is an officer, the plaintiff cannot deny the privilege: but, if he pleads it without a writ, the plaintiff may deny it, but the plea is good without shewing the writ. As to the second exception he held, that the conclusion made the plea; for if a man begins in bar and concludes in abatement, it is a plea in abatement.

Sid. 74. The clerks of the papers and secondary of the King's Bench, when they claim privilege, declare themselves to be clerks to the master.

Sid. 65. Privilege in the Common Pleas must be certified by the prothonotaries, and not by the secondaries.

2 Bull. 207. It hath been a matter of great doubt how far an attorney of C. B. or other privileged person, being in *custodiâ marescalli*, shall be ousted of his privilege; for on the one hand being in actual custody, he is to answer to the plaintiff's demand lodged against him, and not to the process that brought him in; and on the other hand, it hath been thought hard, that his being there by coercion and on a fictitious trespass should oust him of his real privilege: the determinations herein have been, 1st, That though *A.* be in *custodiâ marescalli* at the suit of *B.*, yet when *B.* declares against him he may plead his privilege, because he comes there by coercion, and had no opportunity before to take advantage of it. 2^{dly}, If *A.* files bail at the suit of *B.* and in the same term a declaration is delivered against *A.* at the suit of *C.*, *A.* may plead his privilege against *C.* as well as against *B.*; for it were absurd that *C.*, who tops his suit upon the action of *B.*, should have more liberty or advantage against *A.* than *B.* himself had. 3^{dly}, But if it be in a subsequent term, or if by any thing *A.* waive his privilege in the first action, he then becomes obnoxious to the suits of every one; and as to *C.* he is truly in *custodiâ marescalli*; for being once ousted of his privilege, he can no longer attend as an officer in the other courts, but is fixed in the King's Bench; and therefore cannot by the supposition of the necessity of his attendance oust the party of his action.

So, if an attorney of *C. B.* is brought into the court of *B. R.* at the suit of an attorney there, which is an estoppel to the defendant's privilege, the defendant shall be ousted of his privilege in all other actions commenced against him in *B. R.* in the same term; because the jurisdiction of this court was attached upon him by the first action. Carth. 377.

As to the time of pleading privilege, it has been laid down in a variety of cases as a sure rule, that after imparlance the defendant cannot plead his privilege, because by imparlance he affirms the jurisdiction of the court, which by this plea he would oust. But herein these distinctions have been taken, and the law by the modern authorities seems now established, that after a general imparlance, the defendant cannot plead privilege, because he must then plead in chief; so after a special imparlance in this manner, *Salvis omnibus allegationibus & exceptionibus omnimodis tam ad breve quam ad narrationem*; for by this special imparlance he has confined himself to take advantage of defects in the writ and count only; but in case of a general special imparlance obtained from the court, viz. *Salvis sibi omnibus & omnimodis advantagiis & exceptionibus*, he may after plead his privilege; for this is not to oust the court of its jurisdiction, but is a privilege which each court allows to the officers of the other, to be sued in their own court only.

A witness was arrested in his return from *Winchester* assizes, and in the term following was discharged by motion on common bail by the court from which the record issued, and that without having the privilege of the court of *nisi prius* certified. Had the arrest been at the assizes, the judges there might have discharged him; for privileges given by law are to be prosecuted in such a manner as the party may most easily get the benefit of them. Trin. 13 Ann. in B. R. Hatch v. Blisset. Gibb. cas. 308. 2 Stra. 986.

5. How privileged Persons are to sue and be sued.

When an attorney or other officer entitled to privilege, is plaintiff, he regularly sues (a) by writ of privilege, and is sued by bill; which processes issue out of the court in which the action is commenced, and have no foundation in Chancery. 4 Inst. 71. 99. 112. (a) In the Exchequer, where the plaintiff is 2 Salk. 546.

privileged, the suit is *quo minus*; where the defendant is privileged, the suit is by bill.

But an attorney is not obliged to sue by writ of privilege, but may sue by original; but if he elects the former, he must name himself attorney, &c. for when any particular character or relation gives any person rights and privileges, it must be set forth. Vent. 199. 28 E. 3. 4. Cro. Eliz. 731.

And therefore it hath been held, that if an attorney sues by original, he must declare as others do; and that if he does otherwise, it will be fatal on a special demurrer, though aided after verdict, and also good on a general demurrer. 2 Lev. 40. Vent. 198. 2 Keb. 860. 879. 3 Keb. 15. Mod. 10.

Attornies are entitled to process of attachment, and are not to be arrested or held to special bail, let the cause of action be what it will; for being officers of the court they are obliged to a constant attendance, and are presumed to be always amenable.

2 Salk. 544. pl. 4. Brown's case. A filazer of B. R. was arrested by writ, but discharged on common bail; for he ought to be sued by bill, as being present in court.

Salk. 544. [(a) But now it may be filed in vacation as well as in term time, Dougl. 300.; though if it be filed in vacation, otherwise than to avoid the statute of limitations, the plaintiff will not be allowed his costs, if the action should be settled before the ensuing term.] A bill cannot be filed against a person privileged, in vacation (a); for then he is not present in court, and as to the vacation, it begins the last day of the term, as soon as the court rises.

300.; though if it be filed in vacation, otherwise than to avoid the statute of limitations, the plaintiff will not be allowed his costs, if the action should be settled before the ensuing term.]

2 Salk. 544. pl. 5. The bill must be filed though the attorney agrees to appear and dispense with it; but it may in such case be filed afterwards.

6 Mod. 16. In an attachment of privilege by the marshal, he shall have no attorney, because present in court.

Sid. 134. The King v. Paget. (b) An attorney may plead his privilege by an attorney, without any inconvenience, for he may be sick, or have business in another court, and the precedents are both ways, Stil. 413. An information was exhibited against the *custos breviarum* of B. R. for abuses and misdemeanors in his office, who refused to appear in (b) person, but would have appeared by attorney; and the opinion of the court was, that he could not appear by attorney, being an officer of the court, and presumed to be always present; and therefore it was agreed, that no process should be issued against him; but that upon reading the information, if he did not appear, judgment should be given against him.

Cro. Car. 580. Raymond v. Burdedge. In an action brought by an attorney by bill of privilege, the judgment was *quod nil capiat per breve*, instead of *nil capiat per billam*; which was held manifest error, unless it could be amended as the mistake of the clerk.

Leon. 319. Crew v. Baile, vide title Outlawry. In a bill of privilege by or against an attorney, no *capias* lies, but an attachment of privilege; and consequently on such proceeding there can be no outlawry.

Dyer, 288. a. Pl. 53. Cro. Car. 91, 92. 3 Lev. 39. (c) Seems. In an attachment of privilege by or against an attorney, it hath been held, that pledges to prosecute must be entered on the imparlance roll; and that this is not barely form, but matter of (c) substance.

now aided by the 4 & 5 Ann. c. 16.

2 Mod. 207. 3 Lev. 38. 3 Salk. 283. pl. 8. Ed. Raym. 399. The judges, prothonotaries, attorneys, &c. of the court of C. B. whose attendance is wholly required in court, are not suable by original, but by bill only; but serjeants at law, judges' servants, and other clerks, though they may be entitled to the privilege of being sued in that court, yet must they be sued by original, and not by bill.

Trin. 5 G. 2. in B. R. Durett v. Hayward. In *assumpsit* by bill against the defendant as *un' clericorum domini regis coram ipso rege*, the defendant pleaded that he was a filazer, *absque hoc*, that he was a clerk; and on demurrer, the plea was set aside as frivolous and impertinent, for that filazers are clerks.

6. Whether there can be Privilege against Privilege.

It seems a general rule, that there can be no privilege against privilege; so that if an officer of one court sues an officer of another, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as the defendant's is in his; and therefore the cause is legally attached in the court where the plaintiff is an officer.

Jenk. 173. 2 Keb. 346. [Barnes, 44. 2 Bl. Rep. 1325. If one attorney sue another attorney by attachment of privilege, and hold him to bail, the defendant may either plead his privilege in abatement, or move the court to stay the proceedings, but in neither case will he be entitled to costs. Barber v. Palmer, 6 Term Rep. 524.]

Bro. Privilege, pl. 40. Godb. 81. Jenk. 131. 2 Brownl. 267. Moor, 753. 2 Rol. Abr. 274.

As, where J. S. attorney of B. R. brought trespass against the warden of the Fleet who came into the court of C. B. and prayed the advice of the court, whether he being an officer of the court should be obliged to answer; and on consideration of the equality of privilege, the court determined, that he who commences the suit is entitled to privilege; and therefore advised the warden to answer.

2 Leon. 41. Povey's case.

So, where one of the clerks in Chancery was empleaded in C. B. by bill of privilege by an attorney of the said court, and prayed his privilege; it was denied him, because the plaintiff was privileged in that court as well as the defendant in Chancery, and was first interested in his privilege by bringing his writ.

4 Leon. 193. Ben Jonson's case.

So, where the plaintiff brought his bill in the Exchequer, to be relieved against a bond, put in suit against the defendant in the Petty-bag Office, which is a court of common law, to which the defendant pleaded his privilege as an officer of the court of Chancery; the court agreed, that when both parties are privileged persons, his privilege shall take place who first sues; so that here the suit in equity to be relieved against the penalty of the bond, being first attached here, gained a preference in the plaintiff in his suit, which is a distinct suit from that of the defendant at common law; and therefore the plea was over-ruled, and an injunction awarded till answer. In this case it was said, that if both are privileged, but the attendance of the one is more requisite than that of the other, his privilege shall be allowed who has most cause of privilege.

Hard. 117. Baker v. Lenthal.

Where an action is brought by the king, the defendant shall not have privilege.

Ld. Raym. 27.

An attorney of C. B. sued a member of the University of Oxford, who prayed his privilege, which is, not to be sued in another place; and though it was insisted, that this privilege was given them by act of parliament, yet, in regard the words were general, the court held, that there was no necessity to construe them so as to extend to privileges before *in esse*; and that therefore this special privilege was not taken away by the statute.

Ld. Raym. 342. Joliffe v. Langston.

(C) Privilege of Peers and Members of Parliament: And herein,

1. Who are entitled to this Privilege.

4 Inst. 24.
Stil. 118.
222. 253.
454.
Dyer, 314.
Mod. 66.
Bro. Ex. g.
3. Moor.
707. Sco-
bel's Memo-
rials, 88.

203. Sir Simon Dew's Journals, 414. Pick. 59. Fin. h. 355. 2 Ld. Raym. 1247. 3 Sed. Wile. edit. p. 1478. (a) Dyer, 60. a. in margine. Noy, 102. Moor. 778. pl. 1020. 2 Cum. P. C. 38. Hawk. P. C. c. 22. § 2. That the king's grant or charter of exemption cannot displace a nobleman from his attendance in parliament, 4 Inst. 49. (b) The law intends them to be assisting the king with their counsel for the commonwealth, and to keep the realm in safety by their prowess and valour. 9 Rep. 49. a. id. 68. Jenk. Cent. 107. pl. 6. Hob. 61. 10 Rep. 76. b. 12 Co. 50.

(c) Ld. Coke
says of this
law, *ab om-
nibus queren-
da est, a mul-
tis ignorata,
a paucis cog-
nita*, 4 Inst.
25. (d) 13
Co. 63.
4 Inst. 23.
50. 363.

Primo's Animad. on 4 Inst. 12. Cio. Car. 181. 604. 2 Ld. Raym. 1111. (e) Vide Mod. 66. Have determined in relation to their journals. Hob. 111. See the arguments in the case of Abdy v. White, Salk. 19. pl. 10. 6 Mod. 45. 2 Ld. Raym. 938. Earnardiston v. Soame. 2 Lev. 114. 3 Keb. 365. 369. Onslow's case. 2 Vent. 37. The Queen v. Paty. 2 Ld. Raym. 1105.

Co. Lit. 156.
2 Inst. 48.
3 Inst. 30.
pl. 19.

This privilege extends only to the peers of *Great Britain*; so that a nobleman of any other country, or a lord of *Ireland*, hath not any other privileges in this kingdom than a common person. Also, the son and heir apparent of a nobleman is not entitled to the privilege of being tried by his peers, which is confined to such person as is a lord of parliament at the time. But it seems, that an infant peer is privileged from arrests, his person being held sacred.

(f) 9 Co.
117. Stat.
5 Ann. c. 8.
P. W. 583.
[Since this
statute, the
person of a
Scotch peer
has been

helden to be privileged from arrests, 2 Str. 999. Fort. 163. 165. But the above article of the Statute of Union, upon which this privilege is claimed by a peer of Scotland, not one of the sixteen, says, that the peers of Scotland shall have the privileges of the peers of Great Britain, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon. Now, as every privilege claimed by a peer solely depends upon, and is in consequence of his sitting in parliament, that is, being an actual lord of parliament, it seems, that the allowing all the Scotch peers the privilege from arrests is not within the words of the act of Union, the only act under which the Scotch peers to this day can claim any privilege here at all. 2 Cr. Pr. 127.]

A peeress by (a) birth is entitled to privilege : so, of a peeress by marriage, and that as well during the coverture as after : but, as a peeress by marriage (b) loses her dignity by marrying a commoner, after such marriage she is not entitled to any privilege.

2 Inst. 50. Stil. 222. 234. 252. 2 Chan. Ca. 224. Fortesc. Rep. 162. Vent. 298. Styl. 222. Eq. Caf. Ab. 349. (A). Co. Lit. 16. b. 6 Rep. 53. b. Dyer, 79. pl. 51. 2 Hawk. P. C. c. 44. § 11. Order of House of Peers, 21 Feb. 1692. — (a) But doubted whether a peeress by parent only for life, is entitled to this privilege. Styl. 234. 252. held that she is not entitled. Style, 254. but adjourned. — (b) Co. Lit. 16. 6 Co. 53. Dyer, 79.

It was holden by my Lord Ch. J. Holt, in the case of (c) Lord *Banbury*, that where a person is called by writ to the House of Peers, he is no peer till he sits in parliament, the writ giving him no nobility or honour; but that it was the sitting in the House of Lords, and associating himself with them that ennobled his blood; and that therefore, if the king or he dies before a parliament meets, the writ is determined, and the party remains a commoner; but he held it otherwise in a creation by letters patent, by which the party is immediately noble without any other act or ceremony; and though the parliament never meets, or the king dies, the nobility remains to him and his posterity, according to the limitations in the patent.

(c) Vide this case *infra*.

2. How far this Privilege extends to their Servants and Attendants.

A (d) member of parliament shall have privilege of parliament, not only for his (e) servants, but for his horses, &c. or other goods distrainable.

4 Inst. 24. (d) Noblemen's servants are privileged from arrests in time of parliament. 2 Show. 84. Order of House of Lords, 28 May 1628. Sir W. J. 155. Style, 139. 167. Sir Simon D'Ewes's Journals, 313. 323. 530. 532. 533. 607. 608. 617. (e) Said to extend only to servants, and not to their tenants. Mod. 13. And in March, 92. it is said to have been ordered by the Lords in Parliament, 1 Car. 1. That only menial servants, or those who attended on the person of a knight or burgess of parliament, should be free from arrest.

J. S. brought debt for rent against H. who pleaded that he was tenant and servant to Lord *Moon*, and prayed his writ of privilege might be allowed: the plaintiff demurred: it was argued, that the matter of the plea was against the common and statute law; but *per Roll*, Ch. J. You ought not to argue generally against the privilege of parliament; every court hath its privilege; I conceive a writ of privilege belongs to a parliament-man, so far as to protect his lands and (f) estate; and you have admitted his privilege by your demurrer.

Stile, 139. Smith v. Hale. & vide Latch, 150. and the S. C. Stile, 167. 223. (f) 1 Jo 155.

The warden of the *Fleet* insisted upon a writ of privilege, alleging that he was obliged to attend the House of Lords; but it appearing that he was sued upon an escape, and the court considering that great inconvenience would ensue, and being of opinion that it was in their discretion whether they would grant such writ or no upon a motion, they said he might plead it if he would, but they would not award such a writ, or, if his privilege was infringed, he might complain to the House of Lords.

2 Vent 154.

Mod. 146.
cited to have
been adjudg-
ed between
Rivers v
Confin. Hil.
24 E. 4. ret.
4. 7. 10. in
Scacc.

Pasch.
30 Car. 2. in
C. B. Leav.
Wheatley.

In debt, the defendant pleads he was a servant to a member of parliament, and *ideo capi seu arresari non debet*; the plaintiff prays judgment; and *quia videtur quod tale habetur privilegium quod magnates, &c. Et eorum familiares capi seu arresari non debent; sed nullum habetur privilegium quod non debent implacitari, ideo respondet ouster.*

Defendant after a general imparlance pleaded, that he was a servant to a peer, viz. the Earl of Pembroke; and by North, Ch. J. it is not receivable, for it is the privilege of the master and not the servant's; but the defendant ought to sue his writ of privilege, for perhaps his master will not protect him; and if he will not, he is then left to answer; like to the case of a counsellour, where it is the privilege of the client that he shall not be compelled to discover the secrets of the client; but, if the client be willing, the court will compel the counsel to discover what he knows; which Serjeant Maynard said was his father's case before the Lord Cecil, in the court of Wards. North said, as it was a matter of great consequence, he would advise with the Lord Chancellour and the rest of the Judges, what used to be done in such cases: afterwards it was moved again, and North said it was moved in the House of Lords, and that they had left it to the Judges to do according to law; and therefore the plea was rejected.

2 Stra. 1065.

By an order 24 Jan. 1606, in the House of Lords, it was resolved, that no common attorney or solicitor, though employed by any peer, should have the privilege of that House.

By an order 24 May 1724, this privilege was restrained to menial servants and others necessarily employed about estates of peers.

By an order 22 Jan. 1715, it was resolved, that every peer should upon his honour certify to the House, that the persons protected were within the privilege of the House; and should by letter acquaint the party arresting such privileged person with the same.

M. 10 G. 2.
in B. R.
Wickham v.
Hobart.
2 Stra. 1065.
C. B. temp
Hardw.
348. S. C.

An attorney was taken in execution upon a *ca. sa.* about two years ago, but upon a letter under the hand and seal of the Lord Say and Seal, the sheriff discharged him as steward to his lordship. A rule was obtained at the side-bar for the return of the writ; and now on motion in court to discharge this rule, it was urged in behalf of the sheriff, that this privilege belonged only to the peer, and not to the party, and was not returnable to the process; and that therefore the court ought not to insist upon a return, as the sheriff could not justify the detention of the defendant, but under peril of bringing himself and the plaintiff under the censure of the House of Peers: but on consideration of the above-mentioned orders, and on considering the nature of this case, that the plaintiff was within the ordinary justice of the court entitled to a return of his writ; that without such return he might be debarred from any further execution; but principally from the great inconveniency that might arise by allowing attornies, who are officers to the courts in which they respectively practise, and therefore amenable

able to those courts, this kind of privilege; the court gave the plaintiff liberty to proceed against the sheriff, but gave him time till next term to make his return.

[But now the statute of 10 G. 3. c. 50. takes away from servants all privilege whatever, personal, as well as privilege from suits.]

On the meeting of the new parliament in

November 1774, it was doubted whether, as this act had thus taken away all privilege from the servants of members, some alteration ought not to be made in the form of the prayer of the Speaker of the House of Commons to the throne; and the then Speaker, Sir Fletcher Norton, at first, it seems, intended to make an alteration, by claiming all the usual privileges, "except where the same had been varied or taken away by act of parliament." But upon conferring with the Lord Chancellor, Lord Apsley, his Lordship said, "that as no alteration had been made formerly, on the passing of the act in King William's time, relating to the privilege of parliament; and as, whatever the Commons claimed, neither the allowance of the king, nor the claim itself, could be supposed to include privileges not warranted by law; he was of opinion, that it would be the safer way, in order to prevent any difficulties that might arise from an alteration, to adhere to the usual form; and that he was ready to give the king's answer in the accustomed manner." Sir Fletcher Norton acquiesced in this; and made the claim in the ancient form of words, without any alteration, and received the usual answer, and the same form has been continued ever since.

3. In what Cases this Privilege is to be allowed.

In all causes this privilege is regularly to be allowed; so that a peer of the realm, or a member of the House of Commons, is not to be arrested or molested in his person or (a) estate. against a lord of parliament, nor against an abbot or bishop; but, if seised upon a lord of parliament, a *capias* lies for the contempt. Moor, 767. Finch of Law, 355. (a) The goods of a privileged person taken in execution during the privilege of parliament ought to be redelivered and freed as well as the person. Jon. 155.

Bro. Exigent. that a *capias* does not lie

But privilege of parliament doth not extend to (b) high treason, felony, breach of the peace, or surety of the peace.

4 Inst. 25. Prin's Survey of

Parliament Writs. [On the 4th of June 1614, the Lord Chancellor Ellesmere, in a case then before the House of Lords, declares, "That no privilege of parliament doth protect any man, in case of breach of the peace." So, on the 7th of February and 8th of June 1757, on a complaint against Earl Ferrers, the Lords resolve, "That no peer or lord of parliament hath privilege of peerage or of parliament against being compelled, by process of the courts in Westminster-hall to pay obedience to a writ of *habeas corpus* directed to him." In the year 1795, the Earl of Abington was committed by the court of King's Bench to the prison of that court as part of the punishment inflicted upon him, being convicted of publishing a libel.] (b) In treason or felony, or misprision of treason or felony, they can only be tried by their peers; but for all other offences, as *præsumitur*, riot, seducing a young lady from her parents in order to debauch her, &c. they are to be tried by the country. 2 Hawk. P. C. c. 44. § 13. — That neither *Magna Charta*, nor any other law privileges a peer from being indicted by a grand jury of commoners, either in the King's Bench or before commissioners of oyer or the coroner, &c. 2 Hawk. P. C. c. 44. § 25. — But the court of B. R. cannot receive the plea of not guilty, or the confession of a peer, but only the Lord High Steward; but it may allow a pardon pleaded by a peer to an indictment in that court. 2 Hawk. P. C. c. 44. § 17. — So, if a peer be attainted of treason or felony, he may be brought before the court of B. R. and demanded what he has to say, why execution should not be awarded against him; and if he plead any matter to such demand, his plea shall be discussed, and execution awarded by the said court, upon its being adjudged against him. 2 Hawk. P. C. c. 44. § 18. [In the case of Earl Ferrers it was determined by all the judges, that a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same according to the provisions of the 25 G. 2. c. 37. And supposing the day appointed by the judgment for execution should lapse before such execution done, that a new time may be appointed for the execution, either by the high court of parliament before which such peer shall have been attainted, although the office of high steward be determined, or by the court of King's Bench, the parliament not then sitting; and the record of the attainder being properly removed into that court. Fost. Cr. L. 139.]

And therefore in an indictment for treason or felony, trespass vi & armis, assault or riot, process of outlawry shall issue against a peer of the realm; for the suit is for the king, and the offence

2 Hal. Hist. P. C. 197. 2 Hawk. P. C. c. 44. is § 16.

is a contempt against him. But in civil actions between party and party, regularly, a *capias* or *exigent* lies not against a lord of parliament.

Cro. Elis. 170. *Ld. Stafford v. Thynne.* If a peer of parliament be convicted of a disseisin with force, a *capias pro fine* and *exigent* shall issue; for the fine is given by statute in which no person is (a) exempted.

vide Dyer, 314. (a) For execution on a statute Staple, merchant, on the statute of *Miles Burnel*, or on the statute of 23 H. 8. the body of a baron shall be taken in execution; for by these statutes, such persons are not exempted. 2 Leon. 173. — So, a custom to commit persons who shall take an orphan out of the custody of a guardian, is good without exception of peers; for a peer is not privileged in this case, and in a *hominum replegiando*, where he detains the body, he shall be committed. Lev. 162-3.

Cro. Elis. 503 *Earl of Lincoln v. Flowers.* So, in debt upon an obligation against the Earl of *Lincoln*, he pleaded *non est factum*, which being found against him, the judgment was *ideo capiatur*: this on a writ of error brought by him was objected to, in that a *capias* does not lie against a peer of the realm: *sed non allocatur*; for by this plea found against him, a fine is due to the king, against whom none shall have any privilege.

Comb. 49. *The King v. Earl of Devonshire.* An information was exhibited in *B. R.* against the Earl of *Devonshire*, for striking in the king's palace; which being in time of parliament, he insisted on his privilege of a peer, and refused to plead in chief, but put in his plea of privilege; to which there was a demurrer, and the plea over-ruled, and he was fined 30,000*l.*

3 Mod. 215. In the case of the seven bishops it was insisted, that peers of the realm could not be committed in the first instance, nor a misdemeanor before judgment; and that no precedent could be shewn where a peer had been brought in by a *capias*, which is the first process for a bare misdemeanor, and they put in a plea in writing of their being peers, &c. but the plea was rejected.

3 Hawk. P. C. c. 22. § 33. 1 Burr. 634. Also peers of the realm are punishable by attachment for contempts in many instances; as for rescuing a person arrested by due course of law; for proceeding in a cause against the king's writ of prohibition; for disobeying other writs wherein the king's prerogative or the liberty of the subject are nearly concerned; and for other contempts which are of an enormous nature.

Dyer, 314. Moor, 767. 9 Co. 49. Co. Lit. 157. Jon. 153. If a peer be returned on a jury, on his bringing a writ of privilege he may be discharged: also, it seems the better opinion, that without such writ he may either challenge himself or be challenged by the party.

Paſch. 27 Car 2. in B. R. In the case of Sir *Edward Bainton*, who was returned on a jury, the court would not force him to be sworn against his will, he being a parliament man, and the parliament then sitting.

9 Co. 49. 2. A day of grace shall not be given against a lord of parliament; for he is presumed to be attendant on the service of the publick.

9 Co. 49. 2. So, if a peer be made steward of a base court or ranger of a forest, he may, from the dignity of his person, and the presumption that he is engaged in the more weighty affairs of the commonwealth, exercise these offices by deputy; though there are no words for this purpose in his creation.

So, if a licence be granted to a peer to hunt in a chase or forest, he may take such a number of attendants with him as are suitable to his state and dignity. 9 Co. 49. b.

A peer or lord of parliament cannot be an approver; for it is against *Magna Charta* for him to pray a coroner. 3 Inst. 129.

If a peer of the realm bring (a) an appeal, the defendant shall not be admitted to wage battle, by reason of the dignity of his person. 2 Hawk. P. C. c. 45. § 5 a) In an appeal

brought against him he shall be tried by a jury of commoners, and not by his peers; for the words of *mag. char. nec super cum ibimus*, &c. are to be intended only of the suit of the king. 3 Inst. 30. b. Inf. 49.

In *Jenkins* the following privileges are laid down as belonging to peers: 1. They are entitled to a letter missive. 2. (b) They have a knight to try an issue which concerns them. 3. They are not to be arrested for debt, trespass, or any personal action. 4. They are exempted from serving on juries. 5. To have no day of grace against them. 6. Upon the trial of a peer for treason or felony, they try him upon their honour only, and not upon oath. 7. When they pass through any of the king's forests to attend upon the king, upon blowing a horn they may have a buck or doe, as the season of the year is. 8. They have power in their house to reverse judgments given in the King's Bench. 9. They have the benefit of clergy though they cannot read. 10. They are not liable to find carriages for the king when he removes from one place to another. Jenk. 107. (b) This privilege is taken away by 24 G. 2. c. 13. § 4.

4. Of the Commencement and Continuance of this Privilege.

The privilege of the Lords commences from the teste of the writ of summons, and the privilege of a burgess at his (c) election: but, if he be arrested, or in execution before his election, he shall not have privilege. Moor, 57. 340. Jenk. 118. Dalt. 58. Dyer, 59. 60. Latch, 46.

150. (c) *Vide* 1 Sid. 42. [Sir Richard Temple's case, Pasch. 13 Car. 2. A trial at bar, wherein Sir Richard Temple was defendant, being appointed for this term, he moved the court by his counsel to put off the trial, upon the ground of his being elected a burgess to serve in the next parliament, which was to meet in eight days, and therefore prayed his privilege. But the court doubted whether they could allow the privilege, because it did not appear to them whether it were actually so as he suggested or not, but by affidavit, which they would not admit to prove this suggestion. And it was said by the court, that if he were arrested upon mesne process, or taken in execution, it was proper for the parliament (when they should meet) to discharge him, for the court doubted whether they had the power to do so. The defendant said, that the clerk of the parliament would not make him out a certificate of his election before the meeting of parliament. Upon which Twissén, J. asked, why he could not sue his writ of privilege out of Chancery upon the return of his election? *Quare bien*. But the court refused to grant the motion, because the trial was to come on before the day on which the parliament were to meet.—On the 9th of February 1625, a motion was made, that Mr. Giffard, returned a member of the House, and then in execution, might be sent for. On this motion being examined into, it appears from a report of the committee of privileges on the 15th, “that one of the burgesses for Bury was elected on the 6th of January; that Mr. Giffard was elected on the 11th of January, but that the indenture was not dated till the 30th of January, the town clerk conceiving it was to bear date the day of the next county-court; and that Mr. Giffard was arrested on the 23d of January, after his election, but before the return.” After much debate and consideration of this difficulty, on the 17th of February, the clerk of the crown, the sheriff of Suffolk, and the town-clerk of Bury, were all called up to the table, and there, by order of the House, amended the return from the 30th of January to the 11th; and then it was ordered, that Mr. Giffard should have privilege, and be delivered out of execution; and a warrant was issued to the clerk of the crown to bring him up the next day. On the 18th he was accordingly brought in, with the keeper of the gate-house, the bar down; the writ of *habeas corpus* was handed up to the clerk, and the writ and return being read by him, the Speaker discharged Mr. Giffard, and wished him to take the oath, and then his seat in the House. 1 Hatf. Prec. 164.—On the 1st of March 1592, Mr.

Serjeant Yelverton, from the committee of privileges and elections, reported the following case: " Thomas Fitzherbert of Staffordshire, being outlawed upon a *capias utlagatum* after judgment, is elected burgess of this parliament: two hours after his election, before the indenture returned, the sheriff arrested him upon this *capias utlagatum*: the party is in execution: now he sendeth his supplication to this House to have a writ from the same to be enlarged, to have the privilege in this case to be granted." On the 5th of April the House came to the following resolution; " That Thomas Fitzherbert was, by his election, a member thereof; yet that he ought not to have privilege in three respects: 1st, Because he was taken in execution before the return of the indenture of his election: 2d, Because he had been outlawed at the queen's suit, and was now taken in execution for her majesty's debt: 3d, and lastly, In regard that he was so taken by the sheriff, neither *sedente parlamento*, nor *eundo*, nor *redeundo*." Dewes's Journ. 479. 1 Hats. Prec. 107. On the 4th of July 1625, the case of Mr. Bassett was referred to the committee of privileges, who reported, " that he was imprisoned upon mesne process, and afterwards chosen a burgess." There is a debate in the Journal, whether, under these circumstances, he was eligible, or to be allowed privilege? Great distinction was made between a person arrested on mesne process, or in execution; and it was at last resolved, upon the question, " That Mr. Bassett should have the privilege of the House; " and a warrant was ordered to the marshal to bring him up the next morning, which was done accordingly. 1 Hats. Prec. 163.]

And. 293. So, persons outlawed ought not to be knights or burgesses of parliament, and such persons outlawed may be arrested by *cap. utlag.* privilege of parliament notwithstanding.

Atkin's Power of Parl. 38. As to the time and exact continuance of this privilege, it seems in good measure unsettled even at this day. It is indeed agreed in most books that members of parliament have privilege 4 Inst. 44. *eundo*, *morando* (a), & *redeundo*; and that they are entitled to Scobell's Memorials, 38. 103. privilege as well after a dissolution as a prorogation of the parliament.

180. Sir Simon Dewes's Journals, 414. [The writ of privilege in the case of Trewynnard, in the 36th and 37th H. 8. is to persons "*venientes seu venire intendentes*." Pryn's Fourth Register, 780.] (a) By the 35 H. 8. c. 11. members of parliament have their wages so many days after the parliament as they may reasonably spend in their return home. Vide Rast. 664. Appendix to Reg. 1.

2 Lev. 72. Chan. Ca. 221. Sid. 29. pl. 2. Keb. Rep. 3. pl. 7. (b) In Cotton Record. 704. they claim forty days. So, by Jenk. 118. Dewes's Journ. p. 410.

By two orders of the House of Lords, one dated the 28 of May 1624, the other the 27 January 1628, it is declared, that their privilege commences from the teste of their writ of summons to parliament; and that upon every session and prorogation, their privilege is for twenty days before and twenty days after each session, which one of the orders says is time enough for them to come from all parts of the realm, and to return; but the Commons never assented to this, for they claim (b) forty days before and after each session.

[On the 27th of February, 1586, the House was informed, that one William White had arrested Mr. Martin, a member of the House of Commons; therefore it was ordered, " That the Serjeant should warn White to be here to-morrow, sitting the court." On the 6th of March, William White was brought into the House, to answer his contempt for arresting Mr. Martin; who answered, " that he caused him to be arrested the 22d day of January, " which was above fourteen days before the beginning of the " parliament." The House upon this appoint a committee to search precedents, who, on the 11th of March, make report " of " Mr. Martin arrested upon mesne process by White, above twenty " days before the beginning of this parliament, holden by prorogation (mistaken for adjournment), and in respect that the " House was divided in opinion, Mr. Speaker, with the consent " of the House, moved these questions to the House: 1st, Whether

“ther they would limit a time certain, or a reasonable time, to
 “any member of the House for his privilege? The House
 “answered, A convenient time. 2d, Whether Mr. *Martin* was
 “arrested within this reasonable time? The House answered,
 “Yea. 3d, If *White* should be punished for arresting *Martin*?
 “The House answered, No; because the arrest was twenty days
 “before the beginning of the parliament, and unknown to him,
 “that would be taken for reasonable time. But the principal
 “cause why *Martin* had his privilege, was, for that *White*, the
 “last session (mistaken for meeting) of parliament arrested
 “Mr. *Martin*, and then knowing him to be a burgess for this
 “House, discharged his arrest; and then afterwards Mr. *Martin*,
 “again returning to *London* to serve in the House, Mr. *White*
 “did again arrest him; and therefore the House took in evil
 “part against him his second arrest, and thereupon judged, that
 “*Martin* should be discharged of his second arrest out of the
 “Fleet by the said Mr. *White*.”

It is observed upon the above case, that this parliament met on
 the 29th of *October* 1586; on the 22d of *December* they were
 adjourned by commissioners from the queen to the 15th of
February following; so that this arrest was not either before the
 beginning of the parliament, or during a prorogation, but on the
 22d of *January*, during an adjournment, and consequently clearly
 within privilege. For an adjournment, even for a very long
 period, would not affect privilege, as we may collect from the
 Journals of the House of Commons of the 1st of *June* 1621, and
 the printed debates of that session, when it was ordered, agreeably
 to the opinion and advice of Sir *Edward Coke*, Mr. *Noy*,
 Mr. *Hakevill*, and others, “that during that adjournment,”
 (which was for above five months, from the 4th of *June* to the
 14th of *November*,) “no suits against members, or their servants,
 “should be proceeded in, in any court of law; and if they were,
 “that a letter should issue, under the Speaker’s hand, for the
 “party’s relief therein, as if the parliament was sitting; and the
 “party refusing to obey it to be censured at the next access.”
 And a similar resolution was about the same time come to by the
 Lords. For upon the 2d of *June* 1621, the Lords consulted the
 Judges upon this question; and they having answered, on the
 4th of *June*, that they could not satisfy their Lordships of any
 precedents of the continuance of their privileges, during all the
 time of the long cessation, the Lords notwithstanding resolve,
 “That they do know, that the privileges of themselves, their
 “servants and followers, do continue, notwithstanding the ad-
 “journment of the parliament; and they order and adjudge the
 “same to be observed in all points accordingly.”

On the 22d of *January* 1628, Mr. *Rolle* complained of goods
 being seized by an officer of the customs for dues; and this
 complaint was immediately referred to the consideration of a
 select committee. The substance of the case was, that these goods
 were seized by the customers, or those who had a lease of the
 customs, for refusing to pay the duties of tonnage and poundage,

1 Hatf.
 Prec. 100.

This re-
 striction as
 to suits was
 afterwards
 limited by
 stat. 12 &
 13 W. 3.
 c. 3. to an
 adjourn-
 ment of 14
 days.

(a) The
 House had
 been pro-
 rogued from
 the 20th of
June to the
 20th of *October*, and
 then further

which

prorogued to the 20th of January. When King Charles the second intended to prorogue the parliament from the 27th of July 1663, to the 16th of March following,

a space of eight months, he said in his speech to both houses of parliament upon that occasion, "I think it necessary to make this a session, that so the current of justice may run the two next terms, without any obstruction by privilege of parliament, and therefore I shall prorogue you to the 16th day of March." *Lords' Journ.* 417.

Trin. 8 G. 2.
In B.R. Col.
Pit's case.
2 Stra. 985.
Porteſc.
Rep. 159.
342.
Barnard.
K. B. 442.
Com. Rep.
44.

which the Commons had not yet granted to the king; but which the king, as appears from his warrant in the eighth volume of the *Parliamentary History*, p. 311. had directed to be levied by his own authority. The House, on the report from the grand committee upon this violation of their privileges, resolve, 1. That every member of this House is, during the time of privilege of parliament, to have privilege for his goods and estate. 2d, That the 30th of *October* last was within the privilege of parliament (a); and 3d, That Mr. *Rolle* ought to have privilege for his goods seized the 30th of *October* last, the 5th of *January* last, or at any time since.]

In the case of Colonel *Pit*, the parliament was prorogued 16 April 1734, dissolved the 17th, and the new writs bore teste the 18th following, and the defendant *Pit*, who was a member of that parliament, was arrested on the 20th: One of the questions in this case was, Whether the arrest was within time of privilege? And it was determined that it was, although the defendant had lived for two years before no farther distant from *London* than *Hammerſmith*; but the court did not think it necessary, in the determination of this cause, to ascertain the exact time of privilege members of the House of Commons were entitled to after a dissolution of parliament.

This point, though left undefined by the British parliament, as in Ireland ascertained by a statute of the legislature of that country, viz. 3 E. 4. c. 1. and limited to forty days before, and forty days after the conclusion of the parliament.

[The only statutory declarations of the duration of privilege in any instances, are the above statute of 12 & 13 W. 3. c. 3. and the 4 G. 3. c. 24. & 24 G. 3. c. 37.; by which two last statutes the right of members to send their letters free from postage, is ascertained to continue, during the sitting of parliament, and within forty days before, and forty days after any summons or prorogation of the same.]

and limited to forty days before, and forty days after the conclusion of the parliament.

5. How Privilege is to be claimed and taken Advantage of.

Dalf. 16.
Stil. 177.
186. 214.
222.
[But so early as the 34th of H. 8.

It seems, that formerly the usual and indeed necessary way of taking advantage of privilege, was to plead the same, or to bring a writ of privilege; and that applications in other manner, or even by motion in court, were held insufficient.

Ferrers, a member in execution, was delivered by the serjeant without any other warrant than his mace, even though the Lord Chancellor ordered a writ of privilege. *Holling. Chron.* 1 *Hist. Proc.* 53. *Dyer*, 61. a. But *qu.* of this case, & *vide infra*.]

Noy, 83.
Latch, 48.
150.
Hodges v.
Moore.
(b) See ord.
House of
Commons;

As, where the defendant being a burgess of parliament brought a (b) letter from the Speaker to the King's Bench, to stay. &c. it was disallowed by the court; for, as the book says, it ought to have been a writ of privilege; and in this case it was said, that when *Thorpe* was Speaker, he had a general *superſedeas* for all actions

actions against him; and this was held ill, for he ought to have had a particular *superfedeas* for each action.

A person chosen to serve in parliament shall not have privilege before the day of session; for there is no clerk of parliament to certify, and the court will not admit affidavits in that case; he ought to sue his writ of privilege in Chancery, on the return of his election.

Rep. 161. and the cases *supra*.

Lord *Banbury* was indicted of murder by the name of *Charles Knollys*, Esq. and he pleaded in abatement, that by letters patent K. Car. I. created his grandfather Earl of *Banbury*, and so shewed the descent to him, and prayed judgment of the indictment, because he was not named earl. The Attorney-General replied, that upon his petition to the House of Lords to be tried by his peers, the Lords dismissed his petition, and disallowed his peerage, &c. and upon demurrer, the replication was held to be naught, and the plea good, and the indictment abated. In this case the following points were determined: 1st, That it was not necessary for the defendant in his plea to aver that *Banbury* was within any county in *England*; for that in reality there is not any necessity that he should be created of any place. 2^{dly}, That it was not necessary for the defendant to aver that he was *unus parium regni Angliæ*; for whatever is done under the great seal of *England*, ought to bear relation to *England*; and to suppose him a Peer of *Ireland*, is a foreign intendment, and ought to be rejected. 3^{dly}, That the conclusion of his plea, *Et hoc paratus est verificare unde ex quo*, without *prout patet per recordum*, or producing a writ to certify that he was an Earl, was sufficient (a); though baron or not baron is regularly to be tried by the record of his having sat in parliament: but herein the court took a difference between a creation by writ, and that by patent; and held, that in the latter case his sitting or not sitting in parliament was not material, as his creation was by patent, which gave him all the privileges of a peer, though he had never sat in parliament: besides, his plea does not barely consist of matter of record, but the descents are matters of (b) fact which might be traversed, and tried by a jury 4^{thly}, It was held, that the replication did not avoid the defendant's plea, nor was he concluded from his peerage by the order of the House of Lords: 1st, Because in an original cause the Lords have no jurisdiction, nor is there any precedent of their having ever determined a right of peerage without a previous petition to the king, who is the fountain of honour, and the king's reference to them. 2^{dly}, That this dismissal can amount to no more than an ordinance of one part of the legislature, and such ordinance cannot divest the party of that in which he hath a freehold and inheritance, and in whose advice and services the king and commonwealth are interested. 3^{dly}, That this dismissal does not amount to a judgment of parliament, and therefore cannot be pleaded in bar to the defendant.

A bill of *Middlesex* was issued out of B. R. by an attorney of the court, against the Countess of *H.* which was discharged by *super-*

1st June
1621, *supra*.

Sid. 42.
pl. 9. Kel.
Rep. 3. pl. 7.
T. Raym.
12. See
Fortesc.

2 Stra. 989.
2 Salk. 509.
pl. 1.
Skin. 336.
pl. 2.
Carth. 297.
Comb. 273.
Ld. Raym.
10. S. C.
The King
and Queen v.
Knollys
al. Lord
Banbury.
Trin. 6 W.
& M. in
B. R.

(a) 22 Aff.
24. Bro.
Aff. 240.
35 H. 5.
46.
6 Co. 53.
9 Co. 31.
F. N. B.
247.
Regist. 287.
Cro. Car
205.
(b) A trial
of peerage
in some
cases shall
be by the
country, as
where a
duchess is
ennobled by
marriage.
6 Co. 55.

Vent. 298.
Countess of
Hunting-

don's case.
[*Vide infr.*]

2 Ld. Raym.
3247.
2 Salk. 512.
pl. 2. S. C.

Salk. 3.
pl. 7.
Smith v.
Villars.
Stil. 454.

4 Inst. 15.
Skin. 521.

M. 7 G. 2.
Col. Pit's
case, at Ser-
jeants-Inn.
2 Barnard.
K. B. 423.
433. 448.
Com. Rep.
444. pl.
208.
2 Str. 905.
Fortesc.
Rep. 159.
342.
[Col. Pit
was first
brought up
by *babeas
corpus* into
the court of
Common
Pleas, but as
he had been
taken by
process out
of the

superfedeas without pleading; because it appeared by the record that she was a peeress, and the attorney committed for suing out the process.

A motion was made in the behalf of the Lord *Banbury* for a *superfedeas* to a *latitat* which was issued out of the court of B. R. against him, and on which he had been taken; and to induce the court to grant it, they offered to produce an exemplification of the judgment in the indictment in this court against my Lord, and the letters patent of creation, and an affidavit that my Lord was the same person in the record of the judgment; and it was also pretended, that if my Lord should put in bail he would be estopped to plead his peerage. But the court denied the motion, and the Ch. J. said, that they could not take notice that this *Charles Knolly* is Earl of *Banbury*; that there was a difference between this case and the case of a peer that had sat in the House of Lords. If my Lord had been ever summoned to parliament and had a writ to shew, and there were no dispute about the identity of the person, it would have been reasonable to have granted a *superfedeas*; but in this case of a lord who has never sat, they could not do it; for they could not try peerage on a motion, but his Lordship might plead it, and pray a *superfedeas*.

Villars was arrested as *J. Villars, Armiger*, and pretended himself to be Earl of *Buckingham*; and upon a motion, the question was, How he should put in bail so as not to estop himself? & *per cur.* he need not join in the recognizance, and then there is nothing to estop him; for the act of others cannot conclude him.

If a bishop has occasion to plead to the jurisdiction of a court, he must plead that he is *unus de paribus hujus regni Anglie*; for he has no patent to produce in testimony of his peerage, but is only a peer *ratione baronia*, which he holds in *jure ecclesie*: otherwise, of a temporal peer.

In the case of Colonel *Pit* who was arrested two days after the dissolution of that parliament of which he was a member, and which was held to be within time of privilege, the question of the greatest difficulty was, How he should be relieved, and whether he could not be discharged on motion without bringing his writ of privilege? And it was held by ten judges, that though a writ of privilege was heretofore held a sure and legal remedy, that notwithstanding, and especially since the statute 12 & 13 W. 3. c. 3. which expressly provides, that no person entitled, &c. shall be arrested during time of privilege, that he might be discharged on motion; for the judges are to take notice of every act of parliament, and to take care that they be duly executed; and this method was since the making of the above-mentioned statute thought more advisable by the judges than a plea or writ of privilege, as the act does not make the process void, but only avoidable; and as there could be no plea to a process for irregularity which is aided by the appearance of the party. And this case was compared to an arrest of an ambassador's servant contrary to the 7 Ann. c. 12. § 3. and to an arrest on a Sunday against the statute

statute 29 Car. c. 7. and to other cases of privilege, as when a King's Bench, the court of Common
juror or witness, or the plaintiff himself, is arrested in going to or returning from the court; who are all discharged upon motion. Pleas refused to interfere, and remanded him. Dutton v. Pit, Barnes, 199.]

6. What shall be deemed a Breach of Privilege.

The privilege, order, or custom of parliament, either of the 13 Co. 63, 64. Prinn's
Upper House or House of Commons, belongs to the determination or decision only of the court of parliament; so that they are the proper judges of all breaches of privilege, of which the courts of Westminster only take notice incidently. 4 Inst. 16. Cro. Car. 181. 604.

And accordingly in the case of *Patty* and others who were committed to *Newgate* for a breach of privilege in commencing and prosecuting actions at common law against the late constable of (a) *Aislebury*, the court of *K. B.* by the opinions of three judges against *Holt* Ch. J. refused to relieve or discharge them on a *habeas corpus*, this being a parliamentary matter in which the House of Commons are the sole judges. 2 Ld. Raym. 1105. The Queen v. Paty. (a) See the case of Ashby v. White, 6 Mod. 45. 2 Ld. Raym. 938. 1 Salk. 19.

So, in the case of one *Ferrers*, the sheriff was committed for detaining a member in execution. Dyer, 68. [Before this case of

Ferrers, the House, if in truth the privilege of parliament extended to persons in execution, had been very tender in their mode of exerting it. It had indeed been the practice to release members in confinement in execution, but this had not been done by any immediate authority of the House itself, or even by writ of privilege, but by petition by the Commons to the king, and a special act of parliament for that purpose, an act being supposed to be necessary as well to protect the gaoler from an action for the escape, as to secure the debt of the creditor, who would otherwise have lost his right to a new execution. See the cases of *Lark*, Rot. Parl. 8 H. 6. No. 57. of *Clark*, Rot. Parl. 39 H. 6. No. 9. and of *Hyde*, Rot. Parl. 18 E. 4. No. 55. There can be no doubt, however, of the existence of such privilege at present, as the stat. 1 Ja. 1. c. 13. which is a general law passed for the purpose of obviating in all cases the difficulties which were the objects of the above-mentioned special acts, expressly provides, "That nothing therein contained shall extend to the diminishing of any punishment, to be thereafter by censure in parliament inflicted upon any person which thereafter should make, or procure to be made, any such arrest as is aforesaid," that is, any arrest in execution; and is therefore a parliamentary declaration, that, during the privilege of parliament, it is not lawful to arrest, even in execution, any member of either house of parliament. We cannot help remarking with what a high hand the privilege was asserted in *Ferrers's* case; for though, as we have before mentioned, it had not been the practice in any preceding time, to release members in execution without a special act of parliament, yet it appears, that *Ferrers* was delivered by the serjeant, without any other warrant than his mace, even though a writ of privilege was offered by the Lord Chancellor; that the persons who opposed the delivery were imprisoned by the House of Commons, some in the Tower, and some in *Newgate*; and the creditor himself, who procured the arrest, was also committed for the contempt of the privilege of parliament. And these powers, according to *Hollingham*, were admitted by all the judges of England to be legal. *Hollingham Chron.* and 1 Hatf. Prec. 53. *Dyer* too, in his argument as counsel in *Trewynnard's* case, (Dy. 61. a.) cites the case of *Ferrers*, to shew what the law was in this respect; but, when in a subsequent case he was delivering his opinion as judge, he said, "If a man be condemned in debt or trespass, and be elected a member of parliament, and then be taken in execution, he cannot have the privilege of parliament; and so it was holden by the sages of the law in the case of *Ferrers*, in the time of H. 8. And though privilege was at that time allowed, *eo fuit minus iust*." *Moor*, 57. pl. 153. We may add, that even since the stat. of 1 Ja. 1. c. 13. no instance occurs where any person entitled to privilege, if in custody in execution, hath been delivered by any other mode, than by virtue of a writ of privilege, or by a writ of *habeas corpus*, issued in obedience to a warrant under the Speaker's hand, some formal process being deemed necessary to give the act its full operation. See *Sir Thomas Shirley's* case, 5 Parl. Hist. 113. and 1 Hatf. Prec. 155.]

But, where in *assumpsit* the defendant pleaded the statute of limitations, and the plaintiff replied that the defendant was a parliament Sir George Binton v. Evelin. Lev. 111.

Med. 145.
2 Salk. 512.
pl. 2.
Show. 99.
Carth. 137.
2 Ld. Raym.
1113. S. C.

liament man, &c. the plea was over-ruled; because one may file an original against a parliament man, and continue it down without any breach of privilege, here being no actual molestation of his person or estate; and that this should be so is of absolute necessity in order to save the bar of the statute, for such case not being provided by an exception, the plaintiff would be barred of his action, though he could not file an original.

2 Ld. Raym.
1113. per
Molt., C. J.

So, a man whilst member of parliament may alien his estate by fine with proclamations; and a person who has a right may be necessitated to commence an action to save the bar that would incur against him by the statute of 4 H. 7. c. 24:

2 Ld. Raym.
1113. per
Holt.

So, one may commence an action against a member of parliament that is executor.

7. Of the Proceedings in Courts by and against Persons entitled to Privilege of Parliament.

By the statute 12 & 13 W. 3. c. 3. § 1. it is enacted, "That any person may prosecute any suit in any of his Majesty's courts at *Westminster* or Chancery or Exchequer, or the Duchy Court or in the Court of Admiralty; and in all causes matrimonial and testamentary in the Court of Arches, the Prerogative Courts of *Canterbury* and *York*, and the delegates, and all courts of appeal, against any lord of parliament, or any of the knights, citizens, and burgesses of the House of Commons, or their servants or any other person entitled to privilege of parliament, at any time immediately after the dissolution or prorogation of parliament, until a new parliament shall meet, or the same be re-assembled, and immediately after any adjournment of both Houses for above fourteen days until both Houses shall meet; and the said courts may, after such dissolution, prorogation, or adjournment, proceed to give judgment, and to make final decrees and sentences thereupon; any privilege of parliament notwithstanding.

§ 2. "Provided that this act shall not subject the person of any of the knights, citizens, and burgesses, or any other person entitled to privilege of parliament, to be arrested during the time of privilege; nevertheless if any person have cause of action or complaint against any peer, such person after such dissolution, prorogation, or adjournment as aforesaid, or before any sessions of parliament, may have such process out of his Majesty courts of King's Bench, Common Pleas and Exchequer against such peer as he might have had out of time of privilege; and if any person have cause of action against any of the knights, citizens, or burgesses, or any other person entitled to privilege of parliament, after any dissolution, prorogation, or such adjournment, &c. such person may prosecute such knight, citizen, or burgess, or other person entitled to privilege, in his Majesty's courts of K. B. C. P. and Exchequer, by summons and distress infinite, or by original bill and summons, attachment and distress infinite, which the said respective courts are empowered

“ empowered to issue, until they enter a common appearance, or
 “ file common bail; and any person having cause of suit or
 “ complaint may, in the times aforesaid, exhibit any bill or
 “ complaint against any peer, or against any of the said knights,
 “ citizens, or burgeses, or other person entitled to privilege, in
 “ the Chancery, Exchequer, or Duchy Court, and proceed there-
 “ upon by letter or *subpoena* as usual; and upon leaving a copy of
 “ the bill with the defendant, or at his last place of abode, may
 “ proceed thereon, and for want of an appearance or answer, or
 “ for non-performance of any order or decree, may sequester the
 “ estate of the party, as is used where the defendant is a peer,
 “ but shall not arrest the body of any of the said knights, citizens
 “ and burgeses, or other privileged person, during the continuance
 “ of privilege of parliament.”

And § 3. “ Where any plaintiff shall by reason of privilege of
 “ parliament be staid from prosecuting any suit commenced,
 “ such plaintiff shall not be barred by any statute of limitation, or
 “ nonsuited, dismissed, or his suit discontinued for want of pro-
 “ secution, but shall upon the rising of the parliament be at liberty
 “ to proceed.”

And § 4. “ No suit or proceeding in law or equity against the
 “ king's original and immediate debtor, for the recovery of any
 “ debt originally and immediately due to his Majesty, or against
 “ any person liable to render an account to his Majesty, for any
 “ part of his revenues, or other original or immediate duty, or
 “ the execution of any such process, shall be impeached or delayed
 “ by privilege of parliament; yet so that the person of such
 “ debtor or accountant, being a peer, shall not be liable to be
 “ arrested, or being a member of the House of Commons, shall
 “ not, during the continuance of privilege, be arrested by any
 “ such proceedings.”

§ 5. “ This act shall not give any jurisdiction to any court to
 “ hold plea of any real or mixed action in other manner than such
 “ court might have done before.”

[By the 2 & 3 *Anne*, c. 18. An act for the further ex-
 planation and regulation of privilege of parliament, in relation to
 persons in publick offices, it is enacted, “ That any action or suit
 “ may be commenced or prosecuted against any officer or person
 “ entrusted or employed in the revenue, &c. for any forfeiture,
 “ misdemeanour, or breach of trust, &c. and shall not be staid
 “ or delayed by or under colour or pretence of any privilege of
 “ parliament, although such officer or person be a peer of the
 “ realm, or lord of parliament, or one of the knights,” &c.

Provided, “ That nothing therein shall extend to subject the
 “ person of such officer, being a peer of the realm, or lord of
 “ parliament, to be arrested or imprisoned: but that all process
 “ shall issue against such officer or person, being a peer of the
 “ realm, or lord of parliament, as should have issued against him
 “ out of the time of privilege: nor shall extend to the person of
 “ such officer, being a knight, citizen, or burges of the *House of*
 “ *Commons*, to be arrested or imprisoned, during the time of
 “ privilege

“ privilege of parliament; and that against such officer or other
 “ person, being a knight, citizen, or burghers of the *House of*
 “ *Commons*, entitled to privilege, shall be issued summons and
 “ distresses infinite; which the said respective courts are hereby
 “ empowered to issue in such case, until the party shall appear
 “ upon such process, according to the course of such respective
 “ courts.”

The act of 12 & 13 W. 3. c. 3. restraining only the privilege of parliament, in actions or suits commenced in the courts therein specified, by the 11 G. 2. c. 24. in amendment of the act of King William, it is enacted, “ That any person and persons shall
 “ and may commence and prosecute, in *Great Britain* or *Ireland*,
 “ any action or suit in any court of *Record*, or court of *Equity*,
 “ or court of *Admiralty*; and in all causes matrimonial and
 “ testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer or lord of parliament
 “ of *Great Britain*, or against any of the knights, citizens, and
 “ burghers of the *House of Commons* of *Great Britain*, for the time
 “ being, or against them and any of their menial and other servants, or any other person entitled to the privilege of the parliament of *Great Britain*, at any time from and immediately
 “ after the dissolution or prorogation of any parliament, until a
 “ new parliament shall meet, or the same be re-assembled; and
 “ from and immediately after any adjournment of both Houses
 “ of Parliament, for above the space of *fourteen days*, until both
 “ Houses shall meet or re-assemble; and the said respective
 “ courts may proceed,” &c.

Provided, “ That the said act shall not extend to subject the
 “ person of any knight, &c. to be arrested during the time of
 “ privilege. And § 2. authorises proceeding as above in any
 “ of the courts of *great sessions* in *Wales*, courts of *session* in the
 “ counties palatine of *Chester*, *Lancaster*, and *Durham*; the courts of
 “ *King's Bench*, *Common Pleas*, and *Exchequer*, in *Ireland*, after
 “ any such dissolution, &c. And the court of *Chancery* in *Ireland*,
 “ and equity of *Exchequer*, are authorised to proceed in like
 “ manner as the court of *Chancery*, and equity court of *Exchequer*
 “ in *England* may, against any peer, knight, &c. after such
 “ dissolution,” &c.

§ 3. saves the statute of limitations in like manner as the act of King William.

And by § 4. No action or suit commenced against the king's debtor, &c. to be staid in any court in *England* or *Ireland* [as by § 4. in the act of King William.

And lastly, by the stat. 10 G. 3. c. 50. The preamble of which states, that the acts already in being are insufficient to obviate the inconveniences arising from delay of suits, by reason of the privilege of parliament, it is enacted, “ That any person or persons shall and may, at any time, commence and prosecute any
 “ action or suit, in any court of *Record*, or court of *Equity*, or of
 “ *Admiralty*; and in all causes matrimonial and testamentary, in
 “ any court having cognizance of causes matrimonial and testa-

“ mentary,

"mentary, against any peer, or lord of parliament of *Great Britain*; or against any of the knights, citizens, or burgeses, and the commissioners for shires and burghs of the *House of Commons of Great Britain*, for the time being; or against their or any of their menial or any other servants, or any other person entitled to the privilege of parliament of *Great Britain*; and no such action, suit, or any other process or proceeding thereupon, shall, at any time, be impeached, staid, or delayed, by or under colour or pretence of any privilege of parliament."

2. Provided, that "Nothing in this act shall extend to subject the person of any of the knights, citizens, and burgeses, or the commissioners, &c. for the time being, to be arrested or imprisoned upon any such suit or proceedings."

3. And whereas the process by *distingas* is dilatory and expensive: For remedy thereof, be it enacted, "That the court out of which the writ proceeds, may order the issues levied, from time to time, to be sold; and the money arising thereby to be applied to pay such costs to the plaintiff as the said court shall think just, under all the circumstances, to order; and the surplus to be retained until the defendant shall have appeared, or other purpose of the writ be answered."

4. Provided always, when the purpose of the writ is answered, that then the said issues shall be returned; or if sold, what shall remain of the money arising by such sale, shall be repaid to the party distrained upon.

5. And it is further enacted, "That obedience may be enforced to any rule of his Majesty's courts of *King's Bench*, *Common Pleas*, or *Exchequer*, against any person entitled to privilege of parliament, by distress infinite, in case any person or persons, entitled to the benefit of such rule, shall choose to proceed in that way: and the last clause extends them to *Scotland*."

It has been always held, that a peer is to put in his answer to a bill in equity, on his (a) honour only, and not on his oath; but when he is (b) examined as a witness, he must be sworn. (a) The 6 May 1628, it was resolved by the House of Lords, that the nobility of this kingdom are of ancient right to answer in all courts as defendants, upon protestation of honour only, and not upon the common oath. W. Jon. 155. Fortesc. Rep. 395. (b) Dyer, 314. Jon. 153. 2 Mod. 99. 3 Keb. 631.

Also, if a peer is by order of court to be examined on interrogatories, or to make an affidavit, the same must be on oath. 2 Salk. 513. & Freem. 422.

pl. 566. vide Proce. Chan. 92.

As, where the Lord *Stourton* brought a bill against Sir *Thomas Meers* to compel him to a specific performance of articles for the purchasing of Lord *Stourton's* estate, Sir *Thomas* in his defence insisted, that there were defects in Lord *Stourton's* title to the estate; and it being ordered that Lord *Stourton* should be examined on interrogatories touching his said title, it was objected, that Lord *Stourton*, being a peer of the realm, ought to answer upon honour only; but it was ruled by Lord *Harcourt*, that though

1 P. Wms. 146. pl. 39.
2 Salk. 51.
S. C.
Sir Thomas Meers v. Ld. Stourton.

privilege

privilege of peerage did allow a peer to put in his answer upon honour only, yet this was restrained to an answer; and that as to all affidavits, or where a peer is examined as a witness, he must be upon his oath; and that this examination upon interrogatories, being in a cause wherein his Lordship was plaintiff, to enforce the execution of an agreement, as his Lordship would have equity, so he should do equity, and allow the other side the benefit of a discovery, and that in a legal manner; and accordingly ordered Lord *Stourton* to put in his examination on oath.

Vern. 329.

It hath been held, that though a court of Equity will not proceed against a member that has privilege of parliament, yet if a parliament-man sues at law, and a bill is brought here to be relieved against that action, the court will make an order to stay proceedings at law till answer or further order.

Raym. 12.

Sid. 42.

S. C.

R. T. being chosen a burgess for *Buckingham*, and having a trial at bar to be had on *Tuesday* before the sitting of the parliament, moved to have his privilege allowed him; but was denied in regard the parliament was not sitting nor to sit till after the trial had.

H. 10 G. 1.

in B. R.

Wadsworth

v. Handiside.

It hath been held, that in an action founded on the above-mentioned statute 12 & 13 W. 3. c. 13. the defendant shall have an imparlance; and it was said in this case, that the practice is to file a bill in nature of a special *copias* against the defendant, and then to summon him; and if he appears upon such summons, the plaintiff may declare against him, as in *custodia mariscalii*.

Jenk. 107.

Peers are entitled to a letter missive, which method was introduced upon a presumption that peers would pay obedience to the Chancellor's letter; and is founded on that respect that is due to the peerage.

If the lord doth not appear upon the letter, a *subpœna* on motion is awarded against him; because no subsequent process can be awarded but upon a contempt to the great seal; and the Chancellor's letter is only *ex gratia*.

2 Vent. 342.

Har. Chanc.

Pract. 50.

Gillb. Chanc.

65, 66.

3 Seld. 1543.

If, on the service of the *subpœna*, the peer doth not appear, or if he appears and does not put in his answer, no attachment can be awarded against him, because his person cannot be imprisoned; but the proceedings must be by sequestration, unless cause, &c. and this is regularly made out, upon affidavit made of the service of the letter and the *subpœna*, though sometimes it is moved for without, since the peer may shew want of service at the day assigned to shew cause why the sequestration should not issue; and this order for a sequestration is never made absolute without an affidavit of the service of the order to shew cause, and a certificate of no cause shewn.

A bill being filed against a peer or peers, the first application is for my Lord Chancellor's letter returnable in term-time; or it may be *immediate*, if the peer or peers lives in town; but in this case there must be an affidavit, that the original letter is left with the peer at his house, with a copy of the petition as answered; and therewith also is left an office-copy of the bill signed by the six clerk; for if the bill is not signed, the service is irregular.

This

This letter is only a compliment, and no process to found proceedings on; so that a peer may appear or not, as he pleases; if he fails, a *subpœna* issues against him, and his time for appearing and answering being out, an attachment must be actually sealed and entered against him, though never executed, to ground a sequestration upon. It is a motion of course for a sequestration upon an attachment for want of an answer.

The peer must be personally served with this order, and he hath eight days to shew cause after personal service of the order; if no cause, the order is absolute; but if the sequestration is for want of an appearance, and he appears, the plaintiff must run the same race over again for want of an answer, and the peer must pray time to answer, as suitors do.

The proceeding is the same against a member of the House of Commons: there, the party proceeds by way of sequestration, only with this difference, that instead of a letter there is always a *subpœna* sued out; and when a cause either against a peer or a commoner stands in the paper, and is called, and cannot proceed (privilege being in *) the court never strikes it out as they do in other cases where the party is not ready; but they let it stand over from one term to another, till privilege is out, and never put the party to sue out a new *subpœna* to hear judgment. And the direction of the court to the registrar is to put all privileged causes (which have been put off on that account) the very first causes in the paper when the court sits after privilege is out.

A sequestration was granted, unless cause, against the Lord Clifford for want of an answer; he afterwards put in an answer, which being reported insufficient, it was moved for a sequestration absolutely, an insufficient answer being as no answer. But the court thought it a hardship in the case of a peer or member of the House of Commons, that a sequestration, which in some respects is in nature of an execution, should be the first process against them; and therefore allowed, that in case of an answer which is reported insufficient, the plaintiff is to move again *de novo*, for a sequestration *nisi*.

[The cause shewn against an order *nisi* for a sequestration for want of an answer from a member of the House of Commons, was, an answer come in; to which it was replied on the part of the plaintiff, that, as exceptions were taken, it was no answer, and therefore the order ought to be made absolute. On the other hand was cited the above case of Lord Clifford. But by Lord Chancellor—If there is a sequestration *nisi* for want of an answer against a member of parliament, and he puts in an answer before the order is made absolute, and exceptions are taken to his answer, the court will enlarge the time for shewing cause till it shall appear whether the answer is sufficient or no. Mr. Goldborough, who said, when Lord Clifford's case was before the court, that it was the standing rule of the court there should be a new sequestration *nisi* in this case, was a good officer, but yet I should think what I have mentioned is the proper medium. But his

* This was before 10 G. 3. c. 50. which enacts, That privilege shall not delay proceedings in law, equity, or ecclesiastical courts.

1 P. Wms. 385. pl. 127. Ld. Clifford's case.

Butler v. Rashfield, 3 Ark. 749.

Lordship at present allowed the cause, as it was the course of the court.]

J. P. Wms.
535 *P.* 155.

It was moved for a sequestration *nisi*, for want of an answer, against a menial servant of a peer of the realm, as the first process for contempt, in the same manner as in the case of the peer himself; and though the motion was granted by the Master of the Rolls, yet the Registrar refused to draw it up as thinking it against the course of the court; which being moved again before the Lord Chancellor, his Lordship, upon reading the statute 12 & 13 *W. 3. c. 13.* likewise granted the motion, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons, consequently, there would be no remedy against them, and they would have a greater privilege than their lord, if the process against such menial servant were to be a *subpoena*.

Martin v.
Townshend,
5 *Burr.*
2725.

[The plaintiff, in an action against a member of parliament, had proceeded agreeably to the act of 10 *G. 3. c. 50.* and had obtained rules for selling the issues levied upon a *disfringas*, *alias*, and *pluries*; and also a rule for an attachment against the sheriff: but no issues had been actually levied, and at length defendant appeared; whereupon it was moved, that these rules should all be discharged. For as no issues had been levied, they could not be sold; [*vide* § 3. of the statute 10 *G. 3. c. 50.*] and as the defendant in the action had now appeared, the end and purpose of the writs were answered. On the other side, the plaintiff insisted on the costs of issuing the writs, before the rules should be discharged. And the court thought that reasonable; and directed, that on payment of costs the rules should be discharged. They were of opinion, that these costs were not to attend the event of the suit, but were to be paid to the plaintiff at all events, whether he should finally succeed in his suit or not.

Comp. 844.

In *Trinity* term, 18 *George 3.* in the *King's Bench*, in the case of *Gosling and wife against Lord Viscount Weymouth*, the question was, whether a peer could be sued there by bill of privilege? And adjudged that he might. The case was this:

The plaintiffs commenced an action against the Lord *Weymouth*, by bill of privilege, to which he pleaded in abatement, that he ought to have been sued by original writ, and not by bill of privilege; and whereupon, there was a demurrer and joinder. On the argument of which, the court relied on the case of *Say* against Lord *Byron* in that court, a few years before, and awarded a *respondens ouster*.

In the case of *Say v. Lord Byron*, Mr. *L. Robinson* moved (upon an affidavit, that the plaintiff had sued out two writs of *disfringas*, whereupon the sheriff had levied 40*s.* and 4*d.* and that no bill was filed) for a rule to shew cause why the said two writs should not be quashed, and the money levied thereon be restored. He objected that a peer ought not to be sued by bill, but by original writ; and that the stat. of 12 & 13 *W. 3.* does not make any variation in the proceedings against peers, but respects, in
this

this particular, *commoners* only. Mr. *Stowe* shewed cause, and the rule was enlarged. Upon shewing cause at a farther day, the court declared, that there were many precedents of actions against peers of parliament for many years before the statute of *W. 3.* as certified by the Master, and the clerk of the rules; and said, why could not the court support its ancient jurisdiction, as well as the court of Exchequer, as *debitor domini regis*? The court therefore discharged the rule.

It is however very remarkable, that when the act of King *William* went to the *Lords* for their concurrence to the proceedings therein, against the members of both Houses, by bill and summons thereon, the *Lords* expunged that part of the clause relating to themselves being sued by *original bill and summons*, and sent back the amended bill to the Commons; which afterwards passed accordingly. Which clearly proves, that the *Lords*, at that time, did not think themselves included therein.

Nor is it clear even at this day, notwithstanding the above cases, that they are included in the act. For upon a writ of error by the Earl of *Lonsdale*, to reverse judgment because he had been sued by bill, the two following questions were proposed to the judges by the House of Lords. 1st, Whether the court of King's Bench hath any jurisdiction to hold plea in a personal action against a peer, or lord of parliament, who is neither in the custody of the marshal, nor is an officer or minister of that court, without the king's original writ issuing out of his Chancery, to warrant such action? 2d, If the court has no such jurisdiction, can it derive such jurisdiction from the acquiescence of the defendant, by pleading to issue in an action commenced without the king's original writ? In answer to which the Lord Chief Justice *Eyre* stated the unanimous opinion of the judges to be, that the first question would have admitted of considerable doubt, if the objection had been made in an earlier stage of the cause, and that the cases of *Say v. Lord Byron*, and *Gosling v. Lord Weymouth*, were not to be considered as decisive authorities upon the subject. But that after pleading in chief it was too late for the defendant to object to the jurisdiction of the court.

A member of the House of Commons may be sued either in *B. R.* or *C. B.* by bill; but he cannot be declared against in *B. R.* as in the custody of the marshal.

Earl of
Lonsdale v.
Littledale,
2 H. Bl.
267. 299.

All the subsequent proceedings to the declaration against a peer or privileged person are the same as in other cases, except that their bodies cannot be taken in execution, unless the judgment is obtained upon a *statute-staple*, or *statute-merchant*, or upon the statute of *Acton Burnell*, 11 *Edw. 1.* and then a *capias ad satisfaciendum* lies even against peers of the realm.

By stat. 4 *G. 3. c. 33.* the creditor of a member, a merchant, may on affidavit sue out a writ, and serve him, and if he does not make satisfaction in two months, he shall be bankrupt from the time of service. Merchant committing act of bankruptcy, creditors

2 Str. 734.
Say. Rep.
634.

creditors may sue out commission, and commissioners proceed, notwithstanding privilege. But the person shall not be arrested or imprisoned, except for cases made felony by the bankrupt acts.]

in Mallorin Entries -

Prohibition.

AS all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was (a) framed; which issues out of the superior courts of common law to restrain inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, &c. upon a suggestion that the cognizance of the matter belongs not to such courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that give it, are in such superior courts (b) punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case.

(a) *Inf. 401. F.N.B. 40. 12 Co. 65. And. 279. 2 Jon. 213. Skin. 628. (c) And is of great antiquity, 3 E. 1. An attachment granted against the bishop and official, for holding plea after a prohibition. 2 Rol. Abr. 281.*

(b) *Ecclesiastical courts holding plea by fraud of matters of which they had not cognizance, were punishable in the Star-Chamber. Dav. 52.*

Show. Par. Ca. 63.

The object of prohibitions in general is, the preservation of the right of the king's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law, to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice.

2 Inf. 402. Rol. Rep. 352. 3 Bulst. 120. Palm. 297.

So that prohibitions do not import that the ecclesiastical or other inferior temporal courts are *alia* than the king's courts, but signify that the cause is drawn *ad aliud examen* than it ought to be; and therefore it is always said in all prohibitions (be the court ecclesiastical or temporal to which they are awarded) that the cause is drawn *ad aliud examen contra coronam & dignitatem regiam.*

Under this Head we shall consider :

- (A) What Courts may grant a Prohibition.
- (B) Whether the granting of a Prohibition be discretionary, or *ex debito justitiæ*.
- (C) Who have a Right to such Writ, and may demand it.
- (D) Who may join in such Writ.
- (E) Of the Suggestion and Manner of obtaining a Prohibition.
- (F) When to be granted absolutely, or *quousque* only; and therein, of directing the Party to declare on his Prohibition.
- (G) Whether more than one such Writ is to be awarded.
- (H) At what Time to be granted; and therein, in what Cases it may be granted after Sentence.
- (I) To what Courts a Prohibition may be awarded; and therein, that the Superior Courts are to determine the Boundaries of all Inferior Jurisdictions.
- (K) Prohibitions to Inferior Temporal Courts in what Instances to be granted.
- (L) Prohibitions to the Spiritual Court in what Instances; And herein,
 - 1. Where they meddle with a Matter purely Temporal.
 - 2. Where they determine on a Matter of Freehold.
 - 3. In what Cases a Prohibition lies when they determine on Criminal Offences.
 - 4. Where the Ecclesiastical Courts determine on Acts of Parliament.
 - 5. In what Cases they have a concurrent Jurisdiction, and may determine Incidents.
- (M) The Offence of disobeying a Prohibition.

(A) What Courts may grant a Prohibition.

F. N. B. 53.
4 Inst. 81.

THE superior courts of *Westminster*, having a superintendency over all inferior courts, may in all cases of innovation, &c. award a prohibition. In this the power of the court of *B. R.* has never been doubted, being the superior common law court in the kingdom.

Bro. Prohibition, pl. 6.
4 Inst. 81.
2 P. Wms.

Also, the court of Chancery may award a prohibition, which may issue (a) as well in vacation as in term-time, but such writ is returnable into *B. R.* or *C. B.*

43. (a) If one be sued in an inferior court for a matter out of its jurisdiction, the defendant may either have a prohibition from one of the common law courts of *Westminster-hall*; or, in regard this may happen in a vacation, when only the Chancery is open, he may move that court for a prohibition; but then it must appear by oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused. And if a prohibition has been granted out of Chancery *improvidē*, and without these circumstances attending it, the court will grant a *superfideas* thereon.
2 P. Wms. 476. pl. 135.

(b) Bro. Prohibition, pl. 6.
Noy, 153.

As the jurisdiction of the court of *C. B.* is founded on original writs issuing out of Chancery, it hath been heretofore (b) doubted, whether this court could without writ or plea depending award a prohibition; but this point has been (c) determined by the unanimous sense of all the judges, *viz.* That this court may upon a suggestion grant prohibitions, to keep as well temporal as ecclesiastical courts within their bounds and jurisdictions, and that without any original writ or plea depending; the common law being, in these cases, a prohibition of itself, and standing instead of an original.

(c) 12 Co. 58. 108.
Bro. Consultation, pl. 3.
4 Inst. 99.
2 Brownl.
27.—Prohibitions for encroaching jurisdictions

issue as well out of the *C. B.* as *B. R.* Vaugh. 157. *per* Vaugh. Ch. J. [The Author of the Commentaries says, that the writ of prohibition is issuing properly only out of the court of King's Bench, being the King's prerogative writ, but that for the furtherance of justice it may now also be had in some cases out of the court of Chancery, Common Pleas, and Exchequer. 3 Bl. Comm. 112. And Lord Hardwicke is reported to have said, that where the ecclesiastical court proceeds to try a custom by a different evidence from that which the common law courts would have done, no other court has the cognizance of it, but the court of King's Bench. 3 Atk. 628. *Rotherham v. Farnshaw*. In the case of the Company of Horners in London, it is said that it is the proper power and honour of the court of King's Bench to limit the jurisdictions of all other courts. 2 Rol. Rep. 471.]

Moor, 861.
2 Rol. Abr. 317. *Hutton's case*.
Hob. 15. S. C. and there said by Hob. that the party might likewise have a prohibition out of the *Duchy* court.

Accordingly it hath been adjudged, that a prohibition ought to be granted by the court of *C. B.* to the court of delegates, for suing there to avoid an institution of a clerk to a church in *Lancashire*, after induction made of him thereto, though the *quare impedit* for this church could not be brought in *C. B.* but only in the county of *Lancaster*; because the title of the advowson was not questioned by this prohibition, but the intrusion upon the common law, of which this court has special care.

Noy, 77.
Dixy v. Brown.
Palm. 422.
Litch, 114.
S. C.

(d) That if it be insisted
ubi-

But as to the courts of *B. R.* and *C. B.* this difference hath been made, that in the first of those courts a prohibition may be awarded upon a (d) bare surmise, without any suggestion on record; and such writ is only in nature of a commission prohibitory, which is (e) discontinued by the demise of the king; but that as to a prohibition issuing out of *C. B.* the suggestion must be

is on record, and therefore is considered as the suit of the party, which he may be nonsuited, and is not discontinued by the demise of the king.

is entered on the roll. Salk. 136. per Holt, Ch. J. [For want of a suggestion on record in court of B. R. discharged the rule to shew cause why a prohibition should not be granted. Hawkins, Assignee of Wooldridge, v. Blaquiére and others, Assignees of Sampson, Hil. 20 G. 3. 2 Crompt. Pr. 239.]
 e) But, if an attachment issues upon such prohibition, or the party puts in bail, then it becomes a private suit, not discontinued by the demise of the king; and after such proceeding the party may be nonsuited, though not before. Palm. 423. Latch, 114. per Dodderidge and Jones.

If the king's farmer, or a copyholder of the king's manor, be sued in the ecclesiastical court for tithes, upon a suggestion in the court of Exchequer that he prescribes to pay a certain *modus* in lieu of tithes, he shall have a prohibition out of the said court, and such *modus* shall be tried there.

The grand sessions of *North Wales* may send a prohibition and write to the spiritual courts there, as well as the courts here may.

bition cannot be moved for till the suggestion

on record

it becomes a private suit

Palm. 525. Lane, 39. Rol. Abr. 539.

Sid. 92. but for this *wide* Cro. Car. Vaugh. 411.

(B) Whether the granting of a Prohibition be discretionary, or *ex debito justitiæ*.

It is laid down in *Hob.* that though a surmise be a matter of fact, and triable by a jury, yet it is in the discretion of the court to deny a prohibition, when it appears to them that the surmise is not true.

This authority has been often quoted in questions of this kind, and in some cases denied to be law. But yet it seems the better opinion, and to have been so holden by the greater number of our judges, that the awarding of a prohibition is a matter discretionary, that is, that from the circumstances of the case the superior courts are at liberty to exercise a legal discretion herein, but not an arbitrary one, in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted.

and *not de gratia*. In Raym. 92. Hide, Ch. J. affirms, that a prohibition is *ex gratia*, but Keling and Twissden positively denied it.—Salk. 33. pl. 6. Comb. 148. they are held to be discretionary.—Ld. Raym. 220, 578. it is said by Holt, Ch. J. that Hale and Windham held prohibitions to be discretionary in all cases.—And of this opinion is Holt; and so in Ld. Raym. 586.

Hob. 67. in the case of Aston Parish v. Castle Birmidge Chapel.

Winch, 78. it is said to be a matter discretionary.—But in Raym. 3, 4. Sid. 65.

Prohibitions are said by the Judges to be *ex debito justitiæ*,

It hath been determined in the House of Lords, that no writ of error will lie upon the refusal of a prohibition; but, when a consultation is awarded, it is with an *ideo consideratum est*, and then a writ of error will lie.

If a master of a ship sues in the Admiralty for his wages, and a prohibition is moved for, upon a suggestion that the contract was made on land, and the court is of opinion that a prohibition ought by law to be granted; in this case they will not compel the party to find (a) special bail to the action in the court above.

Sandgrave. 3 Term Rep. K. B. 315.] (a) But Holt, Ch. J. confessed that the court had sometimes interposed, and procured bail to be given, but that was by consent. Ld. Raym. 578. [For without consent it cannot be done, and the case of Wharton v. Pitts, Salk. 548. where such terms were imposed was over-ruled in Velthausen v. Ormsley, 3 Term Rep. K. B. 315.]

Ld. Raym. 545. in the Bishop of St. David's case.

Salk. 33. pl. 4. Carth. 518. Com. 74. Ld. Raym. 576. S. C. [Clay v.

Comp. In-
comb. 43.
Sed. 65.

If there is judgment against a simonist, who by the assent of parties is to continue for a certain time on the benefice, and who at the expiration of the time refuses to remove, but commits waste on the house or glebe, a prohibition to stay his doing waste may be had by the patron, incumbent, or any other person, because that is the king's writ; and any one may pray a prohibition for the king, and it is grantable *ex debito iustitie*, and not in the discretion of the court.

(C) Who have a Right to such Writ, and may demand it.

F. N. B. 40.

THE king may sue for a prohibition, though the plea in the spiritual court be between two common persons, because the suit is in derogation of his crown and dignity.

2 Inst. 607.

So, if the ecclesiastical court will hold plea of any matter which belongs not to their jurisdiction, upon information thereof to the king's courts, either by the plaintiff, defendant, or by a mere stranger, a prohibition will issue.

2 Rol. Abr.

312.

Leon. 130.

Goult. 49.

As, if a man libels in the spiritual court for a matter which does not appertain to that court, but to the common law, as a matter of frank-tenement; yet he himself, against his own suit, may pray a prohibition, and shall have it.

Cro. Jac.

351.

2 Bull. 283.

Lie. Rep.

20. Wort

v. Clifton.

So, where the plaintiff in the spiritual court brought a prohibition to stay his own suit there, for that he suing for tithes by virtue of a lease made by the vicar of *A.* for three years, the defendant claimed to be discharged of the tithes by a former lease and composition by deed; it was held, that the plaintiff himself may have a prohibition to stay the suit; for the ecclesiastical judges are not to meddle with the trial of leases or real contracts, though they have jurisdiction of the original cause (*viz.* the tithes); for the lease is in the realty, and is not merely accidental. And it makes no difference, that the plaintiff bring this prohibition to stay his own suit; for if the temporal court has knowledge by any means, that the spiritual court meddles with temporal trials, a prohibition ought to be awarded.

2 Rol. Abr.

312. Ro-

bert's case.

(a) Cro.

Elia. 251.

If a vicar sues a parishioner for tithes in the spiritual court, and the parson appropriate appears there (*a*) *pro interesse suo*, and prays a prohibition, it shall be granted.

Keilw. 110.

Moor, 915.

Cro. Elia.

55.

March, 22.

45.—A pro-

hibition quia

et non does

not lie.

Allen, 56.

Tarrant v.

Munn.

3 Str. 576.

If lessee for years is sued in the spiritual court for tithes, he in reversion may have a prohibition.

But no man is entitled to a prohibition, unless he is in danger of being injured by some suit actually depending; and therefore upon a petition to the archbishop, or other ecclesiastical judge, no prohibition lies.

[If the wife libel in the spiritual court to recover her fame, a prohibition shall not be granted upon the motion of her husband.]

(D) Who

(D) Who may join in such Writ.

If several libels are exhibited against *A.* and *B.* in a matter in which the court hath not consufance, *A.* and *B.* cannot join in prohibition. So, if the griefs be several, as some books say.

But, where the vicar of *A.* libelled several persons severally for crimes, who joined in a prohibition, suggesting a *modus*; though the court held in this case, that the prohibition was not regularly sought, being in all their names, when there were several libels; inasmuch as this was on a custom, and matter triable at common law, in which the ecclesiastical court was properly prohibited, though not in exact form, they refused to award a constitution, but directed that the parties should put in several declarations, as if there had been several prohibitions.

So, if *A.* libels against *B.* and *C.* for defamation, and they sue a prohibition, they shall join in attachment upon it; and it is no objection to say, that the defamation was several.

this, Vent. 266. Raym. 425.

Noy, 138.
Leon. 286.
Cro. Car.
162.
Yelv. 128-9.
Burgefs and
Dixon v.
Aftton.
Owen, 13.
Bartue's
case, L. P.
adjudged.

Ld. Raym.
127. per
Treby, C. J.
& vide for
Comb. 448.

Where two or more are allowed to join in a prohibition, and one of them dies, the writ shall not abate; because nothing is by them to be recovered, but they are only to be discharged.

Owen, 13.
per cur.

E) Of the Suggestion and Manner of obtaining a Prohibition.

WHERE the matter suggested for a prohibition appears upon the face of the libel, an affidavit is never insisted upon; but if it does not appear upon the face of the libel, or, if prohibition is moved for as to more than appears upon the face of the libel to be out of their jurisdiction, there ought to be an affidavit of the truth of the suggestion.

2 Salk. 549.
pl. 8.
per Holt,
Ch. J.
1 P. Wms.
677.
[4 Burr.
2037. Cowp. 330.]

The suggestion in the temporal courts may be traversed.

2 Inst. 611.
2 Co. 44.
—Where
Show. 179.

Prohibition not to be granted upon process before libel or appearance. Salk. 35. pl. 8. — That a person may alter his suggestion. Lev. 253. — Where a variance between the libel and suggestion is not material. Yelv. 79.

On a rule to shew cause why a prohibition should not be granted to stay a suit against the plaintiff in the court of the archdeacon of *Litchfield*, for not going to his parish-church, nor any other church, on *Sundays* or holidays, nor receiving the sacrament thrice a year, upon suggestion of the statute *Eliz.* and toleration act, and then qualifying himself within the act, and alleging that he pleaded it below, and they refused to receive his plea; cause was shewn, that this fact, that such a plea had been put in and refused, was false, and that the plaintiff was not a dissentor, nor had qualified himself *ut supra*, and therefore hoped the court would not suffer the rule to stand, unless there was an affidavit of the above fact; for by that means any person might

2 Ld. Raym.
1211.
Burdett v.
Newell.

might come and suggest a false fact, and oust the spiritual court of their jurisdiction; which the court admitted; and therefore for want of such affidavit the rule was discharged.

Skin. 20.
pl. 20.
Hard. 406.
3 Keb. 217.
4 Mod. 367.
[1 Str. 187.
4 Burr.
2032. 2039.
See Dougl.
380. as to
this custom
of London.]
Vent. 10.
Day v. Pitts.

If a plea to an inferior jurisdiction be properly tendered, and they refuse it, though this be a good cause for a prohibition, yet an affidavit must be made of the refusal.

A motion was made for a prohibition to the ecclesiastical court of London, for calling a woman *whore*, upon a suggestion that the words were actionable there by custom of the place; but the court would not grant a prohibition without oath made, that any such words were spoken, they were spoken in London, and elsewhere.

On a libel for calling the plaintiff *old thief and old whore*, the defendant suggested for a prohibition, that if any such words were spoken, they were spoken at the same time; but this suggestion was held ill, because the words ought to have been fully confessed.

(n) Re-
heard in
the Statutes
27 H. 8.
c. 20. and
32 H. 8.
c. 7. to
which this
act refers.

33g. 9. 25. 2. 2.

By 2 & 3 Ed. 6. c. 13. § 14. it is enacted, "That if any party at any time hereafter, for any matter or cause before (or rehearsed, limited, or appointed by this act, to be sued or determined in the king's ecclesiastical court, or before the ecclesiastical judge, do sue for any prohibition to any of the king's courts where prohibitions before this time have been used to be granted, that then in every such case the same party before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court, where such party demandeth prohibition, the very true copy of the libel, depending in the ecclesiastical court concerning the matter wherefore the party demandeth prohibition, subscribed or marked with the hand of the said party, and under the copy of the said libel shall be written the suggestion, wherefore the party so demandeth the said prohibition; and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the court where the said prohibition shall be so granted, within six months next following after the said prohibition shall be so granted and awarded, that then the party, that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall, upon his or their request and suit, without delay, have a consultation granted in the same cause in the court where the said prohibition was granted, and shall recover double costs and damages against the party that so pursued the said prohibition; the said costs and damages to be assigned or assessed by the court where the said consultation shall be so granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint, or information, in any of the king's courts of record."

In the construction of the above-mentioned statute the following opinions have been holden.

4 Inst. 662.
Comp. In-
umb. 600.

That this statute referring to the statutes 27 H. 8. c. 20. and 32 H. 8. c. 7. which extend to tithes and offerings generally, all such

In tithes and church-duties as are mentioned in those statutes, Dyer, 170. B. as much within this act as if particularly enumerated.

And therefore it extends to prohibitions to suits for small tithes as well as great.

So it hath been adjudged, that the suggestion of a *modus decimandi* ought to be proved within six months, being within the act.

So, where one that was sued for tithe of hay in the spiritual court, suggested for a prohibition, that he was to pay so much upon an arbitrament; it was held, that this suggestion ought to be proved, as well as one made of a *modus decimandi*. So, on a suggestion upon the statute 31 H. 8. c. 13. that lands are tithed, because the clause requiring the proof of a suggestion is general, and not limited to real composition.

So, upon a suggestion, that the suit in the spiritual court was for tithes of heath and barren ground improved within seven years after the improvement, contrary to the statute; in this case, proof of the suggestion within six months was held necessary.

But it hath been held, that there needs no proof of the suggestion, where the suit is for tithes contrary to common right, or where the (a) contract of the party is suggested.

Brown. and Goult. 99. Hetl. 145. 2 Keb. 134. Lit. Rep. 2974

It hath been held, that the suggestion need not be proved (b) strictly, nor with precise certainty as to all its circumstances; but that if it be proved in substance, or in such a manner as to shew that the ecclesiastical court has not jurisdiction, it is sufficient.

Wray is sufficient. Palm. 377. — Or that it is so by common fame. Noy, 28. *modus* was alleged to be; that one should pay 20 s. in satisfaction of tithes, and the proof was, that he should pay 40 s., this was held sufficient proof; because thereby the court above had sufficient jurisdiction. Inst. 100. So, where the suggestion was to pay 2 s. 6 d. for tithes, and the witnesses proved the *modus* to be to pay 3 s., this was held good by two judges against one; because it ousted the ecclesiastical court of jurisdiction. Noy, 44. Hetl. 110. & vide Yelv. 55. 2 Keb. 57. 407. — So, if one swears that the inhabitants of B. (of which he himself is one) have paid a *modus*, and the proof is that he himself had paid it, this is sufficient; because it ousts the ecclesiastical court of its jurisdiction. Noy, 28.

The suggestion must be proved by honest and sufficient witnesses, which is required by the express words of the statute; and therefore the testimony of one attainted of felony, excommunicated or convicted of recusancy, is, as in other cases, to be rejected.

But it hath been held, that persons, such as parishioners of the parish, &c. who may not be sufficient and able witnesses at a trial at law, may notwithstanding be sufficient witnesses to prove the suggestion; the chief intent of the statute being to prevent frivolous and vexatious suggestions. Also it hath been held, that after admitting and recording the proof of the suggestion, nothing is to be objected against the persons of the witnesses or their evidence.

If a suggestion consists of two parts, it is said to be sufficient to produce one witness to the one, and another to the other.

Yelv. 102.
2 Ld. Raym.
1172.
Noy, 148.
Yelv. 102.
L. P.

Rel. Rep.
55. Rey-
nolds v.
Hay.

Jon. 231.
Strande v.
Hoskins.
Cro. Car.
208.

(a) For this
vide Yelv.
102. 119.
2 Leon. 29.

Cro. Eliz.
736. 819.
Ca. temp.
Hardw. 292.
Moor, 911.
(b) That
proof by

(c) As, where
2 Bult. 154.

M. 27 Car.
2. in C. B.
Sharp v.
Hobart.

Vent. 127.

Hob. 179. It hath been held, that the six months for proof of the fund shall be accounted according to the calendar; for that this is a computation which concerns the church, it is but reasonable that it should be done according to the computation used in the ecclesiastical law.

Lit. Rep. 19. 2 Mod. 58. 2 Rol. Abr. 321. Foy v. Lister, 2 Salk. 554. 2 Ld. Raym. 1172. S. C. sem. b. [Vide contr. and that this computation is confined only to the case of a lapse in *quare impedit*, Co. Lit. 135. b. Cro. Jac. 166, 167. 4 Mod. 186. 3 Burr. 1455. Skin. 300. And that depends on the words in the act of 13 E. 1. §. 1. c. 5, "*tempus semestre*." But, in all cases where "months" are spoken of, without the word "calendar," and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean lunar months. Lacon v. Hooper, 6 Term Rep. 226.]

(a) Moor, It is said in (a) *Moor*, that the time of six months given by the statute to prove the suggestion, ought to be intended six months in term-time, and that the vacation should be no part of the time; but this hath been since (b) adjudged otherwise, and that the time shall commence from the *teste* of the writ of prohibition, and not from the time of the rule made for awarding it.

[When the declaration is ordered to be amended, the time for proving the suggestion is to be computed from the amendment.]

(b) Noy, 30. 2 Ld. Raym. 1172. 2 Salk. 554. pl. 20. (c) That it must be entered in the office. 2 Show. 308. pl. 316.

Malton v. Acklom. Barnes, 428. Noy, 30. (c) That it must be entered in the office. 2 Show. 308. pl. 316.

If the (c) surmise be proved before one of the judges within the six months, although it be not recorded till after the six months by the court, it is well enough.

Lit. Rep. 155. It hath been held, that proof which is not sufficient may be supplied by better proof within the six months, but not after.

Arg. Creake v. Pitcairn, Tr. 13 G. 2. Caf. Pr. C. B. 158. [It is said, if the party who has obtained a writ of prohibition, be ordered to declare in prohibition, that he is not obliged to make proof of his suggestion within six months pursuant to the 2 & 3 Ed. 6. because the proof is, in such case, to be made at the trial of the cause.]

Bendl. 143. (d) Vide stat. 8 & 9 W. 3. c. 11. The party, on failure of proof of the suggestion, shall not only have double costs and damages, but also his (d) costs and damages in the action he brings for the recovery of them.

Brownl. Goulf. 99. Yelv. 119. But, if the prohibition be grounded partly on a *modus*, which needs proof, and partly on the contract of the parties, which needs no proof, there ought not to be double costs; for the mixing of the contract with the manner of tithing privileges the whole.

Yelv. 79. 40. So, where for a variance between the libel and suggestion, a consultation was awarded, and double costs adjudged to the defendant; this was held to be error by the very letter of the statute, which gives double costs (e) only for want of proving the suggestion, and for no other cause.

(e) Carth. 463.

Latch, 140. Watkinson v. Sir G. Pacy.

So, where a prohibition was obtained upon a suggestion which was not proved within the six months, in which the defendant took issue with the plaintiff, which was found for the plaintiff; in this case it was resolved, that the defendant should not have double costs for want of the suggestion's being proved; for the statute is, that he shall have a consultation and double costs; but in this case he could not have a consultation, the matter and issue being found against him; but ought to have prayed a consultation upon

pon the suggestion's not being proved, and then should have had double costs.

[Where a consultation is granted, because the suggestion has not been proved within six months, the court will not make the payment of the double costs and damages given in such case to the defendant in prohibition by the 2 & 3 *Edw. 6. c. 13.* a part of the rule;—that would be unnecessary, for if a consultation be awarded for want of such proof, double costs and damages follow of course.

A suit was instituted in an ecclesiastical court against an administrator for tithes due from the intestate in his lifetime, to which suit the administrator, alleging a *modus*, obtained a prohibition, but did not prove his suggestion within the time limited for that purpose by the 2 & 3 *Edw. 6. c. 13.* and it was doubted, whether or not he was liable to double costs according to that statute.

Pract. Reg. 118. According to these books, the court resolved, that the plaintiff in prohibition was not liable to pay any costs.

If a defendant in prohibition bring an action of debt for the recovery of the double costs and damages, given by the 2 & 3 *Edw. 6.* where a consultation is granted for want of the suggestion's being proved within six months, he shall also have costs in such action.

The 2 & 3 *Edw. 6. c. 13. § 14.* gives costs where the party applying for a prohibition fails in proving the truth of his suggestion within six months; and this continued to be the only case, where either a plaintiff or defendant in prohibition was entitled to recover any costs until the 8 & 9 *W. 3. c. 11.* By the third section of that statute it is enacted, "That in all suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*"

Where judgment is given for the plaintiff, in a suit in prohibition, upon demurrer, or after plea pleaded, he shall have costs taxed from the suggestion, and so as to include the costs incurred by the motion.

Thus in prohibition, a motion being made that the prothonotary should not allow costs, except from the time of the delivery of the declaration, the court unanimously declared, that the plaintiff ought to have his costs from the time of the suggestion, and of the suggestion itself, and all costs incident and subsequent thereto.

So where, after judgment for the plaintiff in prohibition, the question was, whether the costs payable by the defendant should be computed from the first motion, or only from the declaration? Upon search, it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances, *viz. Eads v. Jackson, B. R. 2 G.*, and *Brown v. Turner* and others,

Foy v. Lister,
2 Ld. Raym.
1172.

Creak v.
Pitcairne,
T. 13 & 14
G. 2.
Barnes, 129.
Sed. v. S. C.
Caf. Pr.
C. B. 157.

1 Rol. Abr.
516. l. 37.

Comb. 20.
The 5th
sect. of 8 &
9 W. 3. c. 11.
provides,
that nothing
in that act
contained
shall be con-
strued to al-
ter the laws
then in be-
ing, relative
to the pay-
ment of costs
by executors
or administrators.

2 Str. 1062.
Caf. temp.
Hardw. 396.
Andr. 621.
Barnes, 130.

Wills v.
Turner, H.
2 G. 1. Caf.
Pr. C. P.
11. S. C.
B. N. P.
331.

Sir Harry
Houghton v.
Starkey, 12
Seacc. H.
4 G. 1.
1 Str. 82.
S. C. Fort.
348. S. C.

cited Caf.
temp.
Hardw. 396.

in *C. B.*, where costs were allowed from the time of the original motion for the prohibition. And Mr. Baron *Fortescue* said, that this question had been put to all the judges, whose opinions were conformable to these two decisions. Therefore, in the principal case, the court of Exchequer ordered costs to be taxed from the first application to the court inclusively; and directed the officers to pursue that mode of taxation, in all such cases for the future.

1 Str. ubi
sup. Sed vide
Ca. temp.
Hardw. 396.
where this
case is cited
differently,

Afterwards, in *Sweetnam v. Archer*, the same question occurred, and received the same determination; and, in this case, it was agreed that the practice had been uniformly such, since the resolution in *Houghton v. Starkey*.

and said to have been never determined.

Bury v.
Croft,
2 Str. 83.
S. C.
1 Barnard.
K. B. 47.
S. C. cited
Caf. temp.
Hardw. 396.

And this point was again agitated, in a subsequent case, on account of a doubt entertained on the subject by a new Master of the King's Bench; when the court resolved, that the plaintiff in prohibition should have costs from the very first application for the prohibition, because the whole is but one suit, and the words of the 8 & 9 W. 3. c. 11. are, that the plaintiff shall recover his costs of suit.

But it hath been holden, that a defendant in prohibition, in case of the nonsuit of the plaintiff, is not entitled to the costs occasioned by opposing the rule for the prohibition, but merely to the costs of the nonsuit.

Carlisle v.
Meyrick,
C. B. H. 17
G. 3. Say.
on Costs,
337.

Thus, upon a rule to shew cause why the prothonotary should not review his taxation of costs, it appeared, that the plaintiff in a suit in prohibition had been nonsuited; upon which the question was, whether the defendant ought to have the costs incurred by opposing the rule to shew cause why the writ of prohibition should not be granted, as well as the costs of the nonsuit? It was determined, that he ought to have no more than the costs of the nonsuit. If the defendant had succeeded in his opposition to the rule to shew cause why the prohibition should not be granted, it would even then have been for the consideration of the court, whether, upon all the circumstances of the case, that rule should be discharged with costs; but as he did not succeed in that opposition, it must be now intended that it was groundless, and, consequently, there is no pretence for his being allowed the costs thereof.

If, upon argument of a demurrer to a declaration in prohibition, a writ of prohibition be awarded as to some of the points contained in the libel in the court below, and a consultation as to others, the plaintiff in prohibition shall have costs.

Middleton
v. Croft,
Caf. temp.
Hardw. 395.
S. C. Andr.
57. a Str.
1662.

Thus, where *John Middleton* and his wife were libelled against in the spiritual court, for being married out of canonical hours, without licence or banns, and in a private house; a prohibition was applied for, upon a suggestion that the power of the ecclesiastical court was taken away by the statute of 7 & 8 W. 3. c. 35. by which penalties were laid on the clergyman marrying, and the parties married, without banns or licence, which penalties were to be recovered in the temporal court. In order to bring the mat-

ter fully before the court, the plaintiffs were ordered to declare in prohibition; the defendant by his plea denied (in common form) that he had proceeded in the spiritual court contrary to the writ of prohibition; and for a consultation demurred generally. After joinder in demurrer by the plaintiffs, *John Middleton*, the husband, died; however, notwithstanding his death, the court, at the instance of the parties, and because the ecclesiastical court might still proceed against the wife, gave judgment, that the prohibition should stand as to that part of the libel which was for marrying at an uncanonical hour, (*i. e.*) not between the hours of eight and twelve in the forenoon, and that a consultation should be awarded *quoad* the residue of the cause.

In consequence of this judgment, application was made to the court that the Master might be directed to tax *Anne Middleton*, the wife, her costs, upon the 8 & 9 *W.* 3.; but no suggestion being then made upon the roll, of the husband's death, the court refused, at that time, to grant any rule.

This suggestion being afterwards made, the matter was moved again, and a rule to shew cause was granted.

For the plaintiff, the case of *Dr. Bentley* and the Bishop of *Ely* was cited; where, in a suit in prohibition in this court, judgment was given that the prohibition should stand as to all the articles, concerning which the Doctor was libelled below; but, upon a writ of error in the House of Lords, that judgment was reversed, and a new judgment given,—That the prohibition should stand as to part of the articles, and a consultation go as to the rest; and there it came to be debated, whether the plaintiff in prohibition was entitled to costs, he having judgment only for part? and this was solemnly argued, upon a day appointed for that purpose, by all the judges then present; and finally the plaintiff had judgment thereupon for his costs.

Vide 4 Bro. Parl. Cas. 66.

Upon the first argument of the principal case, the whole court were clearly of opinion, that where a prohibition goes to part, and a consultation to other part, the plaintiff in prohibition is entitled to costs. And Lord *Hardwicke*, then Chief Justice of this court, observed, that this case was within the very words of the statute of 8 & 9 *W.* 3. *c.* 11. § 3. which are, *if the plaintiff obtain judgment, or any award of execution after plea pleaded, or demurrer joined*; and the statute only provided for the defendant's recovering his costs in such suits where the plaintiff should become nonsuit, suffer a discontinuance, or a verdict should pass against him; neither of which was the case here. And as to the *quantum* of the costs, he said, that though it was an equitable construction of the statute, to give costs from the first motion; yet, where a consultation was awarded as to part, it was in the discretion of the court, upon the circumstances of the case, whether they would allow costs for that time or not.

Hil. Term. 10 Geo. 2.

However, it being objected, that the death of the husband before judgment had abated the suit, no rule was then made for costs, but the court ordered this point to stand over for further argument.

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Andr. 62.

Malton v.
Acklam,
Barnes, 138.Creek v.
Pitcairne,
Cal. Pr. C.P.
157. Præd.
Reg. 118.Sir E. Bet-
tinson v. Dr.
Hinchman,
Cal. Pr.
C. P. 20.
S. C. B.
N. P. 331.
Lill. Ent.
320. Acc.
Raym. 387.
2 Jon. 128.
1 Vent. 337.
348. 350.
3 Lev. 360.Hull. on
Costs, 322.

Accordingly, this question was argued in a subsequent term when the court were unanimously of opinion, that in this case the circumstance of the husband's death, previous to the judgment, was not an abatement of the suit, even at the common law; or, if it was, that it was clearly aided by the 8 & 9 W. 3. c. 11. § 7. And thereupon they made the rule for the allowance of costs to the wife absolute; and added, that such costs must be allowed from the time of the original motion for the prohibition.

So, it hath been determined, that a defendant in a suit in prohibition is entitled to costs, where a verdict is found for him, though it be for part only of the matter in issue, and a consultation be awarded for the residue.

If, in a suit in prohibition, the plaintiff be obliged to declare as administrator, (as if the prohibition be granted to a suit, in the spiritual court against the plaintiff as administrator, for tithes due in the intestate's lifetime,) and become nonsuit at the trial, he is not liable to the payment of costs.

A plaintiff in prohibition is entitled to costs, by the statute of 8 & 9 W. 3. c. 11. only where he obtains judgment after plea pleaded, or demurrer joined; but, if there be judgment by default in a suit in prohibition, and the plaintiff have damages upon a writ of inquiry for the contempt in proceeding after the writ of prohibition delivered, he will be entitled to costs, by virtue of the statute of Gloucester, c. 1.: this was determined in the following case.

Upon a motion to set aside a writ of inquiry of damages in prohibition, after judgment by default, upon which the jury had found damages for the plaintiff, it was alleged on the part of the plaintiff, that the citing him to appear in the spiritual court in a plea of which that court has no cognizance, and whereby the plaintiff may sustain great damage, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff satisfaction for the damage sustained by the proceedings in the court below; and this the defendant tacitly admits, by suffering judgment to go against him by default. And if the plaintiff be entitled to damages, he is also to costs, under the statute of Gloucester.

The court inclined to be of this opinion, but took further time to consider of the matter. On a subsequent day, the question was solemnly argued; after which the court gave the plaintiff leave to proceed on his inquiry, and directed the prothonotary to tax his costs. But because, in this case, the defendant was prosecuted for a contempt at common law, as judge of the spiritual court, and he could not possibly be in contempt until the rule was made absolute to stay his proceedings, the costs were allowed only from the time that the rule for the prohibition was made absolute.

It should seem that the case reported, by the name of Sir Edward Bettinson v. Savage, in Com. 335. is the same with that above stated; though it must be confessed, the reports differ very widely in several material points.

According

According to *Comyns*, the plaintiff having declared in prohibition, the defendant, *quoad* any proceedings since the writ of prohibition delivered, pleaded not guilty, and for a consultation demurred: there was judgment for the plaintiff upon the demurrer, and upon a writ of inquiry of damages in that issue, the jury found 2*l.* damages. And the court were of opinion, the plaintiff should have costs; and, upon error in the King's Bench, this judgment was affirmed. And, afterwards the reporter adds, a writ of error was brought in parliament, which was dropped upon his persuasion that it was reasonable, and agreeable to the authorities in law, that the plaintiff should have costs.

If one of the issues joined upon a declaration in prohibition be, whether the defendant hath proceeded in the spiritual court subsequent to the granting of a writ of prohibition, and, at the trial, it be found against the defendant; or if, in an attachment upon a prohibition, it be found that the party proceeded after the writ of prohibition awarded, the plaintiff, in both cases, is entitled to recover damages and costs for the contempt.

Facy v. Lange, Crox. Car. 549. S. C. 1 Rol. Abr. 516. 575. Jon. 447. Vide 1 Str. 485. 2 Mod. 1.

If defendant in prohibition compels the plaintiff to declare, and then pleads a nugatory plea, the court will, on motion, order him to pay costs to the plaintiff.

Thus, at the defendant's instance, it was made part of the rule for a writ of prohibition, that the plaintiff should declare in prohibition. The defendant afterwards demanded a declaration, and threatened a *nonpros* for want thereof. Whereupon the plaintiff's agent prepared a declaration, but when it was ready, he was told by the defendant's agent that he need not deliver it; however, having been at the trouble and expence of preparing it, he delivered the same, and demanded a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Upon which the plaintiff obtained a rule for the defendant to shew cause why he should not pay the plaintiff the costs of the proceedings in prohibition. The rule was now made absolute. The court looked upon the plea to be a sham nugatory plea, not being to the merits of the cause; the allegation that the defendant has proceeded contrary to the prohibition, is, and must be put into every declaration of this kind; but whether he has so proceeded or not, is totally immaterial. The statute 8 & 9 *W. 3. c. 11.* gives costs after plea pleaded, or demurrer, but this is not a plea within that statute.

Seed v. Wolfenjen, Barnes, 148.

But, though a plaintiff in prohibition may have prepared, and actually tendered, a declaration to defendant, proceedings shall be staid without costs, where the defendant is desirous of submitting without further litigation.

Thus, upon shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The plaintiff insisted he had a right to go on, in order to

Gedge v. Jones, 2 Str. 7149.

get at the costs of the motion, which he could not otherwise have. But the court staid the proceedings *without* costs; laying the direction to declare was in favour of the defendant, who might waive it.]

The *sumise* or suggestion may be brought in by attorney, and need not be in proper person.

A prohibition is not to be granted the last day of term, but a motion on that day a rule may be obtained to stay proceedings till the ensuing term.

"*Let the day be one.*" Gibb. 1029. 3 Barn's Eccl. Law, 213.]

(F) When to be granted absolutely, or *quousque* only; and therein, of directing the Party to declare on his Prohibition.

Prohibitions are granted either absolutely, or *hoc usque* only such an act be done. The first of these is peremptory: ties up the inferior jurisdiction till a consultation is awarded: second is *ipso facto* discharged upon performing the act, and without any writ of consultation.

When a prohibition is moved for, because a copy of the is denied to be delivered, the court requires that oath should be made of the denial, and the prohibition is only *quousque* then delivered.

A prohibition *quousque* they give copy of the libel, if granted before any libel exhibited, does not bind them exhibiting any libel, and after they shall not proceed till they have a copy of it.

A prohibition was denied to be granted to the Admiralty upon a suggestion that they refused to give the party sued a copy of the libel, because the (a) statute extends only to the secular courts.

It was formerly held by all the judges of *England*, that there was a proceeding *ex officio* in the ecclesiastical court were not bound to give the party a copy of the articles.

law is otherwise; for in such cases, if they refuse to give of the articles, a prohibition shall go *quousque* they deliver.

On (b) motions for prohibitions it is frequent in doubt to grant them *missi*, or that the adverse party should shew cause they should not be granted. Also, in (c) nice and difficult is usual to direct the plaintiff to (d) declare on his prohibition to proceed to (e) issue, that the merits of the cause may be before the court with the greater exactness, and they then the better enabled to judge of the reasonableness of granting the prohibition. [(f) But, if the court be clearly of opinion that there is no ground for a prohibition, it ought not to put out putting the defendant to expence, and to delay the time the exercise of what appears to them to be proper. For this denial is not conclusive to the jurisdiction, the sentence will be a nullity.]

1. Ld. Raym. 1091. per Holt, Ch. J. and so ruled by him in a like case. Salk. 553. (b) Lord Raym. 236. (c) Cro. Eliz. 736. 4 Mod. 251. 2. Lev. 125. Raym. 83. (d) Stile's Pract. Reg. 473. (e) If the jury, upon an issue joined in a prohibition de facto delivered, find a

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nities su-
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Cro. Car.
97 2 Show.
145. pl. 123.
154. pl. 141.
12 Co. 76.—
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by English bill in Chancery, &c. a second prohibition may be awarded notwithstanding this statute. *Cra. Eliz.* 736. p. 5. (d) Whether proceeding out of the same court or another, if for the same cause. *Cra. Eliz.* 277. (e) 2 *Rel. Rep.* 207.

2 *Brownl.*
26. 247.
Leon. 130.
3 *Bulst.* 182.
Moor. 917.

This statute hath been construed to extend to those cases where a consultation hath been lawfully granted; that is, upon the right and merits of the thing in question, and not to such cases where for defect of form, misprision of a clerk, misleading an act of parliament, &c. consultations have been awarded.

Jones. 231.
Yelv. 102.
Cro. Car.
208.

2 *Keb.* 719.
(a) But
must pay
double costs.

Cartin. 463.
Comb. 63.

So, if a consultation be awarded for default of proof of the suggestion pursuant to the statute 2 & 3 *E. 6. c. 13.* the plaintiff is not precluded, but may bring (a) another prohibition; for this statute goes to the suggestion made upon the (b) same libel, and to a consultation duly granted, and not to the case of not having witnesses ready to prove the suggestion through negligence.

(b) It is said by *Justice Holloway*, that after a consultation awarded for not proving his suggestion, &c. the party shall be for ever barred from having another prohibition on the same libel. [See *qu.*]

2 *Vent.* 47.

A motion was made for a prohibition to a suit for tithe-lamb, upon suggestion of a *modus* to pay 2 *d.* a lamb for lambs falling in the plaintiff's farm in the parish. It was objected, that a prohibition was granted before to stop this suit, upon a suggestion, which was tried and found for the plaintiff, and a consultation granted. But it was answered, that that suggestion was for every lamb which fell in the parish, whereas this only is for lambs falling in a particular farm, and so not within this statute. However the court inclined against the prohibition, thinking it within the statute.

Keb. 286.
[See *Com.*
Dig. tit.
Prohibition.
(*K. 4.*)
cont.]

If upon the trial of a suggestion the plaintiff be nonsuit, no new prohibition shall be granted, although the nonsuit was occasioned for want of some of the plaintiff's witnesses, who were to prove the truth of the suggestion, and who were necessarily obliged to be absent.

Moor. 917.

If the ecclesiastical court refuse to grant a copy of the libel, for which a prohibition is granted, and thereupon they grant the copy, and afterwards proceed in the cause, the matter not being within their jurisdiction, another prohibition lies.

Owen v. —
2 *Show.* 195.

[A prohibition was granted in a suit for tithes, upon a suggestion that the lands were barren and newly improved, and a trial had on the declaration in prohibition, and a verdict for the plaintiff that the lands were not barren, on which a consultation was granted, and he obtained sentence. From the inferior court there was an appeal to the Arches, and an allegation entered that the land was barren; and the court there were proceeding to reverse the sentence, because barren land, though contrary to the verdict at law; upon which a prohibition was granted *quoad* the allegation of barren land.]

Lit. Rep.
155.

If the defendant in a prohibition die, his executors may proceed in the ecclesiastical court, and the judges of the court, out of which the prohibition was granted, will also in such case make a rule to the spiritual court to proceed; but the plaintiff may, if he please, have a new prohibition against the executors.

(H) At what Time to be granted; and herein, in what Cases it may be granted after Sentence.

IT is clearly agreed, that in all cases where it appears upon the face of the libel, that the Admiralty, Spiritual Court, &c. have not a jurisdiction (*a*), a prohibition may be awarded, and is grantable as well after as before sentence; for the king's superior courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds.

Skin 299. pl. 2. Carth. 463. March, 153. 2 Roll. Rep. 24. Comb. 356. [Ca. temp. Hardw. 317. 1 Burr. 314. 2 Burr. 813. 3 Burr. 1912. 2 Str. 1133. 4 Burr. 2037. Cowp. 424. (*a*) Either never had any at all, or have exceeded that which they had. 3 Term Rep. 37. Prohibition will be granted to a court of appeal where it appears that they have no jurisdiction over the subject-matter even after they have remitted the suit to the court below, and awarded costs against the appellant, if they are proceeding to enforce the payment of these costs. Darby v. Cosens, 1 Term Rep. 552. On a libel to charge a man to repair a church in respect of a light-house, a prohibition was granted after sentence, and an appeal to the Delegates. Sir Isaac Rebow v. Bickerton, Buns. 31.]

But, where the court has a (*b*) natural jurisdiction of the thing, but is restrained by some statute; as by 23 H. 8. c. 9. for citing out of the diocese, there, the party must come before sentence; for after pleading and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition.

Vent. 61. 6 Mod. 251. 7 Mod. 137. Godb. 163. 243. 5 Mod. 341. Herl. 19. 12 Co. 76. — (*b*) 2 Salk. 549. Like point; because the cause belongs to the spiritual court, and though not to that spiritual court, yet it belongs to some other, and not to the king's temporal courts; & vide Carth. 33, 34. where it appeared on the face of the libel, that the party was cited out of his proper diocese. — Cro. Jac. 429. Cro. Car. 97. Com. 448 where the party obtained a prohibition before sentence, but did not serve it till two terms after, which was after sentence definitive, it was held to be too late.

[If a man libels in the spiritual court for tithes in kind, and the defendant below suggests and insists upon a modus, *there*, the spiritual court have no jurisdiction to try the modus, their method of trial of prescription being different from ours: but, if a man libels for a modus, and the defendant admits the modus, the spiritual court may proceed in the cause. But even in the first case, if the party permit the spiritual court to proceed to sentence, he comes, *then*, too late for a prohibition, it being *pro defectu triationis* only: but a party can never be too late, where it is *pro defectu jurisdictionis*.]

Upon a motion for a prohibition the case was, the defendant libelled in the spiritual court for tithes of faggots made of loppings of trees; and the suggestion for a prohibition was, that these loppings were cut from the stumps of timber-trees above the growth of twenty years; and it was alleged, that sentence was given in the spiritual court, and therefore the plaintiff comes here too late to have a prohibition: But *per Holt Ch. J.* the sentence will not hinder the having a prohibition in any case, but in case of prohibitions grounded upon 23 H. 8. c. 9. for not citing out of the diocese; but because the plaintiff had not pleaded this matter in the spiritual court, they denied the prohibition, because the spiritual court has a general jurisdiction of tithes; and if any

1 Inst. 600.
2 Rol. Abr.
318, 319.
Noy, 137.
Sid. 65.
Cro. Eliz.
571. Moor,
462, 907.

Vide the authorities supra, and Cro. Car. 97. 2 Show. 145. pl. 123. 155. pl. 141.

Offley v. Whitehall, Buns. 17.

2 Ld. Raym. 835. Dike v. Brown.

special matter deprives them of their jurisdiction, it must be pleaded there; and if it had been pleaded there, and issue joined upon it, and upon the trial it had been found not to be *filva cadua*, it had been well; but if they had refused to admit the plea, a prohibition should have been granted.

(I) To what Courts a Prohibition may be awarded :
And herein, that the Superior Courts are to determine the Boundaries of all Inferior Jurisdictions.

THE king's superior courts of *Westminster* have a superintendency over all inferior courts of what nature soever, and are by law intrusted with the exposition of such laws and acts of parliament as prescribe the extent and boundaries of their jurisdiction; so that if such courts assume a greater or other power than is allowed them by law, or if they refuse to allow acts of parliament, or expound them otherwise than according to the true and proper exposition of them, the superior courts (a) will prohibit and controul them.

1. N. B. 43.
45.
4 Inst. 231.
249.
3 Bulf. 120.
2 Rol. Abr.
317-8.
(e) The honour of B.R. to keep inferior courts in order.
2 Roll. Rep. 472.

Hence prohibitions are grantable to almost all sorts of courts which differ from the common law in their proceedings, to the courts (b) Christian, to the Admiralty, nay to the (c) Delegates, and even to the steward and marshal, upon the statute of *articuli supra chartas*.

Show. P. C.
63.
(b) That the spiritual jurisdiction exercised within this realm is derived from the king. Dav. 97. (c) Where they exceed their authority, or proceed in matters not properly within their cognizance, may be prohibited. Moor, 460. 463. Latch, 85, 86. [So they are grantable to naval and military courts martial. 2 H. Bl. 100.]

A prohibition lies to the convocation, *si concilium teneant de aliquibus que ad coronam regis pertinent, vel que personam regis, vel statum suum vel statum concilii sui contingunt*.

4 Inst. 322.
—Lay to the high commission court. 4 Inst. 333. Lit. Rep. 152. 189. 274.

Prohibitions have been granted to the marches of *Wales*, of which there are many instances;

4 Inst. 243.
2 Rol. Abr.
317.
Roll. Rep. 309. 311. Winch, 78. 103. Raym. 192. Vent. 300. Jon. 248.

As, where a bill of foreclosure was brought against one in the grand sessions for the county of *Montgomery*, upon a mortgage of lands that lay there, but the party himself was not an inhabitant; it was held in this case, that a prohibition ought to go; for that the party living out of the jurisdiction could not be served with process, and, consequently, could not be guilty of a contempt, on which a sequestration on his lands could be grounded.

So, prohibitions have been granted to the county palatine of *Chester* in many instances where they have exceeded their jurisdiction.

Hutt. 69.
2 Rol. Abr.
318.
Stile, 285.
1 Bulf. 116. Hob. 15. Roll. Rep. 246. 331. Sid. 180.

Prohibition.

665

So, prohibitions have been granted to the duchy court of *Lancaster* (a), for holding plea of land; not parcel of the duchy (b), for determining on the validity of letters patent granted of a manor.

(a) 2 Rol. Abr. 317-8. Hob. 77. (b) 3 Bull. 119. Rol. Rep. 252. Skin. 43. pl. 14.

So, where a suit was commenced in the Duchy Chancery court, to discover matters whereby the defendant there would forfeit his freehold; a prohibition was granted.

A prohibition was moved for to the Chancery court of the Cinque Ports, in which a bill was filed, setting forth a custom, that every ship that used the pier of *Ramsgate* should pay 4d. for all their gettings in the year, for the maintenance of the pier, and for a discovery of the defendant's gettings; and such prohibition was held to lie, as to the custom, which is only triable by law; but the court held, that such bill might be proper as to the discovery.

A prohibition was prayed to the court of the chamberlain of *Chester*, where an *English* bill was preferred, setting forth, that *J. S.* being indebted to the plaintiff, the defendant upon good consideration promised, that if *J. S.* did not pay it, he would, and that he wanted such precise proof as the law required, and so prayed to be relieved by the equity of the court: the defendant confessed the promise in his answer, and said that he had paid the money: and a prohibition was granted; for the plaintiff had now obtained the end of his suit, and might have remedy at law upon the evidence of the defendant's answer.

The plaintiff in prohibition suggests, that by the laws of *England*, when issue is joined between the parties, it ought to be tried by the evidence *vivâ voce*, and not by notes or minutes of their testimony: That an information was exhibited against him before the commissioners of excise, pursuant to 12 *Car. 2. c. 23. & 15 Car. 2. c. 11.* setting forth, that he was a common brewer, and did keep a common store-house without acquainting the said commissioners therewith; that he was found guilty; and that he appealed from their sentence to the commissioners of appeals, before whom the informer did produce as evidence the minutes taken before the commissioners of excise, and that the witnesses who gave evidence there were still alive; which minutes were allowed as evidence by the commissioners of appeals, &c. and after great consideration a prohibition was granted *quoad* the admitting this evidence.

If the commissioners for determining policies of insurance grasp at more power, or proceed otherwise than as they are enabled by the acts of parliament which create their jurisdiction, they will be prohibited by the king's superior courts.

A prohibition lies to the vice-chancellor's court in *Oxford* and *Cambridge*, where they exceed their jurisdiction.

On a motion for a prohibition to the court of the vice-chancellor of *Cambridge*, it was suggested, that one *Richardson* had a libel preferred there against him, because he had preferred an information in this court against divers persons for a riot committed within

Lit. Rep. 10. M. 26 Car. 2. in B. R. Richardson's case.

the jurisdiction of their court, and the libel was read in this court; and upon that the court declared, that their jurisdiction was concurrent, but not exempt from this court, and that they ought to plead their privilege here, if they had any such privilege, but they ought not to proceed against the informer as a criminal; and so the court granted a prohibition, *nisi*, upon the motion of Serjeant *Scroggs*.

Lit. Rep.
563.

If justices of peace take upon them more jurisdiction than they are allowed by law, as, where they determined on the statutes of usury, a prohibition lies.

4 Inst. 229.
Cro. Car.
333.

So, a prohibition lies to the court of *Stannaries*, which is confined to tin matters only, and where the parties who sue, or one of them, is a tinner, if they exceed their jurisdiction.

Bull. 130.

A prohibition was granted to the council of *York*, for holding pleas in replevin and avowries; the court being clearly of opinion that these are matters determinable at common law.

Bull. 20.

So, a prohibition hath been granted to the court of Requests, for injoining a creditor to give time to his debtor to pay his debt upon security given.

Show. P. C.
58. in the
case of Dr.
Oldis and
Donmille,

It hath been resolved, that a prohibition lies to the court of the Earl Marshal, for proceeding against a person for painting arms and marshalling funerals.

where there is good learning on this subject. 4 Mod. 123. S. C.

2 Salk. 553.
pl. 18.

7 Mod. 125.

Chambers

v. Sir John

Jennings.

[A prohibition

will go, where visitatorial

authority is usurped. Reg. 40. b.]

So, a prohibition was holden to lie to the court of Honour, to prohibit a suit there for these words, *you a knight! you are a prisoner*; and in this case *Holt*, Ch. J. at first doubted whether there was, or could be any such court; but said a prohibition would lie to a pretended court.

4 Bull. 120.

(a) If the

judges of

C. B. hold

plea of an

appeal, a

prohibition

is to be

granted by

B. R.

It is said by my Lord *Coke* in 3 *Bull.* that the court of King's Bench may prohibit (a) any court in *Westminster-hall*, if they exceed their jurisdiction. But this notion of Lord *Coke*, of which he was very fond, especially as to proceedings in courts of equity, hath been so shaken and contradicted of late years, that his authority herein seems to be but of very little weight; but for this we must refer to title *Courts and their Jurisdiction*.

3 Bull. 120.

— So, if the court of Exchequer hold common pleas without a writ of privilege.

3 Bull. 120

& vide 2 Salk. 550. pl. 12.

— So, an English court, or court of equity, holding plea of a

thing whereof judgment was given at common law, hath been prohibited. Moors, 836. Cro. Jac.

335. — But for this vide Jurisdiction of the Court of Chancery, and *Ld. Raym.* 531.

Lit. Rep.

42. 2 Rol.

Rep. 471.

The superior courts of *Westminster* not only grant prohibitions where inferior courts assume a jurisdiction, which properly belongs to such superior courts, but also in cases where one inferior court inroads upon another, and that even in matters in which such superior courts have not a jurisdiction.

5 Co. 73.

Show. P. C.

63.

As, if the ecclesiastical court grant the probate of a will made within a manor, when by custom or of right such probate belongs to the lord of the manor.

So, where the marches of *Wales* held plea of a matter that belonged to the court Christian, it was holden that a prohibition

2 Rol. Abr.
313.
Winch. 78.

So, in *London*, where the lord mayor and court of aldermen have the government of city orphans, if any orphan sue in the ecclesiastical court or elsewhere, for a legacy or duty due to him by custom, a prohibition lies.

4 Inst. 249.

If a bishoprick be void, and the jurisdiction devolve on the metropolitan, he must hold the courts within the inferior dioceses, otherwise he will be prohibited.

Hob. 178.

If there be a controversy, whether such a will ought to be moved before a peculiar or before the ordinary; whether by the archbishop of one province or another, or both; and what shall be (a) *bona notabilia*: In these and the like cases the common law retains the jurisdiction of determining.

Mod. 213.
per North.
Ch. J.
(a) But in
10 Mod.
272. this
point is

taken notice of and denied to be law, for that the spiritual and common law are the same as to *bona notabilia*; and there said, that if a prohibition lay, there must be frequent instances of it.

(K) Prohibitions to Inferior Temporal Courts in what Instances to be granted.

It is clearly agreed, that a prohibition doth lie as well to a temporal court as to the spiritual, court of Admiralty, or other court, whose proceedings are different from the common law, if such temporal court exceed the bounds of its jurisdiction, or take cognizance of (b) matters not arising within its jurisdiction.

F. N. B. 45.
2 Inst. 229.
243. 602.
2 Rol. Rep.
379. Rol.
Rep. 252.
(b) Or if

but part only, cannot have jurisdiction. Ld. Raym. 698.

As, if trespass *vi & armis* be brought in the county court, a prohibition lies to the plaintiff or sheriff.

F. N. B. 47.

So, if one sue another in a court-baron or other court, which is not a court of record, for charters concerning inheritance or freehold, there shall be a prohibition.

F. N. B. 47.

A person having obtained judgment in *B. R.* for his debt and damages, brought his action for the recovery of them against the bail in the court of the Tower of *London*, in which action the party was taken on a *capias*, and was (c) rescued; after which the plaintiff brought his action on the case in the same court for the rescue; and all this appearing to the court of *B. R.* they granted a prohibition.

Rol. Rep.
54.
(c) If an
officer let a
man at li-
berty who is
in execution
upon a bond
sued in an
inferior

court, the bond not being made within the jurisdiction thereof; this is no escape. 2 Mod. 29. *Squibb v. Hole*.—So, where the plaintiff, in an action brought against an officer, declared in *Hull* upon a bond made at *Halifax*, and had judgment and execution, and the defendant escaped; in an action brought for this escape the declaration was held ill, because it did not allege the bond to be made *infra jurisdictionem curie*. Roll. Abr. 809. *Richardson v. Bernard*.

2 Mod. 29. *Squibb v. Hole*.
upon a bond

So, where an action of debt was brought in the *Marshalsea*, on a judgment in *B. R.* a prohibition was granted.

2 Salk. 439.
pl. 2.

A suit was surmised to be before the Lord President of the Marches, for an office, between the grantee of the Lord President and a stranger, wherein the only question would be, Whether

Keb. 648.
(d) Salk.
396. pl. 1.
That where

Accordingly, this question was argued in a subsequent term when the court were unanimously of opinion, that in this case the circumstance of the husband's death, previous to the judgment, was not an abatement of the suit, even at the common law; or, if it was, that it was clearly aided by the 8 & 9 W. 3. c. 11. § 7. And thereupon they made the rule for the allowance of costs to the wife absolute; and added, that such costs must be allowed from the time of the original motion for the prohibition.

Andr. 62.

Malton v.
Acklam,
Barnes, 138.

So, it hath been determined, that a defendant in a suit in prohibition is entitled to costs, where a verdict is found for him, though it be for part only of the matter in issue, and a consultation be awarded for the residue.

Creek v.
Pitcairne,
Cal. Pr. C. P.
157. Pract.
Reg. 118.

If, in a suit in prohibition, the plaintiff be obliged to declare as administrator, (as if the prohibition be granted to a suit, in the spiritual court against the plaintiff as administrator, for tithes due in the intestate's lifetime,) and become nonsuit at the trial, he is not liable to the payment of costs.

A plaintiff in prohibition is entitled to costs, by the statute of 8 & 9 W. 3. c. 11. only where he obtains judgment after plea pleaded, or demurrer joined; but, if there be judgment by default in a suit in prohibition, and the plaintiff have damages upon a writ of inquiry for the contempt in proceeding after the writ of prohibition delivered, he will be entitled to costs, by virtue of the statute of *Gloucester*, c. 1.: this was determined in the following case.

Sir E. Bettinson v. Dr.
Hinchman,
Cal. Pr.
C. P. 20.
S. C. B.
N. P. 331.
Lill. Ent.
320. Acc.
Raym. 387.
2 Jon. 128.
1 Vent. 337.
348. 350.
3 Lev. 360.

Upon a motion to set aside a writ of inquiry of damages in prohibition, after judgment by default, upon which the jury had found damages for the plaintiff, it was alleged on the part of the plaintiff, that the citing him to appear in the spiritual court in a plea of which that court has no cognizance, and whereby the plaintiff may sustain great damage, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff satisfaction for the damage sustained by the proceedings in the court below; and this the defendant tacitly admits, by suffering judgment to go against him by default. And if the plaintiff be entitled to damages, he is also to costs, under the statute of *Gloucester*.

The court inclined to be of this opinion, but took further time to consider of the matter. On a subsequent day, the question was solemnly argued; after which the court gave the plaintiff leave to proceed on his inquiry, and directed the prothonotary to tax his costs. But because, in this case, the defendant was prosecuted for a contempt at common law, as judge of the spiritual court, and he could not possibly be in contempt until the rule was made absolute to stay his proceedings, the costs were allowed only from the time that the rule for the prohibition was made absolute.

Hull. on
Costs, 322.

It should seem that the case reported, by the name of *Sir Edward Bettinson v. Savage*, in *Com.* 335. is the same with that above stated; though it must be confessed, the reports differ very widely in several material points.

According

According to *Cemys*, the plaintiff having declared in prohibition, the defendant, *quond* any proceedings since the writ of prohibition delivered, pleaded not guilty, and for a consultation demurred: there was judgment for the plaintiff upon the demurrer, and upon a writ of inquiry of damages in that issue, the jury found 2*d.* damages. And the court were of opinion, the plaintiff should have costs; and, upon error in the King's Bench, this judgment was affirmed. And, afterwards the reporter adds, a writ of error was brought in parliament, which was dropped upon his persuasion that it was reasonable, and agreeable to the authorities in law, that the plaintiff should have costs.

If one of the issues joined upon a declaration in prohibition be, whether the defendant hath proceeded in the spiritual court subsequent to the granting of a writ of prohibition, and, at the trial, it be found against the defendant; or if, in an attachment upon a prohibition, it be found that the party proceeded after the writ of prohibition awarded, the plaintiff, in both cases, is entitled to recover damages and costs for the contempt.

Facy v. Lange, Crox Car. 559. S. C. 1 Rol. Abr. 516. 575. Jon. 447. Vide 1 Str. 485. 2 Mod. 1.

If defendant in prohibition compels the plaintiff to declare, and then pleads a nugatory plea, the court will, on motion, order him to pay costs to the plaintiff.

Thus, at the defendant's instance, it was made part of the rule for a writ of prohibition, that the plaintiff should declare in prohibition. The defendant afterwards demanded a declaration, and threatened a *nonpros* for want thereof. Whereupon the plaintiff's agent prepared a declaration, but when it was ready, he was told by the defendant's agent that he need not deliver it; however, having been at the trouble and expence of preparing it, he delivered the same, and demanded a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Upon which the plaintiff obtained a rule for the defendant to shew cause why he should not pay the plaintiff the costs of the proceedings in prohibition. The rule was now made absolute. The court looked upon the plea to be a sham nugatory plea, not being to the merits of the cause; the allegation that the defendant has proceeded contrary to the prohibition, is, and must be put into every declaration of this kind; but whether he has so proceeded or not, is totally immaterial. The statute 8 & 9 *H. 3. c. 11.* gives costs after plea pleaded, or demurrer, but this is not a plea within that statute.

Seed v. Wolfenden, Barnes, 148.

But, though a plaintiff in prohibition may have prepared, and actually tendered, a declaration to defendant, proceedings shall be staid without costs, where the defendant is desirous of submitting without further litigation.

Thus, upon shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The plaintiff insisted he had a right to go on, in order to

Gegge v. Jones, 2 Str. 7149.

16

Yelv. 38.
2 Vern. 38.
but 2 Rol.
Rep. 160.
S. P. comm.

If a legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the spiritual court for the legacy, a prohibition will be granted; for by taking the obligation the nature of the demand is changed; and it becomes a debt or duty recoverable in the temporal courts.

Stedman v.
Hay, Com.
Rep. 368.

[Where a person is sued in the ecclesiastical court for a seat in the church, if he would obtain a prohibition, and oust the ordinary of jurisdiction, he must shew such a legal title as cannot be tried in the ecclesiastical court, which can only be by *prescription*, and *prescription* can in such case be no otherwise proved than by shewing repairs; therefore, in a declaration in prohibition, the plaintiff regularly ought to set out a custom of repairing; but, if he do not, and if the defendant do not demur, but go to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict, unless he proves a custom to repair.

Nutkins v.
Robinson,
Burb. 247.
Snowden v.
Herring,
Id. 289.

If a churchwarden has made up his accounts, and had them allowed at vestry; if there is a libel against the churchwarden in the spiritual court, relating to his accounts, a prohibition shall go.]

2. Where they determine on a Matter of Freehold.

F. N. B. 40.
2 Rol. Abr.
286. Lit.
Rep. 164.
Cro. Jac.
270. Vent.
41. cited.

Matters of freehold and the rights of inheritances, are only determinable in the temporal courts; so that if the ecclesiastical courts intermeddle with those, a prohibition lies.

As, in a feoffment of tithes and lands, where there is no livery, if they adjudge the tithes to pass, notwithstanding there is no livery, a prohibition will lie.

Dyer, 151.
264.
Hob. 265.
2 Rol. Abr.
284-5.
2 Show. 50.
pl. 36. Cro.
Car. 16.

So, if a man devises, that his lands shall be sold for the payment of his debts, and that the overplus shall be paid to such and such persons in certain shares; the legatees in this case cannot sue in the ecclesiastical court; for the provisions intended them arise originally out of lands, and their proper remedy in this case is in a court of equity.

Sid. 279.
2 Keb. 5.
Lev. 179.
(a) Where
the legacy
was to a life

But, if a rent be devised out of a farm for years, the ecclesiastical courts may hold plea thereof; for the term for years being only a (a) chattel is testamentary, and, consequently, the rent devised thereout.

as well out of a term for years, as out of lands of inheritance, and the executor received it; but being dead without payment, so that no action of account could be brought at common law against his executor, it was held that the ecclesiastical court should have cognizance thereof. Cro. Jac. 279. Action of account is given against executors, by stat. 4 Ann. c. 16. § 27.

2 Rol. Abr.
285-6.
Noy, 91.
Latch, 228.
Palm. 450.
Godb. 390.
Cro. Car. 65.
2 Rol. Rep.
306.
Raym. 88.
Lev. 225. 4 Mod. 27. Comb. 306.

The rights of offices for life in the ecclesiastical or courts of Admiralty are determinable at common law; as, in the question concerning the validity of two patents, by which the office of a registrar to a bishop was granted, it was held, that this should not be tried in the spiritual court, though the subject-matter be spiritual; because the office itself being matter of freehold is for that reason of temporal cognizance.

Trespass on a glebe being freehold cannot be determined in the ecclesiastical court.

A parson libelled against the defendant in the spiritual court of *York* for having cut elms in the church-yard; and a prohibition was granted, upon suggestion that they grew on his freehold.

Bro. Jurisdiction,
pl. 41.
Ld. Raym.
212.
Hilliard v.
Jefferson.

[A prohibition was granted to a suit in the spiritual court for breaking a church-wall, and cutting down the boughs of a tree in a church-yard; for the rector having a freehold in him has a right to bring his action, whereby the party would be subjected to a double prosecution. Besides, the ordinary cannot punish a trespass committed on the body of the church, unless it hinder divine service.]

Binsted v.
Collins,
Bunb. 229.

3. In what Cases a Prohibition lies when they determine on Criminal Offences.

It is clearly agreed, that the spiritual courts have no jurisdiction as to crimes and capital offences; so as to punish persons guilty of treason, felony, or other offences, which are cognizable in the king's temporal courts. But it is held, that a spiritual person may, especially after a conviction for a criminal offence at common law, be proceeded against *pro salute anime*, and in order to a deprivation. And this jurisdiction they are indulged in from a necessity of purging their body of all scandalous members. But they are not to inflict a collateral punishment for such matters as are only indictable at common law; and if they take upon them to do so, a prohibition lies.

Keilw. 181.
Dyer, 293.
Cro. Jac.
430.
March, 174.
Hob. 288.
2 Ld. Raym.
1507.

And therefore if a clerk be convicted of homicide or manslaughter, and afterwards libelled against, the libel ought not to charge that he is an homicide, or that he is guilty of manslaughter, &c. and if it do, a prohibition lies. But the regular way is only to charge that he was convicted of homicide, &c. and so the sentence of deprivation ought to be grounded on the conviction in the temporal court, without any further examination of the matter, by which the verdict there given is not to be impeached, but affirmed. And though the person convicted desire that he may be admitted to his defence in the spiritual court, to prove his innocency against the verdict, yet this is not to be allowed him; because this would be to impeach in an improper court a sentence given in a proper court.

Hob. 121.
288.
Cro. Jac.
430.
Searl's case.
Comp. Incumb. 53-4.

So, where a libel was exhibited in the ecclesiastical court against a woman *causa jactitationis maritagi*, and she suggested, that the person libelling was indicted at the sessions in the *Old Bailey* for marrying her, he then having a wife living, *contra formam statuti*, and that he was thereupon convicted, and had judgment to be burnt in the hand; that being tried by a jury and a court which had a jurisdiction of the cause, and the marriage found, a prohibition was prayed, and granted.

3 Mod. 164.
Boyle v.
Boyle.

If a matter of ecclesiastical cognizance be made felony or treason by act of parliament, the spiritual courts (unless there

Jon. 320.

be a saving of their jurisdiction in such statute) cannot take cognizance thereof, nor of any defamation in relation thereto.

Lev. 138.
Sid. 217.
Keb. 721.
76g. Slader
v. Smal-
broke.

A layman forges orders, and obtains a benefice, for which he is prosecuted in the ecclesiastical court in order to deprivation; and he prays a prohibition, because forgery is triable at common law: but the prohibition was denied, for the forgery is touching an ecclesiastical matter, and he is suable there for it in order to his deprivation only.

Comb. 71.

If the spiritual court proceeds against a man for writing a libel, a prohibition lies; for this is an offence indictable at common law.

F. N. B. 42.
2 Rol. Abr.
304.

The ecclesiastical courts cannot punish or hold plea *pro reformatione morum* in case of legal perjury, or *pro lesione fidei* in a temporal matter; as, that the party will pay a debt, make a scoffment, &c. So, if a jury give a false verdict, they cannot be punished for this in the ecclesiastical courts.

Jenk. 184.
Keilw. 39.
pl. 5.

But, for perjury in their own courts, and in matters in which they have cognizance, as matrimony, tithes, testaments, &c. they may punish, and no prohibition lies.

2 Rol. Abr.
886.
Hob. 246.
Held. 132.

If a presentment be made by the churchwardens of a parish in the ecclesiastical court, that J. S. a parishioner, is a railer and fower of discord among the neighbours, a prohibition lies; for this belongs to the lect, and not to this court, unless it was in the church, or such like.

4. Where the Ecclesiastical Courts determine on Acts of Parliament.

4 Leon. 16.
Vaugh. 206.
2 Inst. 614.
618.
4 Lev. 64.

The construction of acts of parliament is of temporal cognizance; so that if the spiritual courts expound them in a different sense than they ought to do, a prohibition lies; as, if upon the statute 32 H. 8. c. 38. which only prohibits marriages within the *Levitical* degrees, the ecclesiastical courts should molest or call in question marriages without those degrees, a prohibition lies; because they act contrary to that which is declared to be lawful by the statutes of the realm. But, where they are not bounded by any law, their jurisdiction still continues, and therefore within the *Levitical* degrees they are still judges of incest.

Jen. 259,
260.

So, if it be made a question in the ecclesiastical court, Whether the words of the statute 25 H. 8. c. 22. have given sufficient power to the archbishop to grant marriage licences, and they determine against the power, a prohibition lies; for by this they determine against an act of parliament, which is a temporal affair: but, if they allow the power, they may determine as to the form of the licence, the notice, and other circumstances requisite, &c. for in these they have a jurisdiction, as such licences have been, and still are, notwithstanding this statute, of ecclesiastical cognizance.

2 Rol. Abr.
303.

If an administration is granted to the next of blood, and upon this an appeal is sued to the delegates, and there they intend to revoke the said sentence, and to grant it to another, who is not

nearer of blood by our law, but is by the ecclesiastical law; a prohibition lies: because this being ordained by statute ought to be interpreted according to our law.

If there be a controversy, whether a person hath disposed of the guardianship of his child pursuant to the statute 12 Car. 2. c. 24. or whether he hath revoked such disposition; this cannot be determined in the ecclesiastical courts.

On a motion for a prohibition to the ecclesiastical court, to stay a suit there against a person for brawling in the belfry, and striking a man there, the statute of 5 & 6 E. 6. c. 4. was suggested; and it was alleged, that all statutes are construable by the common law, and that the person striking was mayor of the town, and that he came there to suppress a riot: but (*absente Holt*) the prohibition was denied; because this offence was consuable in the ecclesiastical court before this statute *ratione loci*; and the statute, though it provides a penalty, does not alter the jurisdiction.

The defendant was presented in the ecclesiastical court for working upon holidays, *viz.* carrying hay on St. John Baptist's day in church-time; but a prohibition was granted, because this was out of the statute by the very words of the act 5 & 6 E. 6. c. 3. it being a work of necessity; and this being an holiday by act of parliament, it belongs to the judges of the common law to determine whether it was broken or not.

5. In what Cases they have a concurrent Jurisdiction, and may determine Incidents.

The ecclesiastical courts have in some instances a concurrent jurisdiction with the temporal courts; as, in laying violent hands on a clerk (*a*), a pension by prescription, &c. So that, if a clergyman be beaten, an action at law lies for the battery; as also a suit in the spiritual court for irreverence to his character. But such proceedings in the ecclesiastical court must be *pro salute anime*, and to punish the sin, not to recover damages.

(a) Vent. 3. 120. 265. Ld. Raym. 578. 2 Salk. 550. pl. 10.

Vent. 207.
Lady Chel-
ter's case.
3 Keb. 30.

2 Ld. Raym.
850. Wea-
mouth v.
Collins.

Godb. 218.
Wheeler's
case.

2 Inst. 492.
9 E. 2. *Ar-
ticuli Cleri.*
Cro. Eliz.
655.
6 Mod. 156.
vide 4 Co.
20. a. in the
abbot of St.
Alban's case.
6 Mod. 252.

Bro. Prohi-
bition, pl. 21.
2 Inst. 492.

2 Inst. 492.
Roll. Rep. 61.

Cro. Eliz.
753 Pyrna's
case.

2 Inst. 603.
(c) On the
statute 5 &
6 E. 6. c. 4.

But, if a clerk be arrested by (*b*) process of law, he cannot for this sue in the ecclesiastical court.

(b) If a person be proceeded against for defamation in the spiritual court, for giving evidence in a court of justice, he may have a prohibition. Bro. Prohibition, 21. 2 Bulst. 296. Cook sued Webb in the spiritual court for saying that he had a *bastard*; Webb, the defendant, alleged in the spiritual court, that the plaintiff was adjudged the reputed father of a bastard by two justices of peace, according to the statute, whereupon he spoke these words, and they of the spiritual court accepted his confession, but would not allow his justification, wherefore he prayed a prohibition; which was granted him. Cro. Jac. 535. Webb v. Cook.

So, if a clergyman be only assaulted, no remedy is to be had in the spiritual court, but in the common law courts.

So, if one be sued in the ecclesiastical courts for laying violent hands on a clergyman; the party being an officer or constable may (*c*) suggest, that the plaintiff made an affray upon another,

against
brawling,
&c. in a

church or church-yard, it hath been held, that he who strikes another in a church or church-yard cannot justify or excuse himself by shewing that the other assaulted him. Cro. Jac. 367.—But in laying hands on a clerk in any other place, he may justify. Moor, 915. Cro. Eliz. 655.

7 Mod. 80.

Also it is said, that though the crime of laying violent hands on a clergyman be within the express words of the statute of *circumspecte agatis*, that yet the party is not punishable in the spiritual court before he is found guilty in a temporal court; and that if he be proceeded against sooner, a prohibition lies.

Cro. Car. 89.

Cro. Jac.

538.

Jon. 440.

In case of criminal conversation with a man's wife, an action lies at common law, in which the husband recovers damages, and the offender is likewise punishable in the ecclesiastical court for adultery.

7 Mod. 80.

So, in case of a lewd woman who hath a bastard chargeable on the parish, though by the statute 7 Jac. 1. c. 4. she is to be sent to the house of correction; yet she may be proceeded against for incontinency in the spiritual court.

2 Salk. 552.

7 Mod. 79.

Galizard and

Rigault; and

2 Ld. Raym.

809. S. C.

where it is

said, that the

court was of

this opinion;

but as the

prayer of the

defendant's

counsel they

ordered that

it should be

argued by

civilians;

but after-

wards, an apparent

fault being in

the pleadings,

they refused to

hear the civilians,

and gave judgment

that the prohibition

should stand.

The defendant libelled against plaintiff in the ecclesiastical court, for having solicited the chastity of his wife, after the plaintiff had been indicted for an assault upon the same woman, with an intent to ravish her, and convicted and fined upon it; and after an action of assault and battery against him for the same offence, which action was depending at the same time that the prosecution was in the spiritual court; and all this matter appearing on the pleadings, the question was, Whether a prohibition should go to stay the proceedings in the ecclesiastical court, or a consultation should be awarded? and it was held in this case, that a prohibition should be granted; for that this being an attempt and solicitation to incontinence, coupled with force and violence, it did by reason of the force, which is temporal, become a temporal crime *in toto*.

2 Rol. Abr.

295.

2 Ld. Raym.

809.—So,

if A. says of

B. you are a

bawd, and thou

keepst a bawdy-house;

the keeping a bawdy-house being a matter indictable at common law, makes the whole of temporal cognizance; but calling *whore* or *bawd* only are punishable in the ecclesiastical courts. 2 Salk. 552. pl. 15. 2 Ld. Raym. 809. & vide 2 Inst. 483. where Lord

Coke, *Mixta spiritualia sunt quæ non habent mixturam temporalium*.

2 Salk. 552.

pl. 15.

2 Ld. Raym.

809. & vide

2 Inst. 483.

where Lord

Coke, *Mixta spiritualia sunt quæ non habent mixturam temporalium*.

2 Salk. 552.

pl. 15.

2 Ld. Raym.

809. & vide

2 Inst. 483.

where Lord

Coke, *Mixta spiritualia sunt quæ non habent mixturam temporalium*.

So, if A. calls B. *whore* and *thief*, the action shall be sued at common law; and B. cannot libel against A. in the spiritual court for the word *whore*, and have an action at law for the word *thief*.

3 Lev. 17.

Crandon v.

Walden.

But on a motion for a prohibition for saying of a parson that *he preaches nothing but lies and malice in the pulpit*, on suggestion that these words were actionable at common law, the court refused to grant it; for that these words concerning and relating to an ecclesiastical person and an ecclesiastical matter, it was fit to be tried there.

2 Ld. Raym.

1101. Evans

v. Brown.

So, where the words were, *You are known by the name of bawdy Nell, and do live with another woman's husband*; and an action being

678

If there be a mutual contract of marriage between a man and a woman *per verba de futuro*, and either of them refuse; for this breach of contract an action lies at common law for the temporal loss to the party, although there might have been a remedy in the ecclesiastical courts for enforcing such contract *.

If the churchwardens take away the bells of a church, they may be proceeded against in the ecclesiastical courts for such sacrilegious taking; and the rather, as (a) they are churchwardens, although an action lies against them at common law by their successors; and the remedy in this case is said to be most proper in the spiritual court, because at common law damages only are recovered, but in the ecclesiastical court they decree a restitution of the thing in *specie*.

J. S. sued his brother whom his father made executor, for his reasonable part of the goods of the father, in the spiritual court, according to the custom of the province of *York*; upon which a prohibition was moved for, and it was insisted, that this was a temporal cause founded upon a custom, and that there was an original form in the register, by which it appeared that it was a matter conusable at common law: but it was holden by three judges, in the absence of *Hale*, that in this case both courts had a (b) concurrent jurisdiction.

It is laid down as a rule in a great variety of cases, that the ecclesiastical courts having cognizance of the principal thing, they shall have it of incidents and accessaries. But this hath been understood in this manner, that if such incident matter be merely temporal, or if a temporal matter be pleaded in bar to an ecclesiastical demand, they must proceed in the ecclesiastical court, according to the temporal law, otherwise they will be prohibited.

As, if a release be pleaded to a demand of tithes, or payment in bar of a legacy, which can only be proved by one witness, and

Eliz. 666. for this reason is rejected by the ecclesiastical courts, because
 Hob 188. their law requires two witnesses; there, a prohibition will be
 247. granted.

Latch, 217. granted.
 Noy, 12. Moor, 413. Vent. 291. Sid. 161. Show. 158. Carth. 142. 2 Salk. 547. pl. 1.
 Ld. Raym. 220. 3 Mod. 283. Comb. 160. Holt, 752. pl. 1.

2 Inst. 653. So, although tithes, oblations, mortuaries, and pensions are of
 Latch, 48. ecclesiastical consueance, yet, if to a demand of these a (*a*) *modus*
 2 Lev. 163. or custom is pleaded, such custom, like all others, must be de-
 3 Bulst. 231. termined in the temporal courts; and (*b*) if the ecclesiastical
 Rol. Rep. courts take upon them to determine it, a prohibition will lie.
 419.
 2 Co. 45.

(*a*) But, if a *modus* be there pleaded and admitted, no prohibition shall go; *secus*, if the question be, *Modus* or *no modus*. 2 Salk. 551. pl. 13. Per Holt, Ch. J.—If they agree in the *modus*, and only vary in the manner of payment, no cause for a prohibition. Wilch. 33. [So, a prohibition shall not go to stay a suit for a mortuary, unless the custom hath been denied in the spiritual court. Johnson v. Okham, 1 Ld. Raym. 609. 12 Mod. 416. S. C. (*b*) Churchwardens libel against the rector, that there hath been time out of mind, and is, a chapel of ease with n the parish; and that the rector of the parish, time out of mind, hath repaired and ought to repair the chancel of the said chapel; and that the chancel being out of repair, the defendant, being rector, hath not repaired it. The rector denied the custom in the spiritual court, and a decree was made for the rector, that there was no such custom, and costs were taxed there for the rector. The churchwardens moved for a prohibition; and it was argued for the prohibition, that it ought to be granted, because it appears that the libel is upon a custom, which the defendant hath denied; and it may be, the question was in the spiritual court, custom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath not jurisdiction, a prohibition may be granted after sentence. But all the court held the contrary. For by Holt, C. J.—The reason for which the spiritual court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those which the common law hath; for in some cases the usage of ten years, in some twenty, in some thirty years, make a custom in the spiritual court; whereas by the common law it must be for time immemorial. And therefore since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But, in this case, that reason fails; for the spiritual court is so far from adjudging, that there is any such custom which the common law allows, that they have adjudged that there hath not been any custom allowed by their law, which allows a less time than the common law to make a custom. And the plaintiffs having grounded their libel upon a custom, which was well grounded if the custom had not been denied, (for libels there may be upon customs,) but the custom being denied and found no custom, it is not reason to prohibit the court in executing their sentence against the plaintiffs. For the design of the motion for a prohibition, is only to excuse the plaintiffs from costs. And there is no reason but that they ought to pay them; since it appears, that they have vexed the defendant without cause. Churchwardens of Market Bosworth v. the Rector of Market Bosworth, 1 Ld. Raym. 435.—The vicar of N. was libelled against in the spiritual court, for that by custom out of mind, the vicars of N. had, by themselves or others, said and performed divine service in the chapel of C. for which there was such a recompence, and that he neglected. The defendant came for a prohibition, and without traversing this custom, suggested, that all customs were triable at common law. And it was urged, that it was enough for a prohibition, that a custom appeared to charge the vicar with a duty, for which he was not liable of common right. But by Holt, C. J.—A person may be bound to an ecclesiastical duty by custom, and when he is bound by custom, the spiritual court may punish him if he neglects that duty: the custom might have a reasonable commencement by composition in the spiritual court, and begin by an ecclesiastical act; and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here, it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied. Jones v. Stone, 1 Ld. Raym. 578. 2 Salk. 550. S. C. And if the subject of the suit be within the jurisdiction of the spiritual court, the mere suggestion of a custom in the pleadings there, if they do not go on to try it, will be no ground for a prohibition. Durens v. Robson, 1 H. Bl. 100.]

Carth. 143. But, if there be but one witness to prove a nuncupative will, and the ecclesiastical court refuse the probate thereof, because to every such will the law requires two witnesses, no prohibition lies; because there is no other way of authenticating such will but in the spiritual court.

Yelv. 172. So, where the churchwardens libelled for a church-rate, which
 129. was sentenced against them, and then they appealed to the metro-
 120. politan, but, pending the appeal, one of the appellants released to the appellee all actions, suits, and demands, but the other ap-
 v. pellant
 und

pellant proceeded in his and his partner's name to reverse the sentence; whereupon the appellee prayed a prohibition; it was adjudged, that no prohibition lay; for the principal matter being of ecclesiastical cognizance, things dependant thereon will be so too; and whether this release will bar both the churchwardens is what they are to determine and not the court of *B. R.*

A libel was exhibited on a custom, that the constable of the town should collect the rates assessed for repairing the parish-church; which he refused to do; and on a motion for a prohibition it was suggested, that it was not triable there, whether the party was constable and duly elected or not: but the court denied to grant one, because this matter is pleadable there, and prohibitions ought not to go unless, upon a trial of the matter, their law and proceedings cross the common law, and in that case a prohibition lies only till trial here, and after that a consultation shall be granted.

Hard. 510.
Goddin v.
Wain-
wright.

But it hath been resolved, that if a feme covert sue another in the spiritual court for incontinence with her husband, and recover costs, if the husband release them the wife is barred; for since the husband is liable to the charges of the suit expended by the wife, he shall have the costs in recompence: besides, the wife cannot have a chattel interest exclusive of her husband.

5 Mod. 69.
Salk. 115.
pl. 4.
Ld. Raym.
73. Charn-
berlain v.
Hewitson.
See 12 Mod.
891.
Ld. Raym.
74. per cu-
riam.

But, if the husband and wife are divorced *a mensa & thoro*, and the wife has alimony allowed her, and she sues for defamation, or other injury, and recovers costs, the husband releases them, yet the wife shall recover them; because they come instead of that she has expended out of her alimony, which was a separate maintenance, and not in the power of the husband.

(M) The Offence of disobeying a Prohibition.

THE disobeying of a prohibition is a contempt to the superior court that awards it, and punishable by attachment, which issues against the judge and (a) party for proceeding after such prohibition, and for which they are subject to fine and imprisonment, according to the discretion of the superior court.

F. N. B. 40.
Bro. Att.
Bro. pl. 5.
pl. 9. pl. 11.
And. 279.
(a) Though
the writ of

prohibition was not directed to the party. 19 H. 6. 54.—And such attachment may be awarded against a peer of the realm. 21 E. 3. 3. pl. 7. 2.

An attachment was granted, upon affidavit that the party proceeded after a prohibition delivered to him, in a suit for a seat in a church which the plaintiff claimed by prescription; and upon his appearance and examination upon interrogatories he confessed the matter, and was fined five marks.

2 Jon. 47.
Dr. Wain-
right's case.

And not only an attachment lies for proceeding in the same cause pending a prohibition, but also for instituting a new suit for the same thing; as, if a parson libels for tithes, and a prohibition is brought, and he libels for tithes of another year, the first not being determined, an attachment shall be awarded.

Moor, 579.
Leon. 111.

Cro. Car.

559.

2 Jon. 128.

Vent. 348.

3 Lev. 360.

In an attachment upon a prohibition, the plaintiff shall recover damages and costs against the party for proceeding after the writ of prohibition awarded.

Release.

(a) But it is contrary to the nature of a release to give possession. 4 Co. 25. Hutt. 65.

And therefore one tenant in common cannot release to his companion, because they have distinct freeholds. Co. Lit. 200. (b) A release cannot operate but upon an estate, interest, or right. Roll. Rep. 197.

Co. Lit.

264. a.

Releases are distinguished into express releases, or releases in deed, and those arising by operation of law; and are made of lands and tenements, goods and chattels, or of actions, real, personal, and mixt.

Hob. 163.

4 Co. 63.

These are to be adapted to the nature of the case, and the purposes for which the release is intended; so that if a man be dispossessed of lands, or dispossessed of goods, and release all actions, he may, notwithstanding, enter into his lands, or retake his goods, the right and property being still in him though he has divested himself of his remedy.

8 Co. 152.

Co. Lit. 286.

So, where a man has divers means to come to his right, he may release one, and yet take advantage of the other: but, if a man has not any means to come to his right but by way of action, there, by a release of all actions his right by judgment of law is gone, because by his own act he has barred himself of all means to come at it.

Dyer, 56. 7.

a. Plow.

289.

Held. 15.

8 Co. 148.

Show. 154.

Heretofore releases were construed with much nicety and great strictness, and being considered as the deed or grant of the party, were according to the rule of law taken strongest against the releasor. They now however receive such interpretation as other grants and agreements do, and are favoured by the judges as tending to repose and quietness.

Mod. 99.

Ld. Raym.

235.

Hence it hath been established as a general rule in the construction of releases, that where there are general words only in a release they shall be taken most strongly against the releasor; but, where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words.

For the better understanding hereof we shall consider,

A) Releases that are expresse and by Deed : And herein,

1. Of the Words and Ceremony requisite in an expresse Release.
2. How far a Covenant or Agreement may operate as a Deceafance or Release.
3. How far a Disposition by Will may operate as a Release.

(B) Release by Operation of Law, how created, and the Effect thereof.

(C) Releases of Lands and Hereditaments, how they enure : And herein,

1. Of Releases that enure by way of *Mitter le Estate*.
2. Releases by way of *Mitter le Droit*.
3. Releases that enure by way of Extinguishment.
4. Releases that enure by way of Enlargement : And therein, of the modern Manner of Conveyancing by Lease and Release.
5. What Estate or Interest passes by the Release : And therein, of the Words requisite to an Enlargement.

(D) Who in respect of their Right and Interest are capable of releasing.

(E) Of Releases by Executors and Administrators.

(F) How far the Husband's Release shall bind the Wife.

(G) To whose Benefit a Release shall enure ; and who shall be bound thereby, though not a Party to the Release.

(H) How far a Possibility or Contingent Interest may be released.

(I) How the operative Words in a Release have been construed : And therein, of the Words,

1. Claims and Demands, what are released thereby.
2. By a Release of all Actions and Suits.

(K) Release, in what Cases restrained to the special Purpose for which it was given.

(L) What Right and Interest shall be said to be released : And therein, of Misrecitals and Exceptions in Releases,

(A) Releases that are express and by Deed: And herein,

1. Of the Words and Ceremony required in an express Release.

Lit. sect.
445. Co.
Lit. 264.
(a) Plow.
140.

Littleton tells us, that the proper words of a release are *remisse*, *relaxasse*, & *quietum clamasse*, which have all the same signification. Lord Coke adds (a), *renunciare*, *acquietare*; and says, that there are other words which will amount to a release; as, if the lessor grants to the lessee for life, that he shall be discharged of the rent; this is a good release.

Sid. 265.—
So, the
words *ei*
reddidit

So it hath been held, that a pardon by act of parliament of all debts and judgments amounts to a release of the debt, the word *pardon* including a release.

enure as a release. Cro. Jac. 696. ——— So, an obligee's acknowledging himself on good consideration satisfied or discharged of all bonds, debts, and demands, is in judgment of law a good release. 9 Co. 52. Show. 331.

Co. Lit.
264. b.
Rol. Rep.
43. 2 Leon.
76. 223.
2 Rol. Abr.
408. 2 Saund. 48. Moor, 573. pl. 787.

An express release must regularly be in writing and by deed, according to the common rule *eodem modo quo oritur eodem modo dissolvitur*; so that a duty arising by record must be discharged by matter of as high a nature: so, of a bond or other deed.

Sid. 177.
2 Sid. 78.
Cro. Jac.
483. 620.
Cro. Car.
383.
Langdon v.
Stokes.

But a promise by words may before breach be discharged or released by words only.

Mod. 262.
2 Mod. 259.
S.C. Edward
v. Weeks.

As, where in *assumpsit* the plaintiff declared that the defendant for valuable consideration assumed to go a certain voyage in such a ship before *August* following, and alleged a breach in the non-performance; to which the defendant pleaded, that, before any breach, the plaintiff the fourth of *April* at such a place *exoneravit* *eum* of the said promise; on demurrer the plea was held sufficient, without shewing how he discharged him, or that such discharge was in writing.

But, where in *assumpsit* for *5l.* upon exchange of a horse to be paid upon request, the defendant pleaded that before the action brought the plaintiff did exonerate him of this agreement; this plea was resolved to be ill; for though a parol agreement may be discharged by parol before cause of action accrued, yet, after that, it cannot be discharged but by deed; and here, the cause of action did accrue at least upon request, and therefore he should have pleaded the exoneration before the request.

Sid. 293.
Westlake v.
Perle.

In trespass for riding the plaintiff's horse, the defendant pleaded that such a day the plaintiff *exoneravit* him of the trespass; and this was held an ill plea, in not shewing that the discharge was in writing.

Leon. 283.
per Ander-
son, Ch. J.

A release of a right in chattels cannot be without deed.

. How far a Covenant or Agreement may operate as a Defeasance or Release.

A covenant perpetual, as that the covenantor will not sue, without any limitation of time, is a (a) defeasance or absolute release. And this construction has been made to avoid circuity of action; or if in such case the party should contrary to his covenant sue, the other party would recover precisely the same damages which he sustained by the other's suing. But, if the covenant be, that he will not sue till such a time, this does not amount to a release, nor is it pleadable in bar as such, but the party hath remedy only on his covenant.

Moore, 23. pl. 80. 81. Rol. Abr. 939. Bridg. 128. 2 Bulf. 95. 290. Hard. 123. 3 Lev. 42. 2 Salk. 573. pl. 1. 575. pl. 4. 2 Ld. Raym. 786. Carth. 210. Ld. Raym. 419. 691. (a) A defeasance is only a conditional release, and may be executed as well after as at the time of the original contract. 2 Saund. 48. Cro. Eliz. 623.

As in debt upon an obligation, the defendant pleaded that the plaintiff by indenture, &c. did covenant that he would not sue the bond before *Michaelmas*, intending thereby that this was a suspension of the action, and consequently a release; but, upon demurrer, the court adjudged, that it only amounted to a covenant, and that for breach thereof an action of covenant would lie.

Cro. Eliz. 352. And. 307. Rol. Abr. 939. Deux v. Jeffries.

So, if the obligee covenants and grants to and with the obligor, that during ninety-nine years he will not put the bond in suit; this is only a covenant on which an action will lie, but it cannot be pleaded in bar of the bond.

Carth. 63. Salk. 573. pl. v. Ailiffe v. Serian. Shire; & vide Show. 46. S. C.

If two are jointly and severally bound in an obligation, and the obligee by deed (b) covenants and agrees not to sue one of them; this is no release, and he may notwithstanding sue the other.

Cro. Car. 551. March, 95. 2 Salk. 575. pl. 3. Ld. Raym. 688. See 12 Mod. 415. 448. 550. 551. (b) But, if two are jointly and severally bound in a bond, a release to the one discharges the other. Ld. Raym. 420.

A. covenants with B. to pay him 300*l.* for the use of the wife of A. only for her life; in covenant brought on this, and breach assigned that there was so much of the 300*l.* arrear, defendant pleads that there was another indenture between him and the plaintiff since the date or delivery of the deed of covenant declared on, reciting the said covenant and agreement for the payment of the 300*l.*, wherein it was covenanted and agreed, that so long as A. and his wife did cohabit, the payment of the 300*l.* should cease; and avers, that they did cohabit for the time the said arrear became due, and pleads this in bar of the first agreement; and though in this case there could not have been any great mischief in construing the deed pleaded a defeasance or release, there being no other parties to the deed; yet, as this was a sum in gross, and the covenant temporary and not perpetual, it was adjudged no bar.

2 Vent. 217. Gawden v. Draper. Ld. Raym. 691. S. C. cited per Holt, and admitted to be good law; but he said, that if the 300*l.* had been a rent, he should have been of opinion that the second deed would have amounted to a grant of the rent for the said time; & vide Lev. 152.

If the collateral ancestor of the disseisee release to the disseisor with warranty, and the disseisor make a deed reciting the release with warranty, and covenant though he be empleaded or ousted, yet he will not take advantage of the deed or warranty, that is a defeasance; and if the disseisor plead the release with warranty in bar

43 Ass. pl. 44. Co. Lit. 265. Ld. Raym. 690. cited.

bar of an action brought by the disseisee, he shall be rebutted from the warranty by his own deed. But in this case if the disseisor had covenanted only not to bring a *warrantia chartæ*, or not to vouch, there, it would only have been a covenant, because there would have remained a remedy upon the warranty.

Nov. 5.

A. having a rent-charge issuing out of three acres, *B.* purchased two acres thereof, and *A.* covenanted and granted to and with *B.* not to distrain in those two acres for the rent. By *Glanvil* it was held a release; but *Anderson contra*; but *per cur.*—If it be a release, the tenant of the other acre may plead it, for thereby the rent was extinct.

Bro.
Estranger al
Fait. pl. 21.

If *A.* be bound to *B.* in a certain sum, and *B.* covenant and grant with *C.* a stranger to the bond, that if *A.* do such a thing, the obligation shall be void; this does not amount to a release.

Carth. 64.
210.
Show. 46.
330. 350.
2 Show.
446.
2 Salk. 573.
pl. 2.

If a letter of licence contain the following words, *viz.* that if the creditor sue within such a time his debts shall be forfeited; such licence is pleadable in bar as a release, for the words, *shall be forfeited*, make an absolute defeasance upon a suit commenced.

Obligee reciting the bond covenants to save the obligor harmless: it is an absolute release; and if upon a contingency, it is a conditional release, because it has an express relation to the bond.

2 Mod. 228.
Strangford
v. Green.

An award that all suits shall cease hath the effect of a release, and the submission and award may be pleaded in discharge as well as a release.

3. How far a Disposition by Will may operate as a Release.

Stil. 286.
Vent. 39.

It seems agreed, that a will, though sealed and delivered, cannot amount to a release, because it is ambulatory and revocable during the testator's life; also by reason of the executors' consent requisite to every disposition of a personal thing by will, and the injury that might accrue to the testator's creditors, were a will allowed to operate as a release.

Sid. 421.
Pidgeon v.
Harrison.

And therefore where in debt upon an obligation, by the representative of a testator, the defendant pleaded that the testator by his last will in writing released to the defendant; this was adjudged ill, and that no advantage could be taken hereof by plea.

1 P. Wms.
33. pl. 16.
Elliot v.
Davenport.
2 Vern. 521.
S. C.

But it hath been held in equity, that though a will cannot enure as a release, yet provided it were expressed to be the intention of the testator that the debt should be discharged, the will would operate accordingly; and Lord Cowper said, that in such case it would be plainly an absolute discharge of the debt though the testator had survived the legatee.

2 P. Wms.
332. pl. 95.
Rider v.
Wager.
[See the
cases of Sib-
thorp v.
Moxom, and

So, in another case, it was held by Lord King, that a release by will can only operate as a legacy, and must be assents to pay the testator's debts; and if a debt so released by will be afterwards received by the testator himself in his lifetime, the legacy is extinct, and such release by will intimates no more than that the executors

Executors shall not after the testator's death trouble or molest the debtor.

Topila v. Baker, v. 4. p. 387-8]
2 Vern. 115.
Fild v.

A. devised to his servant B. a legacy of 50*l.* and 20*l.* per ann. for his life; and by his will acquits, exonerates, and discharges B. of all debts, accounts, reckonings, and demands whatsoever at the death of the testator: B. had a trunk of testator's in which were medals, jewels, &c. and it was made a doubt, and directed to be tried at law, whether by these words the trunk, &c. passed or not.

A. devises 100*l.* to B., and by his will releases to B. all debts and demands, and afterwards A. lends B. 100*l.* and the question was, Whether the will should discharge the 100*l.* lent without any new publication? The court doubted; however, they decreed payment of the 100*l.* legacy, and left the executor to recover the 100*l.* lent, if he could, at law.

2 Vent. 136.
Roberts v. Bennet.

If a debt is mentioned to be devised to the debtor without words of release or discharge of the debt, and the debtor die before the testator; this will be a lapsed legacy, and the debt will subsist.

2 Vern. 522.
admitted.

[In the will of *John Adair* was the following clause: "I devise to my brother, the Rev. Mr. *Adair*, 2000*l.* I also return him a bond for 400*l.* with interest due thereon, which he owes me." It appeared by the Master's report, that the above bond was a joint bond in the *Scotch* form by the testator's brother and his son. The question was, Whether this disposition of the bond by the will amounted to a release, or was only a legacy, and therefore lapsed by the death of the testator's brother in his lifetime, and the bond was still remaining in force against the obligor and executor of his father? Lord Chancellor—There is not the least doubt as to the bond. It is distinctly a legacy to the brother. The inquiry directed, whether it remained in the hands of Mr. *Adair*, shews what the court thought at the hearing. There is no foundation therefore for *Thomas Adair*, the son, to have the bond delivered up.]

Maitland v. Adair,
3 Ves. jun.
231.

(B) Release by Operation of Law, how created, and the Effect thereof.

Releases by operation of law are created sometimes by deed, or may be without; as, if the lord disseise the tenant, and make a feoffment in fee; or, if the disseisee disseise the disseisor's heir, and make a feoffment in fee; this is a release in law of the feignory in the first case, and both of the right and action of the disseisee in the second.

Co. Lit.
264. b.

If a disseisee release to his disseisor's lessee for life, his right is gone for ever; but, if he disseise his disseisor's heir, and make a lease for life, his right is released but during the lessee's life, for a release in law is more favourably taken according to the party's intent than an express release in deed.

Co. Lit.
264, 265.

Co. Lit. 264. Plow. 284-5. Hust. 128. (a) But, if there are not assets, the action is not so much as suspended, and the executor may sue the heir of the obligor where the heir is bound. Roll. Abr. 940. Salk. 304. — So, if a creditor is made executor with others, he may sue the others, especially if he hath not administered. Cro. Car. 372. Jon. 345. Off. of Exec. 2. [And the bare appointment of a creditor to be executor, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt. Rawlinson v. Shaw, 3 Term Rep. 557.]

2 Co. 136.
Off. of Ex.
31.
Salk. 300.

So, if the obligee makes the obligor his executor, who administers several goods, but dies before probate, this in law is a release. So, an administrator who is a creditor may retain so much of the intestate's assets as will satisfy himself. But an executor *de son tort* who is a creditor cannot retain, because this would be allowing him to take advantage of his own wrong.

Cro. Car.
372.
Jon. 345.
Roll. Abr.
934.
Dorchester
v. Webb.

A. and B. are bound in an obligation jointly and severally to C. and after A. makes D. his executor, and dies, and D. takes upon him the execution of the will, and fully administers all the goods of A., and after the obligee makes the same D. his executor, and dies; and the question was, Whether this was a release or extinguishment of the obligation as to B.? and adjudged to be no release, because he had it in another's right.

Ed. Raym.
605.
Cawth v.
Philips.

Debt upon bond by the plaintiff as executor of the obligee; the defendant pleaded that the obligee made the defendant executor during the minority of the plaintiff, and that the plaintiff became executor at his age of seventeen: the plaintiff demurred.—*Per cur.*—This cannot be a suspension of the action, because the defendant was only executor in trust for the plaintiff during his minority.

2 Lev. 73.
Cock v.
Cross.

If A. and B. be jointly and severally bound to C., and A. make C. his executor, or (as the case was) make D. his executor, who makes C. his executor; in this case, if C. has not received satisfaction of the assets of A. he may sue B., for being jointly and severally bound, he may sue which of them he pleases.

Sid. 79.

If an obligor administers to the obligee, and makes his executor, and dies, the creditor of the obligee may well bring an action against him.

2 Co. 136.
Salk. 306.

If the obligee makes the obligor his executor, this is a release in law, in regard it is the proper act of the obligee, who thereby makes the executor the only person capable to receive and pay, &c.

2 Co. 136.
Leon. 90.
2 Mod. 315.
(b) But, if an administrator, having no assets, pays a debt of the intestate to the value of the bond out of his own money, this will amount to a release. Salk. 306.

But, if the obligee dies intestate, and administration of the goods of the obligee is by the ordinary granted to the obligor, this does not (b) extinguish the debt, for he comes into the administration by the act of law, whereas the other is the act of the party.

Plow. 264.
Leon. 320.

If the debtee makes the debtor and another co-executors, and one of them makes his executor, and dies, the surviving co-executor

executor shall not have an action to recover the debt against the executor of the debtor, because the debt was once extinct; for it could not be brought but in the names of both the co-executors, notwithstanding one alone administered; and it could not be brought in both, their names, because the debtor could not sue himself.

If the obligee makes the obligor and others his executors, and the obligor refuses, but the others administer, and the obligor dies first, yet the debt is released, for the obligor notwithstanding the refusal might have come in and administered, and the probate by the others was for his benefit.

Salk. 308,
per Holt.

It is said by Ch. Just. *Holt*, that a creditor making his debtor executor does not operate as a legacy, or amount to a bequest to him of the sum due, but to a payment and release; the meaning whereof is, that such executor having assets sufficient to pay the debts and legacies of the testator, is discharged of the debt due from himself, as he by law is entitled to all the residue of the testator's personal estate after payment of debts and legacies. But it hath been adjudged, that in case of a deficiency of assets either for the payment of debts or legacies, such debt is to be deemed assets, and the executor accountable therewith as so much of the testator's personal estate.

Salk. 304-306.
Cro. Car. 373.
Off. of Ex. 30. Yelv. 160. Chan. Ca. 292. and the case of *Selwin v. Browne*, which *vide* title Executors, vol. 3. p. 12. *Carey v. Goodinge*, 3 Br. Ch. Rep. 210.

[A testator bequeathed to his brother 500*l.* and the like sum to his nephew, and appointed them his executors. The brother was indebted to the testator 7000*l.*, and the nephew was indebted to him 1000*l.* at the time of his decease. A bill being filed by the next of kin, praying an account of the personal estate of the testator, and particularly of the sums in which the executors were indebted to him, and payment of the same to the plaintiffs; it was contended on behalf of the defendants, that the appointment of the brother and nephew executors was an extinguishment of the debt: that this was clearly so at law; and that there is no case, in equity, where it has been holden otherwise, except where there has been a direct gift of the residue: as in the case of *Brown v. Selwin*, *ca. temp. Talb.* 240.; and even there, Lord *Talbot* spoke of it as an undecided point: but that there was no case where it had not been holden an extinguishment against the next of kin. But Lord *Thurlow* said, he thought it had been a settled point in a court of equity, that the appointment of the debtor executor, was no more than parting with the action; and declared it a trust for the next of kin.]

If an infant at the age of seventeen make his debtor executor, this in law is a release; for as the law gives him power to make an executor, it gives his executor the same advantages with others.

Co. Lit. 264.

If a feme obligee marry the obligor, or one of the obligors; or, if there be two feme obligees, and one of them marry the obligor; these are releases in law.

3 Co. 136.
Co. Lit. 264.

But, if a woman, executrix of the obligee, take the debtor to husband, this is no release in law, because she hath the debt in another

3 Co. 136.
Co. Lit. 264.
Cro. Elis.

114. S. P. adjudged that it was suspended but not extinguished, for that after the husband's death an action would lie against his executor. Moor, 236. pl. 368. Leon. 320.

another right; and if this amounted to a release in law, it would be a *devastavit*, which is a wrong the law will not suffer.

2 Roll. Abr. 935. Hob. 10. Moor, 855. Frier v. Gildridge. If *A.* and *B.* are bound in an obligation jointly and severally to *C.*, and *C.* makes *D.* the wife of *A.* his executrix, and dies, and *D.* administers, and after *A.* the husband of *D.* makes *D.* his executrix, and dies, leaving sufficient assets to pay the debt, and after *D.* dies, and *E.* takes administration of the goods of *C.* the obligee not administered, yet he can have no action upon the obligation against *B.* the other obligor, because that when the obligor made the executrix of the obligee his executrix, and left assets, the debt was presently satisfied by way of retainer, and then by consequence no new action could be had for the debt.

Co. Lit. 264. 3 Co. 136. Dyer, 140. By an intermarriage all contracts between the husband and wife for debts due *in presenti* or *in futuro*, or upon a contingency which may become due during the coverture, are released and extinct, because the husband and wife make but one person in law; and it is holden by Just. Gould, that if there was an express agreement that they should not be released by the intermarriage, it would be void, as inconsistent with the state of matrimony.

Hob. 216. 227. Hutt. 17. Noy, 26. Cro. Jac. 571. Palm. 99. Roll. Rep. 343. 2 Roll. Abr. 407. Godb. 271. 2 Roll. Rep. 162. Lit. Rep. 32. Hedl. 122. a Sid. 58. But it is the better opinion, and founded on a great variety of cases, that promises, covenants, and agreements for the performance of a thing which is not to happen during the coverture, as payment of money after the husband's decease, are not released by the marriage.

Ld. Raym. 515. Carth. 511. Comb. 242. Lill. Ent. 214. Salk. 325. Holt, 309. pl. 12. Comyn, 67. pl. 42. Freem. 512. pl. 687. 515. pl. 691. 12 Mod. 288. Gage v. Afton. Also, it hath been adjudged by two judges against Holt, Ch. Just. that where *A.* entered into a bond to his intended wife, conditioned to leave her at his death 1000*l.* if she survived him, that such bond was not released by the marriage, as nothing would be due during the coverture, and as it would be contrary to the express agreement of the parties. But the Ch. J. insisted strenuously, that a bond differed from a promise or covenant, being *debitum in presenti*, though *solvendum in futuro*; and that the rule of law could not be controlled by the intention of the parties.

2 Vern. 290. 480. Preced. Chan. 237. [It is now settled, that such a bond may be enforced at law against the heirs of the husband. Milbourne v. Ewart, 5 Term Rep. 381. and Hayes v. dim. Foord v. Foord, there cited.] Also, where a man entered into a bond to his intended wife, conditioned to leave her 1000*l.* and the husband mortgaged his estate and died, not leaving personal assets to discharge the bond; it was decreed in equity, that admitting the bond void at law, yet it ought to be made good in equity, and that she ought to redeem and hold the land till she was satisfied her debt.

Cannell v. Buckle, 2 P. Wms. 243. The feme gave a bond to her intended husband, that in case of their marriage she would convey her lands to him in fee: they married;

married; the wife died without issue, and then the husband died: it was adjudged, that the bond, though void in law, yet was good evidence of the agreement in equity; and the heir of the husband should compel a specifick performance against the heir of the wife.

(C) Releases of Lands and Hereditaments how they enure: And herein,

1. Of Releases that enure by way of *Mitter le Estate*.

Releases, says my Lord *Coke*, may enure four manner of ways: Co. Lit. 193. b. 273. b.
 1. By way of *mitter le estate*. 2. By way of enlargement or creation of estate; upon both which a rent may be reserved.
 3. By way of *mitter le droit*. 4. By way of extinguishment; upon which two last no rent can be reserved.

When two or more become seised of the same estate by a joint title, as by a contract or descent as joint-tenants or coparceners, and one of them releases to the other his or her claim, right, and pretensions, such release is said to enure by way of *mitter le estate*. Co. Lit. 273. b.

For if there be two joint-tenants, and one of them release to the other, the releasee is in by the original conveyance; and such release is no alienation, nor doth it make (a) a degree (b); nor can this be any injury to a stranger's *præcipe*, for he may bring it against them all, and if any of them disclaim, the rest must defend for the whole, or lose their interest. Co. Lit. 273. b. (a) But, if there are three joint-tenants, and one releases to another

of them, such release makes a degree. Co. Lit. 273. b. Winch, 3. ——— So does the release of one coparcener to another. Co. Lit. 273. b. (b) Booth, 33.

And herein it is to be observed, that joint-tenants can only regularly pass their estates by release; and that by reason of the privity which must necessarily be in releases which enure by way of *mitter le estate*, a fee-simple passes without the word *heirs*. Vide title Joint-tenants.

But, if there be two tenants in common, they cannot release to each other, but they must pass their estate by feoffment, &c. because this estate being established by different notorieties, each having passed by distinct liveries, they must pass to each other by a distinguishing livery, else it cannot be known in whom such parts are as formerly had passed by a distinct livery. Vide title Joint-tenants and Tenants in Common.

As to coparceners, they having in respect of the descending line distinct estates, they may pass the same by feoffment, &c. or may release to each other, and shall join in an assise, as each is seised *per my & per tout*. Vide title Coparceners.

If there are two coparceners, and the one enters in the name of both, and the other releases to him, this countervails entry and feoffment, and is good cause of voucher; but where one enters in his own name only, and claims to him alone, and the other releases to him, this is only an extinguishment of the right, and no making of the estate. 21 E. 3. 27. Bro. Re. leases. 16. 2 Roll. Abr. 403.

Co Lit. 273.
b. Raym.
413. cited.

If there be two parceners of a rent, and one of them marry the tertenant, and the other release to her, this shall enure by way of *mitter le estate*, and yet the rent was suspended at the time of the release: but if she had released to the husband, it would have enured by way of extinguishment.

2 Roll. Abr.
403.
Ley, 167.

One joint-tenant of a reversion depending on a lease for life may release to the other; but, if the rent be arrear, the one cannot release his interest in the arrearages to the other.

2 Roll. Abr.
409.
2 Roll. Rep.
398. 485.
Estate v.
Scawen.

If *A.* feme sole and *B.* are jointtenants for life, and *A.* takes *C.* to husband, and after *A.* and *C.* levy a fine to *B.* by which they grant the land to *B.* & *quicquid habent*, &c. and his assigns, with warranty, and after *B.* dies, living *A.*, yet the lessor may enter into the whole, and there shall not be any occupant of any part, because this fine enures as a release, not by *mitter le estate*, but by way of extinguishment.

Winch, 3.
Wafe v.
Pretty.

If one joint copyholder release to his companion; this is good without surrender or admittance, for the first admittance was of them and every of them, and the ability to release was from the first conveyance and admittance.

Winch, 3.

If land be given to two upon condition that they shall not alien, and one of them release to the other, this is no breach of their condition.

Vaugh. 45.

If two joint-tenants in fee let the land for life, reserving a rent to them and their heirs; if one release to the other and his heirs, this release is good, and he only, to whom it was made, shall have the rent of tenant for life, and a writ of waste without attornment to such release, for the privity which was once between the tenant for life and them in the reversion.

2 Jon. 136.
Raym. 413.
Harrison v.
Belsey.
Vent. 345.
S. C. but
says it was
adjudged
that the
contingent
remainders
were de-
stroyed.—
See
Ferne on
Contingent
Remainders,
3d edit.
239, &c. 22

A. and *B.* joint-tenants for their lives, remainder to the first son of *A.* in tail, and so to the second, &c. remainder to the right heirs of *B.* Before any issue had *A.* releases to *B.* and his heirs, and after hath issue a son; and the question was, If by this release before the birth of a son the contingent remainders were destroyed? And though it was urged that this uniting of the estate for life with the remainder in fee, being by conveyance and act subsequent to the limitation of the contingent remainders, and before they came in being had destroyed them; yet it was adjudged by three judges against *Dalben*, that these contingent remainders were not destroyed, for that to some purposes the whole fee was executed in *B.* immediately upon the first conveyance, and this release of *A.* gave him no greater estate nor in any other degree than he had before, for after such release he is in of the whole estate by the lessor, as he was before, and as he would have been had it come to him by survivorship.

2. Releases by way of *Mitter le Droit* how they enure.

Co. Lit. 274.
276.

Releases are said to enure by way of *mitter le droit* where a person is disseised, and he releases to the disseisee, his heir or feoffee, who being in possession are therefore capable of taking a release of the right.

If there be two disseisors and the disseisee release to one of them, he shall hold out his companion, because the disseisor comes in by no lawful or established act of notoriety, which ought to be defeated before the manner of possessing can be altered; and therefore though he possessed as a joint-tenant before the release, yet, after the release, he shall oust his companion, because he was possessed of the whole before by wrong, and now being possessed by right, it follows, that the possession of the other wrong-doer is no possession at all.

But, if a disseisor had enfeoffed two, the release of the disseisee to one should enure to both (a), because coming in by the legal notoriety of a feoffment, that must be defeated by an act of equal notoriety before the title can be altered, because the feoffment must stand good as an act that gives warning to all persons in whom the freehold subsists, till by some act of equal solemnity it appears that the freehold is in another.

is much favoured in law.

Co. Lit. 276.

^a (a) That the feoffees are in by title, and are presumed to have a warranty, which

Co. Lit. 276.

So, where a disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the tenant for life, or to the remainder-man; this enures to them both, because coming in by a known conveyance, it cannot be altered unless it were defeated by an act of equal notoriety.

Co. Lit.

274-5.

If a disseisor makes a lease for life, and the disseisee releases to tenant for life, this shall not enure to him in reversion, because the release cannot alter the estate that passed by the feoffment without some act that destroys the feoffment.

Co. Lit. 276.

So, if there be two disseisors, and they make a lease for life, and the disseisee release to tenant for life, this shall enure to them all.

Co. Lit. 276.

If there be tenant for life, the remainder in fee, and tenant for life be disseised by two, and he release to one of them, he shall not hold out his companion. So, if the remainder-man had released to one of the disseisors, he should not hold out his companion.

Co. Lit. 276.

But, if tenant for life and he in remainder join in a release to one disseisor, he shall hold out his companion, because when the possession is notoriously in them both, each of them are capable of a release, and when one has obtained a release, it makes his possession rightful, and his holding out his companion makes it immediately notorious that the estate is in him alone.

Co. Lit. 276.

So also, if the disseisors make a lease for years, and the disseisee releases to one of them, this shall enure to them both, because he cannot make it notorious that the estate is in him alone, because he cannot hold out his companion during the continuance of the lease for years.

Co. Lit. 276.

So, if two joint-tenants are disseised by two, and one releases to one of them, he shall not hold out his companion, because he cannot hold him out of the whole, because he has not the whole right, and so there can be no act of notoriety whereby the estate may appear to be in one disseisor.

Co. Lit. 276.

Co.Lit.277.

* There is
not any such
possession in
the 277.
c. 1. or b.

— In 276.
he shall hold

If the king's tenant for life be disseised by two, and he release to one of them, this enures to both, because he can only be disseised of an estate for life since the reversion in the king cannot be divested *.

a. it is said, if the king's tenant for life be disseised by two, and he release to one of them, he shall hold out his companion, for the disseisor gained but the estate for life.

Co.Lit.276.

If there be tenant for life, remainder in fee, and they be disseised, tenant for life cannot release to him in remainder, because the naked right cannot be transferred.

Co.Lit. 276.

3 Co. 152.

If the heir of the disseisor be disseised, and the disseisee release to such disseisor, and after the heir recover against such disseisor, the right of propriety goes along with it, because, when the heir recovers, he defeats the possession of the disseisor as if it had never been, so that the disseisor can never recover in any action; for in the writ of right he must lay the possession in himself or some of his ancestors; and this he cannot do in this case, for here there never was any possession in him but what was totally defeated and destroyed; and he cannot recover by the old possession of the disseisee, for that was turned into a naked right, which could not be transferred but to a true and real possession; and here being no possession but such as stands defeated, it is the conveyance of a naked right, which the law will not allow.

Co.Lit.277.

If the heir of the disseisor be disseised, and the disseisee release to the disseisor upon condition, and the condition be broken, this reverts the naked right in the disseisee, because when the condition is broken the release is as if it had never been, and therefore the disseisee may recover by virtue of his ancient seisin.

Co.Lit. 276.

If two men gain an advowson by usurpation, and the right patron releases to one of them, he shall not hold out his companion, but it shall enure to them, for their clerk came in by admission and institution, which are judicial and notorious acts.

3. Releases that enure by way of Extinguishment.

Co.Lit.279.

b. 280.

In some cases where the releasee cannot have the thing released by way of *mitter le droit*, &c. yet the release shall enure by way of extinguishment against all manner of persons: as, when the lord releases his seignory to his tenant of the land, or, when the grantee of a rent-charge or common releases to the tenant. And such releases absolutely extinguish the rent, &c. although the releasee be only tenant for life.

Lit. sect.

456.

If a lease be made to one for life, reserving rent to the lessor and his heirs; if the lessee be disseised, and after the lessor release to the lessee and his heirs all his right in the land, and after the lessee enter; in this case, the rent is extinct, but the right of the reversion doth not pass.

Lit. sect.

454-

If there be lord and tenant, and the tenant be disseised, and the lord release to the disseisee all the right which he has to the seignory or in the land, this release is good, and the seignory extinct.

But yet, if the tenant, notwithstanding he is disseised, puts his beasts on the land, and the lord takes them for rent arrear, the disseisee shall compel * him to avow on him; and if the lord avows upon the disseisor as his tenant, and the disseisee reply and shew the special matter how he was tenant and was disseised, this shall abate the lord's avowry †.

Co.Lit.268.
Lit. sect.
454.
* See the
stat. 21 H.8.
c. 19. & Co.
Lit. 268. b.
† For the

disseisee is tenant to him in right and in law,

But, if the tenant be disseised, and the lord accept rent from the disseisor, and then the lord distrain his beasts for rent in arrear, he may compel the lord to avow on him, and the lord cannot traverse the disseisor's title, having once admitted it by acceptance of the rent from him.

Co.Lit.268.

And according to my Lord *Coke*, if after such acceptance the disseisee should put in his beasts, and the lord should distrain them, the disseisee cannot compel the lord to avow on him, because it was his own laches to let the disseisor continue till rent was due and accepted.

Co.Lit.268.
b.
[But 48 E. 3.
9. seems to
the con-
trary, be-
cause when
the lord, by his
own act of
Gilb. Ten.

the tenant pleads the disseisin to compel the lord to avow upon him, it is strange, that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract.

64, 65.]

So, if the disseisor dies seised, the heir of the disseisor comes in by title, and then the disseisee cannot compel him to avow upon him, for he has lost the right of possession; and the disseisee cannot put his beasts on the ground, and therefore cannot compel the lord to avow on him, and therefore the lord must take the heir who has such right of possession to be his rightful tenant; but because the disseisee may enter and occupy the land before the descent cast, therefore the lord may release to him and discharge the contract, which is to his benefit, and is still so far subsisting that he may take advantage of it.

Co.Lit.268,

So, where donee in tail releases to the disseisor all his right, yet if he in the reversion releases to him afterwards, it shall extinguish the rent.

Co.Lit.280.

There is a diversity between a feignory and a bare right to land, for a release of a bare right to land to one who has but a bare right, is void; but a release of a feignory to him who has but a right, is good to extinguish the feignory.

Co.Lit.268,

But, if there be lord and tenant, and the tenant make a feoffment in fee, and afterwards the lord release to the feoffor; this extinguishes nothing, for by the feoffment the relationship between the lord and tenant is destroyed, and the feoffor only of necessity becomes tenant in the avowry till the lord procures his arrears.

Co. Lit.
269.
Lit. sect.
457.

If a feme mesne marries her tenant, and the lord releases to the feme, the feignory is extinct; but, if he releases to the husband, both the feignory and mesnalty are extinct.

Co. Lit.
280.

If the tenancy be given to the lord and a stranger, and the heirs of the stranger, and the lord release all his right to his companion; this not only passes his estate in the tenancy, but also extinguishes his right in the feignory.

Co. Lit.
280.

Co. Lit.
275.

If lessee for years be ousted, and he in the reversion disseised, and the lessee release to the disseisor, the disseisee may enter, for the term for years is extinct and determined. But, were it in the case of a lessee for life, it would be otherwise, because the disseisor has a freehold whereupon the release of tenant for life may enure.

Jon. 389.
Johnson v.
Trumper.

Lessee for years devised the term to his wife for life, the remainder of the years to J. S. who by deed released all his right, interest, term for years, possession, and demand in the said land to him who had the reversion in fee; and by this, it was held, that the possession was extinguished in the reversion, and that the reversioner may after the death of the wife well enter.

Moor, 56.
pl. 161.
per cur.

If the lord releases his right in one acre, this extinguishes the whole feignory.

Dalh. 60. & v. And. 235.

Bro. Re-
leases,
pl. 18.

So, if a man has a rent-charge out of twenty acres, and he releases all his right in one acre, this extinguishes all the rent.

Co. Lit. 148.
St. Edm. Cro.
Elis. 742.

But it hath been held, that if the grantee of a rent-charge releases part of his rent, such release does not extinguish the whole rent.

Dyer, 157.
b. pl. 29.

If the lord releases to his tenant all his right to the land and feignory, *salvo sibi dominio suo*; this does not extinguish the tenure, but only the annual services.

4. Releases that enure by way of Enlargement: And therein, of the modern Manner of Conveyancing by Lease and Release.

Co. Lit. 273.
Finch, 44.
Co. 124.
Dyer, 302.
(a) Posses-
sion coun-
tervaile, and
is equal to
livery.
Dyer, 269.
pl. 20.
margin.

Releases enure by way of enlargement when the possession and inheritance are separated for a particular time, and he who hath the reversion or inheritance releaseth to the tenant in possession all his right or interest in the land. Such release is said to enlarge his estate, and to be equal to an entry and feoffment, and to amount to a grant and attornment. And herein the law requires privity of estate, that the releasor have a right, and the releasee such a (a) possession as will make him capable of taking an estate.

Co. Lit. 273.
a Rol. Abr.
402.

And therefore if there be lessee for life or years in possession, the lessor may enlarge their estates by release. So, if they assign or grant over, the estate or interest of grantee or assignee may be enlarged by the release of him in reversion.

44 Aff. 35.
but vide
Browl.
207.

So, if there be a lessee for life, remainder in tail, the remainder in fee; he in remainder in fee may enlarge the estate of the lessee by release notwithstanding the mesne remainder.

Co. Lit. 272.

But, if A. makes a lease for life, and lessee for life makes a lease for years, and A. releases to the lessee for years and his heirs; this is void, because there is not the consent of the tenant for life, who is immediate tenant to the reversioner, and ought to attorn to his grants.

Co. Lit. 270.
Dyer, 4.
pl. 2.
Baron, 62.

So, if a man leases for twenty years, and the lessee assigns for ten years, a release by the reversioner to the assignee is void for want

want of privity. But a release to the lessee is good, for he hath the possession notwithstanding the assignment; the possession of the lessee being always considered the possession of the lessor, and that he holds as his bailiff.

If a man makes a lease for years, the remainder for life, and afterwards releases to the tenant for years; this is good, because the tenant for years holds of the reversioner, and pays him the services, and ought to attorn to his grants, and not he in the remainder for life; and therefore where tenant for years accepts a release of the reversion, it must in consequence be good. And in this case a release to him in the remainder for life would be good likewise, because the lessee in the original creation took the estate for years, subject to such remainder for life, and therefore there needs no consent from the lessee for years to enlarge the estate. Co. Lit. 273.

If tenant by the curtesy grants over his estate, he is not afterwards capable of taking a release, for his estate is created merely by law, and he remains tenant to the heir, and subject to waste, and is compellable to attorn to the grants of the reversioner; yet is he not capable of a release, because he has no notorious possession *in pais*, which may be enlarged into a fee. Co. Lit. 273. a.

But the grantee of tenant in dower, or by the curtesy, is capable of taking a release, because of the privity and notoriety of possession. 2 Roll. Abr. 400. 1.

If a feme covert be tenant for life, a release to the husband and his heirs is good, for there is both privity and an estate in the husband, whereupon the release may sufficiently enure by way of enlargement, for by the intermarriage he gains a freehold in right of his wife. Co. Lit. 273. b. Keilw. 129. pl. 97.

If an infant makes a lease for life, and the lessee assigns it over to another with warranty, the infant at full age brings a *dum fuit infra etatem* against the assignee, and he vouches the assignor, who enters into the warranty, the demandant cannot release in fee so as to enlarge the estate, because the vouchee has no possession. Co. Lit. 273. a. b.

But he who aliens pending the writ may, as long as that writ is pending, accept a release from the demandant. So may a vouchee after he hath entered into the warranty, for though they be not tenants, yet the law and the parties have allowed them as tenants *inter se* for that suit. Lit. 468. 490. Co. Lit. 266. 284. b. Hob. 338.

If a man makes a lease for life, the remainder for life, and the first lessee dies, a release to him in the remainder, and to his heirs, is good before he enters to enlarge his estate, because he hath an estate of freehold in law in him, which may be enlarged by release before entry. Co. Lit. 270. b.

But at common law, a release to a lessee for years before entry is void: yet it is said by my Lord Coke, that if a man makes a lease for years, the remainder for years, the first lessee enters, a release to him in the remainder for years is good to enlarge his estate. Co. Lit. 270.

Co. Lit.
270. b.

And if a lease for years be made to two, albeit the lessor before they enter cannot release to them to enlarge their estate, yet one of them may before entry release to the other.

Jon. 19.
(a) If a man
seised of a
rent in fee
grants it for
life, he may
enlarge it by
release. 43

If an (a) advowson be granted for years, the patronage for years is in the grantee, and he may accept a release in fee of the patron. But, if one, two, or three avoidances are granted, the patronage is not separated, nor can such grantee accept of a release in fee of the patron in fee who hath the inheritance.

Aff. 8. 2 Roll. Abr. 400.

8 H. 6. 1.
Bro. Re-
leases, pl. 62.
2 Rol. Abr.
403.

If A. a member of a corporation, disseise B. to his own use, or, if a mayor and commonalty disseise B., and B. in the first case release to the mayor and commonalty, or, in the second, to a particular member of the corporation; nothing passes by these releases, for they are distinct persons, and claim in different rights, consequently, there is no privity.

31 Aff. 13.
2 Rol. Abr.
401.

If a man sues execution upon an (b) *elegit* of the lands of his debtor, and the debtor who hath the inheritance confirms his estate, he may afterwards enlarge it by a release, for the confirmation hath created a privity between them.

(b) So, of a
tenant by
statute mer-
chant or staple.

Co. Lit. 270. b.

Co. Lit. 270.
Lit. 168.
460. Dyer,
269. b. pl.
20. Owen,
28, 29. S.P.
and that such
lessee shall have aid.

A release by a lessor to his lessee at will, having entered by force of such lease, is good in respect of the privity between them, and as it would be a vain thing for the lessor to make livery and seisin to one already in possession of the land by his own agreement.

Cro. Eliz.
350. Shaw
v. Barber.

But, if tenant at will makes a lease for years, and the lessee enters, he only is the disseisor, and a release or confirmation to the tenant at will afterwards is void, because the privity is determined.

Co. Lit.
270. b.
Dyer, 28.
pl. 19.
Cro. Eliz. 268.

A release to a tenant at sufferance, as, where lessee for years holds over, is void, for though there be a possession, yet there is no privity, which is equally requisite,

3 Leon. 152. Brownl. 207. Cro. Jac. 170.

Co. Lit.
271. a.

If one enter of his own wrong and takes the profits, his words, "to hold it at the owner's will," cannot qualify the wrong, for he is a disseisor, and in such case the owner's release to him is good; or, if the owner consented, he is tenant at will, and in such case the release is likewise good.

(c) By Sir
Francis
Moor,
2 Mod. 252.
2 Salk. 678.
pl. 5.
2 Ld Raym.
998. & vide
7 Mod. 74.

The ancient manner of conveyancing was by feoffment, but the manner of making livery and seisin begetting many nice questions, grew troublesome, which put lawyers upon new devices, and introduced the modern manner of conveyancing by lease and release. This method is said to have been first (c) invented in King Charles the First's reign, and has its validity from the reasons drawn from the statute of uses; for, by the bargain and sale for a year, the bargainee by force of the statute is in possession without entry,
and

and when the bargainor releases to him in possession, the lease is merged, and the bargainee hath the inheritance. For, as at common law, if a man granted a lease, and the lessee entered, this divided the estate, and left a reversion in him, and the possession in the lessee; but still, by the common law, the lessee (a) before entry could not accept of a release, having only an *interesse termini*; and now though the lessee does not enter, yet the statute vesting the estate or use in him for a year, he is deemed to be in the actual possession, and so capable of a release as much as a lessee in possession was at common law. But yet this lessee cannot have trespass till an actual entry.

(a) Lit.
sect. 459.
5 Co. 124.
Plow. 423.

Lessee for years cannot make a lease for years within the statute of uses, so as by this means to give the possession, and make his lessee capable of a release of the reversion.

Lutw. 570.
7 Mod. 73.

In ejectment upon a special verdict the only question was, whether a lease for a year upon no other consideration than reserving a pepper-corn, if it be demanded, could operate as a bargain and sale, and so make the lessee capable of a release? And resolved that it should, the reservation making a sufficient consideration to raise an use in the same manner as a bargain and sale does.

Mod. 262.
2 Mod. 249.
2 Vent. 35.
Barker v.
Keate.

A release to *cestui que use* is good: so, to a *cestui que trust*, who being in possession, may at least be considered as tenant at will.

Godb. 299.
Hard. 491.
Carter, 162.

5. What Estate or Interest passes by the Release: And therein, of the Words requisite to an Enlargement.

Releases, like other conveyances, regularly require words of inheritance; so that if the lessor release to his lessee for years, without saying to him and his heirs, such lessee hath only an estate for his life,

Lit. sect.
465. Co.
Lit. 273. b.
Jenk. 200.
Jon. 328. Cro. Car. 335.

So, if a release be made to tenant by statute staple or merchant or *elegit*, by him in the reversion of all his right in the land; by this a freehold passes for the life of the releasee, it being the greatest estate that can pass without apt words of inheritance.

Co. Lit.
273. b.
2 Vent. 328.

If a lessor release to his lessee *pur autre vie*, he gives him an estate for his own life.

Co. Lit.
275. b.

A chauntry priest incorporate took a lease to him and his successors for 100 years, and afterwards took a release from the lessor to him and his successors; and it was adjudged, that by the release he had but an estate for life, for he had the lease at first in his natural capacity, for that it could not go in succession; and the words *his successors* could not give him an estate of inheritance in the same capacity he had the lease, for want of the words *his heirs*.

Comp. Incumb. 373.

But, if the lord releases all his right to the tenant, the seignory is extinct without the word *heirs*; for this instrument is to discharge the estate of the tenant, and therefore has a necessary relation to the estate which the lord at first created, and, consequently, it refers to those words that in the original of the estate gave him a fee-simple.

Co. Lit. 9.
Coke R. on
Fines, 7.

Release.

It is manifest that cause by way of *mitter le estate*, the word *release* is not requisite; as, where there are two coparceners, and one of them releases to the other, this gives a fee without the word *release*, because it hath a necessary relation to the estate whereof the other was seized.

It is manifest that if two joint-tenants, and one release to the other, this maketh a fee without the word *heirs*, because it refers to the common fee, which they jointly took and are possessed of by force of the first conveyance. But tenants in common have distinct estates, and cannot enlarge the estates of each other without proper words of inheritance (a).

If lands be given to baron and feme, and a stranger in fee, and the stranger releases to the (b) baron; this gives him the fee with the other words of inheritance.

Dyer, 265. a. pl. 34.

A release by one of a bare right for a day or an hour is as good as if it was made to the other and his heirs; for the diffisee cannot release part of his estate in the right, because he has no right to any estate but that whereof he was seized, therefore he must release his right to that, or none at all.

Who in respect of their Right or Interest are capable of releasing.

A bare authority cannot be released; as, where a man by will directs that his executors shall sell his lands; this being a power only, and no matter of interest in the executor, he cannot release it to the heir.

It is not so where the testator directs that his executors should sell the land, and they had made a feoffment over, yet the heir may release the land. Co. Lit. 265. b.

But, though these powers in strangers cannot be released, yet a power of revocation in the feoffor or party from whom the estate derived may be released by deed, or by levying a fine, which is a release in law; for it is in nature of a condition, whereby he may restore himself to his former estate whenever he pleases, and consequently, such power, like other reservations, may be released.

After one has found surety of the peace, all the king's subjects have an interest in it, and neither the king nor party against whom it is found can release it.

In trespass or *detinue* by the villein, the release of the lord is a good bar.

If a commonalty be diffised, and after every one release for himself, it is not good, because it ought to be by their common assent.

A person who procures an outlawry in debt may release the party: for the release is a satisfaction to him; and the outlawry is

this case being pardoned by act of parliament, the party is absolutely discharged.

If *A.* covenants with *B.* that *C.* shall pay to *D.* 8*l.* yearly, and takes *J. S.* to husband, who releases the payment to *A.*; this case does not discharge him, for *J. S.* is a stranger to the covenant, and hath no right in him.

If *A.* has judgment against *B.* for debt or damages, and afterwards the land of *B.* for this debt, and then assigns over the land to *C.* for all his estate therein, and after *A.* releases to *B.* the judgment; this shall avoid the extent, so that *B.* may have an *ista querela* against *C.* the assignee, and therein shall (*a*) avoid the extent, because *A.* notwithstanding the assignment, continues by the judgment, and might after the assignment have acknowledged satisfaction of the judgment, and so defeat the estate the assignee. And this release is all one as if he had acknowledged satisfaction of the judgment.

If one joint-tenant of a rent in fee releases all his right, yet this does not pass the moiety of his companion (*b*); but in personal actions one joint-tenant may release the whole; but, if the person is mixed with the realty, it is otherwise.

A release by the common vouchee is no bar, for he renders nothing, and can be at no loss.

So, if the plaintiff in ejectment, who is a mere nominal person and trustee for the lessor, release the action; or, if an action be brought in his name for the mesne profits, and he release it, this in either case is no bar; but from the power the courts now exercise of regulating all proceedings in these actions, is such a contempt for which the party may be committed.

If a lessor after assignment of the reversion release to the lessee all tenants and demands, yet the assignee may have an action of covenant for rent due after the assignment, for it runs with the reversion at common law, before the *stat. 32 H. 8. (cap. 34.)* and flies by the grant of the reversion, and therefore the lessor could not release it after the assignment.

assignment of his debt cannot release the debtor. 2 Chan. Ca. 169.

If by prescription the inhabitants of ancient messuages in a certain vill are entitled to have common within the vill by reason of their commorancy, such common cannot be released, for though the inhabitant should release it, a succeeding one might claim it*.

where such a claim is pleaded as a custom, and adjudged bad in law, for the reason in the text, among other reasons.

If by the custom of a manor the tenants thereof are to choose among themselves one to collect the lord's rents for a year, and so annually; the lord may discharge or release a tenant of this office, but then the others shall not be further charged than before, for when it comes to his course who is discharged, the lord himself must collect it.

If two churchwardens sue in the spiritual court for a levy towards the reparation of their church, and have sentence to recover, and costs assessed, and after one of them releases, yet the other

3 Bull. 29.
Roll. Rep.
196.

2 Roll. Abr.
Ludburrow.

402. Quick v.
2 Roll. Abr.

402.
Jon. 238.
Cro. Car.

214.
Flower v.
Elgar.

(a) Q. If
there may
not be relief
in equity?

Vide Vern.
50.

21 E. 3. 58.
2 Roll. Abr.

411.
(b) 2 Co. 68.

Cro. Eliz.
2, 3.

Raym. 93.
Skin. 247.

pl. 1.
Comb. 8.

Salk. 260.
pl. 15.

2 Jon. 102.
2 Lev. 206.

Harper v.
Bird. Cro.

Car. 503.
L. P.—that

a creditor
after an

2 Chan. Ca. 169.

Cro. Jac.
152. Smith

v. Gatewood.
* Vide Gate-

ward's case.
6 Co. 60.

21 E. 4. 45.
47. 2 Roll.

Abr. 401-2.

March, 73.
Jenk. 305.

Cro. Jac.
235.

Yelv. 173.
2 Brownl.
215.

(a) 3 Bull.

110. Roll.

Rep. 246.

(b) 4 Mod.

305.

Comb. 263.

(c) Holt's Rep. 660.

may proceed for the costs, &c. for churchwardens have nothing but to the use of the parish, and the corporation consists of body and one only cannot release or give away the goods of the church.

A servant who (a) distrains in right of his master, or one who is (b) robbed of his master's money, cannot, on an action brought on him on the statute of *hue and cry*, release to the prejudice of his master; nor can the (c) ordinary release an administration bond.

Cro. Eliz.
308.

Lev. 235.

Offey v.

Ward. Lit.

Rep. 149.

J. P.

But a sheriff may release an obligation taken by him for the appearance of a person whom he arrests.

In debt on a single bill made to A. to the use of him and B. the defendant pleads a release made to him by B., on which the plaintiff demurs; and without difficulty it was adjudged for the plaintiff; for B. is no party to the deed, and therefore can neither sue nor release it; but it is an equitable trust for him, and suable in Chancery if A. will not let him have part of the money; and the book of E. IV. cited to prove that he might release in such a case was denied to be law.

(F) Of Releases by Executors and Administrators.

5 Co. 28.

Off. Exec.

33.

Flow. 281.

39 E. 3. 26.

(d) *Vide in-
fra.*

*Vide title
Executors
and Admi-
nistrators.*

AN executor may, before probate of the will, release a debt due to the testator, for he derives his authority from the testator, and not from the act of the ordinary; in like manner may he pay debts, and take releases, &c.

And it hath been held, that if an executor releases all actions, this will extend as well to actions which he hath in his own right, as to those which he hath as executor (d); but yet in some cases such general words may, according to the intention of the parties, be restrained.

If there be two executors, and one of them release a debt due to the testator, this shall bind both, for each hath an entire authority and interest different from other joint-tenants; and hence it is held, that, if one executor release to his companion, nothing passes thereby, because each was possessed of the whole before.

Dyer, 319.
pl. 15. Cro.
Car. 420.

But, if there be two executors, and one of them refuse to join in action, upon which he is severed, after such severance he cannot release the action.

Paf. 120 G. 2.

In B. R.

Williams v.

Pen. —

In the case

of Hudson

v. Hudson,

M. 1737. in

Canc. Lord

Hardwicke

was of a contrary opinion, on the difference the law makes between an executor and an administrator the former coming in not by the act of the ordinary, but by the will of the testator, consequently, his authority and interest in the assets greater, &c. [The law, however, is as stated in the text; the opinion of Lord Hardwicke in Hudson v. Hudson was applicable only to the particular circumstances of that case. *Jacomb v. Harwood*, 2 Vez. 265.]

In the case of *Williams v. Pen*, it was adjudged in B. R. that if there be two administrators, and one of them release a bond due to the intestate, that this shall bind his companion, and be a good discharge to the obligor; as the statute 31 E. 3. cap. 11. gives an administrator the same power over debts due to an intestate as an executor had, and as an administrator by releasing without consideration is equally liable to a *devastavit* with an executor.

An infant executor, upon an actual payment and full satisfaction made to him, may release a debt due to his testator, but cannot without, for that this would be a *devastavit* in him. As, if a bond be forfeited, and the infant executor only receive the principal sum without the penalty, and give a general release of all the debt; this release at law is no bar of the penalty *. but now, since stat. 4 Ann. c. 16. whereby the penalty is saved on payment of principal and interest, if principal and all interest be paid to such infant executor, if his release will not operate as in the ceding case?

5 Co. 27.
Co. Lit. 172.
And. 177.
Moor; 146.
Cro. Car.
490.
Kniveton v. Latham.

If an executor release a debt due to the testator, this shall charge him to the value of the debt, though perhaps he did not receive near much as was due; but, if he release an account, this resting in uncertainty, he cannot be charged with more than he actually receives.

Hob. 66.
Cro. Eliz.
43.
And. 138.

If an executor voluntarily release a debt, he shall not be relieved against it in equity, although a creditor may.

Vern. 455.

It hath been held in Chancery, that if there are two executors, and they join in a receipt, and one only receives the money, that as to creditors, who are to have the utmost benefit of the law, each is liable for the whole though one executor alone might release, and the joining the other was unnecessary; but as to legatees, and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other, for the joining in the receipt is only matter of form; the substantial part is the actual receiving, and this only is regarded in conscience.

Salk. 318.
pl. 26. per Lord Harcourt.

F) How far the Husband's Release shall bind the Wife.

BY the intermarriage the husband acquires such an interest in all debts due to the wife, that he may release them, and such release shall bind the wife.

17 E. 3. 66.
2 Roll. Abr. 410.

Baron alone may release waste done by lessee for life before coverture, upon a lease made by the feme.

42 E. 3. 18.
2 Roll. Abr. 402.

So, all rights accruing to the wife during coverture may be released by the husband.

Salk. 115.
pl. 4.
Ld. Raym. 73.

The husband may release the wife's right under the statute of distributions.

Lucas, 63.

If a husband and wife are divorced *a mensa & thoro*, and a legacy is left to her, the husband may release it.

Moor, 665.
Cro. Eliz.
908. Noy, 45.

So, where a legacy was given to a feme covert who lived separate from her husband, and the executor paid it to the feme, and took her receipt for it; yet, on a bill brought by the husband against the executor, he was decreed to pay it over again with interest.

Vern. 261.

If a feme covert sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her and costs, the husband may release those costs, for the marriage continues,

Salk. 115.
pl. 4. per Holt, C. J.
Ld. Raym.

tinues, and whatever accrues to the wife during coverture belongs to the husband.

Roll. Rep. 426. Roll. Abr. 343. 3 Bulf. 264. But, if the husband and wife be divorced *a mensa & thoro*, and the wife have her alimony, and sue for defamation or other injury, and there have costs, and the husband release them, she shall not bar the wife, for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband.

[See vol. I. p. 476, 7, 8, 9, 10.]

(G) To whose Benefit a Release shall enure; and who shall be bound thereby though not a Party to the Release.

Co. Lit. 232. Moor, 856. 2 Roll. Abr. 410. Hob. 10. 2 Sid. 41. 2 Salk. 574. IF two or more are jointly and severally bound in a bond, a release to one discharges the others; and in such case the joint remedy being gone, the several is so likewise.

2 Roll. Abr. 411. So, if there are two conusees of a statute, and one of them releases to the conusor; this shall extinguish the statute as to the other also.

17 E. 3. 66. 2 Roll. Abr. 411. So, if two executors sell the goods of the testator for a certain sum of money, and take an obligation for the money, the release of one of them shall bar both.

Bro. Release, 26. So, where there are two executors, and one only has the possession of the goods which are taken away by a stranger; though he only in whose possession the goods were may bring an action, yet the release of his companion shall bar him.

Lit. Rep. 190. Also, if two are bound in an obligation, and the obligee releases to one of them, proviso that the other shall not take advantage of it; this proviso is void.

Moor, 64. But, if *A.* be bound to *B.* and *C. solvend.* the moiety to *B.* and the other to *C.* this is a several obligation, and the release of one shall not prejudice the other.

Cro. Elis. 408. 470. 2 Salk. 574. So, where several enter into several covenants in the same deed, a release to one of the covenantors will not discharge the others.

5 Co. 56. So, if two are bound to the king, and he releases to one of them; this will not discharge the other.

2 Roll. Abr. 412. Cro. Elis. 161. If *A.* and *B.* are named obligors jointly and severally, and *A.* only seals the bond, and then the obligee releases to *A.*, and after *B.* seals the deed; this release shall enure to the benefit of *B.* though it was not his deed at the time of the release; for the release does not defeat the deed, but is only a bar by plea, and both were bound for one and the same debt, which is satisfied by the release.

Co. Lit. 232. Hob. 66. Noy, 62. 5 Co. 97. Brownl. 89. Cro. 16. 444. If divers commit a trespass, though this be joint or several at the election of him to whom the wrong is done, yet, if he releases to one of them, all are discharged, because his own deed shall be taken most strongly against himself. Also, such release is a satisfaction in law, which is equal to a satisfaction in fact. But he who

who would take advantage of such release must have the same to produce.

If trespass be brought against three, and judgment be given against one, and the plaintiff enter a *noli prosequi* against the other two, if the *noli prosequi* be before judgment, it will discharge the whole action. So, if judgment had been against all three, and the plaintiff had entered a *noli prosequi* against the two, the nonsuit or release, or other discharge of one, discharges the rest.

Hob. 70.
Parker v.
Laurence.

In trover against two, one pleaded not guilty, and a verdict against him; the other pleaded a release, and verdict for him: a motion for judgment against him who was found guilty it was denied, because the trover being joint, a release of all actions discharged both.

4 Mod. 379.
Kiffin v.
Willis.

In replevin by *A.* against *B.*, *B.* makes consuance in right of *C.* or *damage-feasant* to the freehold of *C.*, which is adjudged against *B.*, and judgment that *B.* shall have return irreplegiabie with costs and damages. In a *scire facias* brought by *B.* to have execution of the costs and damages, if *A.* pleads the release of *C.* in whose right consuance was made of all demands, this is no bar, inasmuch as *C.* was not party to the suit, nor liable to any costs or damages, had the matter been adjudged against *B.*, and therefore *B.* was entitled to the costs and damages, which *C.* could not release.

2 Roll. Abr.
412. Sibley
v. Rawlins.
3 Lutw. S.C.
cited, and
said, that if
C. had been
party to the
original suit,
it would
have been
otherwise.

A. and *B.* took an obligation from *J. S.* for the payment of a sum of a sum of money, and this was done by them as trustees, and for securing the payment of legacies to younger children; *A.* brought an action on this bond, to which *J. S.* pleaded a release from *B.*, but upon oyer it appeared that the release was of all actions which *B.* had on his own account; and in truth *B.* did not know of the taking the bond, nor was he privy to the suit; and though it was objected that the release of one obligee discharged the bond, and that it must be on his own account, yet it was adjudged, that the release did not bar, for that the words, *on his own account*, must have been put in for some purpose, and could not in this case be for any other, but to distinguish demands which *B.* had in his own right from those he had in right of or in trust for others.

Vent. 35.
Lev. 272.
2 Keb. 530.
Stokes v.
Stokes.
3 Mod. 279.
S. C. cited.

Where divers are to recover in the personalty, the release of one is a bar to all, but it is not so in point of discharge.

6 Co. 25. 2.
Ruddock's
case. Cro.
Hutton, 40.

Eliz. 648. Jenk. 263. Palm. 319. Owen, 22.

As, if there are two plaintiffs who are barred by an erroneous judgment, and they afterwards bring a writ of error, the release of one shall bar the other, because they are both actors in a personal thing to charge another, and it shall be presumed a folly in him to join with another who might release all.

3 Mod. 135.

But, if an action be brought against four, and judgment against them, on which they bring a writ of error, and the defendant in error plead the release of one of them; this is no bar; for it being brought to discharge themselves of a judgment, the release of one cannot

3 Mod. 109.

cannot bar the other, because they have not a joint interest but a joint burden, and by law are compelled to join in a writ of error.

(H) How far a Possibility or Contingent Interest may be released.

10 Co. 48. a.
Cro. Eliz.
552.

IT is a general rule in our books that a mere possibility cannot be released, and the reason hereof is, that a release supposeth a right in being, and it was thought to countenance maintenance to transfer choses in action, possibilities and contingent interests.

Lit. 168.
446. Co.
Lit. 265. a.
10 Co. 51.
Bridgm. 76.
S. P. though

Hence it is held, that an heir at law cannot release to his father's disseisor in the lifetime of the father; for the heirship of the heir is a contingent thing, for he may die in the lifetime of the father, or the father may alien the lands.

the words *quæ quovismodo in futuro habere potero* are inserted in the release. — But, if the heir releases with warranty, it bars him when the right descends. 2 Leon. 20. Hob. 130.

And. 133.
Co. Lit. 265.
Cro. Eliz.
552.
2 Roll. Abr. 405.

So, if the donee of a statute releases to the donor all his right to the land, yet he may afterwards sue execution, for he has no right to the land but only a possibility.

2 Mod. 281.
2 Lev. 215.

So, if a creditor releases to his debtor all the right and title which he hath to his lands, and afterwards gets judgment against him, he may extend a moiety of the same land, for he had no right to the land at the time of the release, and the land is not bound but in respect of the person.

5 Co. 70.
Hoe's case.
Co. Lit.
265.
Moor, 469.
Cro. Eliz.

So, if the plaintiff release all demands to the bail in the King's Bench, and afterwards judgment be given against the principal, execution may be sued against the bail, for that at the time of the release there was only a possibility of the bail becoming chargeable.

579.
Moor, 469.

Hutt. 17. & vide the case of Harrison v. Huxley, Moor. 852. — ** See *quæ*. if the release was on consideration, and intended to discharge them as bail, if the court, on motion, would not stay proceedings against them? **

2 Rol. Abr.
404.
Cro. Jac.
337. Roll.
Rep. 11.
Child v.
Durant.

So, if *A.* recovers in trespass against *B.* in *B. R.*, and *B.* brings a writ of error, pending which *A.* releases to *B.* all executions, and after the judgment is affirmed and new damages given to *A.* for the delay upon the statute of 3 H. 7. [cap. 10. and vide 19 H. 7. cap. 20.] this release shall not bar *A.* to have execution of those damages, because he had not any right to have execution, nor to any duty at the time the release was made.

Poph. 5.
10 Co. 51.
Hutt. 17.
Raym. 146.

A lease to the husband and wife for life, the remainder to the survivor of them for twenty-one years; the husband grants it over, and though he survived, yet the grant was held void because it was contingent.

Cro. Eliz.
173. 600.
Owen, 85.
Leon. 107.
3 Leon. 256.
and Dyer,
244.
10 Co. 48.

If the next presentation to a church be granted to *A.* and *B.* and living the incumbent, *A.* release all his estate, title, and interest to *B.* this release is void, it being of a chose in action: *secus*, had the release been made after the avoidance, at which time the interest would have been vested in *A.*

Like point.

From the reasons herein it was held, that if, at common law, a woman before marriage had accepted of a jointure in bar and satisfaction of dower, this would not have bound her, because at the time she had no right to dower.

4 Co. i.
Vernon's
case.—If a
husband
makes a lease
for life and

dies, the wife may release her right of dower to him in reversion, though she has no present cause of action against him. Co. Lit. 263.

A city orphan cannot at law release her orphanage part to her father, for she hath no right in her during the lifetime of her father. But it hath been held in equity, that such release being for a valuable consideration, as upon the marriage of a daughter, and a portion given her by the father, it may operate as an agreement to waive the orphanage, and hath accordingly been so decreed.

Blanden v.
Barker, 1 P.
Wms. 638.
Preced.
Chan. 545.
[See acc.
Cox v. Bell-
tha, 2 P.

Wms. 273. Lockyer v. Savage, 2 Str. 947. Medcalf v. Ives, 1 Atk. 63. *Sed*, if a mere voluntary release, Morris v. Burroughs, 1 Atk. 401.]

If there be a devise of a term for years to *A.* for life, remainder to *B.*; *B.* may release his right to *A.*, and such release shall extinguish his interest, though it was objected that *B.* had only a possibility at the time of the release made.

10 Co. 47.
Lampet's
case.

But it was held in the above-mentioned case of *Lampet*, and hath in like manner been held in other cases, that *B.* could not assign over his interest to a stranger in the lifetime of *A.*, the same being only a chose in action, and a mere possibility, inasmuch as an estate for life is in supposition of law a larger estate than for any number of years.

10 Co. 47.
4 Co. 66.
Sid. 288.
Raym. 146.

But later resolutions, especially those which have been in courts of equity, have made a great alteration in this doctrine.

2 Vern. 563.

As in the case of *Cole v. Moore*, where one possessed of a term devised it to *A.* for life, remainder to *B.*, and made *A.* executor; *B.* devised this remainder to *C.* and died in the lifetime of *A.*, and in order to defeat *C.* of his interest, *A.* assigned his term to a third person: it was decreed by Lord Chancellor *Ellesmere*, that *A.* the executor and devisee for life, was a trustee for *B.*, and should not be at liberty to destroy this remainder, but that the executor should preserve the lease, so as it might go according to the will with the performance whereof the executor was intrusted.

Moor, 806.

So, in the case of *Goring v. Bickerstaff*, where the trust of a term was devised to *A.* for life, remainder to *B.*, it was agreed by all that *B.* might assign over this trust, which shews that a trust of a term in remainder may be transferred over by deed.

Chan. C4.4.

One possessed of a term for years devised it to *A.* for life, remainder to *B.* *B.* in the lifetime of *A.* devised his remainder to *J. S.*, who devised it over; and the question was, whether *A.* (the devisee for life) being dead, the devisee of *J. S.* should have the term, or whether it should go to the administrator *de bonis non*? and it was decreed for the devisee of *J. S.*, and the administrator *de bonis non* of *B.* was directed to assign over the term to him.

1 P. Wms.
572. Wind
v. Jekyl.

And in the case of *Theobald v. Duffay*, in the House of Lords, March 1729-30, it was (*inter alia*) determined, that a possibility of a term is assignable for a good consideration.

3 Co. 70.
3 Mod. 281.

It is laid down in *Hoe's* case, that a duty uncertain at first, which upon a condition precedent is to be made certain afterwards, is but a possibility, which cannot be released.

Yelv. 215.
Brownl 116.
Bridges v.
Union.

As a *nomine pœne* waiting on a rent, which cannot be released till the rent is behind, as the non-payment of the rent makes the *nomine pœne* a duty.

Yelv. 192.
Neale v.
Sheffield.

So, if a man covenants to pay 10 l. on the birth of a child, the covenantor cannot be released of the 10 l., it resting merely in contingency, whether such child will ever be born or not.

Yelv. 215.

So, if an award be, that upon the plaintiff's delivering the defendant by a certain day a load of hay, the defendant shall pay him 10 l.; in this case the 10 l. cannot be released before the day, for it rests merely in possibility and contingency whether the money shall ever be paid, for it becomes a duty on the delivery of the hay only, and not before.

2 Salk. 575.
pl. 4.
2 Ld. Raym.
786.
Topham v.
Tailier.

In debt upon a bond against the defendant as administrator, &c. the defendant pleaded a release, whereby the plaintiff, reciting there were several controversies between the defendant and him about a legacy and the right of administration, releases to the defendant all his right, title, interest, and demand of, in, and to the personal estate of the intestate; and on demurrer this was held to be no plea. A difference was taken by Ch. Just. *Holt* between a release of all demands to the person of the obligor or administrator, and a release of all demands to the personal estate of the obligor or administrator, that the last will not discharge the bond as the other may, because the bond does not give any right or demand upon the personal estate, &c. until judgment and execution sued.

2 Roll. Abr.
407-8. Brif-
cot v. Aier.

If *A.* promises *B.* in consideration that he will sell to his son certain merchandize at such a price, that if his son does not pay it at the feast of St. *Michael* next ensuing, he himself will pay it; and before *Michaelmas*, *B.* releases all actions and demands to him who made the promise; this shall not release the *assumpsit*; for till *Michaelmas* it cannot be known whether his son will pay it or not, and till default of payment by him, the other is not bound to pay it, and so it is a mere contingency till *Michaelmas*, which cannot be released.

(I) How the operative Words in a Release have been construed: And therein of the Words,

1. Claims and Demands, what are released thereby.

Lit. sect.
508.
Co. Lit.
291.

Littleton says, that a release of all demands is the best release to him to whom it is made; and Lord *Coke* says, that the word *demand* is the largest word in law except *claim*; and that a release of demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, &c.

But, notwithstanding the large import of the word *demands*, yet there are several instances (which *vide infra*) where the generality of the words hath been restrained to the particular occasion for which the release was made.

By a release of all demands, all actions real, personal, and mixed, and all actions of appeal, are extinct. 8 Co. 154.

So, a release of all demands extends to (a) inheritances, and takes away rights of entry, seifures, &c. Co. Lit. 291. (a) But, if the king re-

leases all demands, yet as to him the inheritance shall not be included. Bro. Prerogative, pl. 62. Bridgm. 124.

By a release of all demands made to the tenant of the land, a common of pasture shall be extinct. Co. Lit. 291.

A release of all demands will bar a demand of a relief, because the relief is by reason of the feignory to which it belongs. Cro. Jac. 170.

If *A.* being possessed of goods loses them, and they come to the hands of *B.*, who being in possession, *A.* by deed releases to *B.* all actions and demands personal which at any time before *habuit vel habere potuit* against *B.* for any cause, matter, or thing whatsoever; this shall bar *A.* of the property of the goods, so that *B.* has the absolute right in him by this release. 2 Roll. Abr. 407. Jordan v. Sanders.

By a release of all demands, all manner of executions are gone, for the recoveror cannot sue out a *fieri facias*, *capias*, or *elegit*, without a demand. Lit. sect. 508. 2 Roll. Abr. 407.

By a release of all demands to the conusor of a statute merchant before the day of payment, the conusee shall be barred of his action, because that the duty is always in demand; yet, if he releases all his right in the land, it is no bar. Co. Lit. 291. Bridgm. 124.

So, a bond conditioned to pay money at a day to come, is a debt and duty presently, and may be discharged by a release of all actions and demands before the day of payment. Cro. Jac. 300.

But in an action of debt for non-performance of an award made for the payment of money at a day to come; there is no present debt, nor any duty before the day of payment is come, and therefore it cannot be discharged before the day, by a release of all actions and demands. Yelv. 214. Cro. Jac. 300.

So, if a man devises a legacy of 20 *l.* to *J. S.* at the age of twenty-three, though the legatee, after he attains the age of twenty-one, and before the day of payment, may release it, yet by the word *demands* it is not released, but there must be special words for the purpose. 10 Co. 51. in Lampert's case.

A release of all demands does not discharge a covenant not (b) broken at the time; as, where a lessor, on payment of 60 *l.* to him by the lessee due on a judgment, released to him all demands; it was adjudged, that this did not release a covenant for repairs not then broken. But it was held, that a release of all covenants would have released the covenant. Hancock v. Field, Cro. Jac. 170. 2 Roll. Abr. 407. Noy, 123. (b) For the difference

when broken or not, *vide* Dyer, 217. Lit. Rep. 86. Moor, 34. 3 Leon. 69. 10 Co. 51. 5 Co. 71. Higdon's case. Co. Lit. 292. 8 Co. 153. And. 8. 64.

If lessee for life grants over his estate by indenture reserving rent during the continuance of the estate, and afterwards releases Witton v. Bie, 2 Roll. Abr. 408.

Cro. Jac. 486. Bridgm. 123. 2 Roll. Rep. 20. Poph. 136. to the assignee all demands; this shall discharge the rent, for he had the freehold of the rent in him at the time.

2 Roll. Abr. 408. in the case of Winton v. Bie. So, if lessee for years grants over by indenture all his estate, reserving a rent during the term, and after releases to the assignee all demands; this shall release the rent; for though he cannot have an action to demand all the estate, yet this is an estate in him of the rent, and assignable over; and in an action of debt for any arrearages after, he shall claim it as a duty accrued from the said estate; and it shall not be said that the duty arises annually upon the taking of the profits, but this had its commencement and creation by the reservation and contract, which was before.

Collins v. Harding, 2 Roll. Abr. 408. Moor, 544. Cro. Eliz. 606. If there be lessee for years rendering rent, and the lessor grant over the reversion, and the lessee attorn, and after lessee assigns over his estate, and after the assignee of the reversion release all demands to the first lessee, yet this shall not release the rent, for that there is neither privity of estate or contract between them after the assignment. But, if the release had been made to the assignee, it had extinguished the rent.

20 Aff. pl. 5. 2 Roll. Abr. 408. If he, who has a rent-charge in fee, releases to the tenant of the land all demands from the beginning of the world till the making of the deed of release; this shall discharge all the rent, as well that to come as what is past.

Lit. sect. 510. Co. Lit. 291. It is said by *Littleton* and *Lord Coke*, that by a release of all demands a rent-service shall be released; but this it is said is to be intended of a rent-service in gross as a seignory; and therefore in the case of

Lev. 99, 100. Sid. 141. Keb. 499. 510. Hen v. Hanfon. *Hen v. Hanfon*, where, in covenant brought on a covenant in a lease for years to pay the rent reserved, the defendant pleaded a release by the plaintiff of all demands at a day before the rent in question became due; the plaintiff replied, that the release was in performance of an award of all matters in controversy between the plaintiff and defendant; upon demurrer, it was adjudged by *Foster*, *Mallet*, and *Windham*, that the rent was not discharged by this release as it became due by the perception of the profits, and was not like to a rent-charge, or a rent parcel of the seignory; and they held that this rent being incident to the reversion, and part thereof, was no more released hereby than the reversion itself was; and that this construction should the rather prevail, as it was not the intention of the party to release this rent. But *Twifden contra*—he said, that in releases and deeds when words are heaped up, the party that is to take the advantage may take the strongest word and in the strongest sense, and that is the reason they are put in; and as to the intent, that must be gathered from the words; and men must take care what words they use, *oportet politiam obedire legibus non leges politiae*; and he said, he could see no difference between this rent and a rent in fee: both are rent-services, and neither demandable before they become due, otherwise than as in 40 E. 3. 47. it is said, there is a continual demand

demand betwixt lord and tenant; and in this case there is a tenure between the lessee and him in reversion; and the reason why the reversion is not touched by this release is, because it can work only by way of extinguishment, and not by way of passing an interest. But it was adjudged *ut supra*.

The plaintiff declared upon a lease for years, *reddendum* 30 s. *Lady-day* and *Michaelmas*, and assigned for breach non-payment of a year's rent due and ending at *Lady-day* 1689, the defendant pleaded a release, dated the 18th day of *November* 1688, of all demands; and upon demurrer, judgment was given for the plaintiff; for the growing rent not due, which is incident to the reversion, is not discharged, though the first half-year's rent, which was a duty demandable, was released; but here the release being pleaded as a bar to all, which it is not, the plea is naught, and judgment must be given for the plaintiff.

2 Salk. 578.
pl. 1.
Stephens v.
Snow.

2. By a Release of all Actions and Suits.

A release of all actions discharges a bond to pay money on a day to come; for it is *debitum in presenti, quamvis sit solvendum in futuro*; and it is a thing merely in action, and the right of action is in him that releases, though no action will lie when the release is made.

Co. Lit. 292.

But a release of actions does not discharge a debt before the day of payment, for it is neither *debitum* nor *solvendum* at the time of the release; nor is it merely a thing in action, for it is grantable over.

Co. Lit. 292.

So, if a man has an annuity for term of years, for life or in fee, and he, before it be (a) behind, releases all actions; this shall not release the annuity, for it is not merely in action, because it may be granted over.

Co. Lit. 292.
Bulf. 178.
Cro. Eliz.
897.
Moor, 133.
(a) But such

release shall release the arrearages incurred before. 39 H. 6. 43. 2 Roll. Abr. 404.

If one releases *omnes querelas aut loquelas*; this is as large as a release of all actions, and releases all causes of action, though no action be then depending.

Co. Lit. 292.

By a release of all manner of actions, all actions as well criminal as real, personal as mixed, are released.

Co. Lit. 287.

A release of actions real is a good bar in actions mixed; as affise of *novel disseisin*, waste, *quare impedit*, (b) annuity; and so is a release of actions personal.

Co. Lit. 284.
(b) But not
after the
grantee has made his election. Jones, 215.

In an appeal of robbery or felony, a release of all actions personal will not bar, because an appeal, in which the appellee is to have judgment of death, is higher than a personal action. But a release of all manner of actions, or of all actions criminal, or of all actions mortal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, will be a good bar of any such appeal.

Co. Lit. 287.
2 Hawk.
P. C. c. 23.
f. 137.

And in an appeal of *maihem* a release of actions personal may be pleaded, because damages only are recovered.

Co. Lit. 288.

Co. Lit. 289. A release of all actions is regularly no bar of an execution, for
8 Co. 153. execution is no action, but begins when the action ends.

2 Inst. 40. Also, a release of all actions does not regularly release a writ
Yelv. 209. of error, for it is no action, but a commission to the justices to
Co. Lit. 288. examine the record; but, if therein the plaintiff may recover, or be
restored to any thing, it may be released by the name of action.

Co. Lit. 290. But a release of all actions is a good bar to a *scire facias*, though
Comb. 455. it be a judicial writ, for the defendant may plead to it, and it is
in nature of a new original given by the statute.

2 Roll. Rep. So, in replevin, a release of all actions is a good bar, for the
75. avowant is defendant, though in some respects he is plaintiff.

Latch, 110. By a release of all suits, a man is barred of a writ of error.

Co. Lit. 291. So, by a release of all suits, a man is barred of execution, be-
8 Co. 153. cause it cannot be had without application to the court, and prayer
of the party, which is his suit.

Co. Lit. If a disseisor releases to the disseisor all actions; this is no re-
28. b. lease of his right of entry, for when a man has several means to
8 Co. 151. come at his right, he may release one of them, and yet take bene-
fit of the other.

Co. Lit. 286. So, if a man by wrong takes away my goods; if I release to
Skin. 57. him all actions personal, yet by law I may take the goods out of
pl. 1. his possession.

39 E. 3. 26. If a man releases all actions, by this he shall release as well
2 Roll. Abr. actions which he has as executor, as those in his own right.
404.

2 Ld. Raym. 1307. S. C. cited by Powell, and said by him to be clearly so, unless there was an action
of his own for the release to work upon.

Co. Lit. 292. If a man releases all quarrels; a man's deed being taken most
strongly against himself, it is as beneficial as all actions, for by it
all actions real, personal, and mixed, are released.

Co. Lit. 292. So, if a man releases *omnes loquelas*, it is as large as *omnes actiones*,
and extends as well to actions in courts of record as base courts.

Co. Lit. 292. So, a release of *omnes exactiones* *, is equal to a release of all
actions.

* For *ex-actio derivatur ab exigendo*, and *exigere* signifieth to require or demand. Co. Lit. 292. 2.

(K) Release, in what Cases restrained to the special Purpose for which it was given.

Plow. 289. ON the rule of law, that every man's deed shall be taken
29 H. 6. 42. strongest against himself, and on what is laid down in (a)
(a) 8 Co. *Altham's case, generalis clausula*, &c. it hath been insisted, that
148. general words in a release are to be taken strongest against the
releasor, and are not to be qualified or restrained by any special
recital.

And. 64. But herein the sure rule and distinction seems to be, that where
Hob. 74. there are general words all alone in a deed of release, they shall
Dyer, 240. be taken most strongly against the releasor; but, where there is a
Mod. 99. particular recital in a deed, and then general words follow, the ge-
3 Mod. 277. neral words shall be qualified by the particular recital.

[2 Vers.

Indeed

Indeed in the case of *Rotherham v. Crnawley*, where, upon a reference to arbitration of some controversies relating to relief and heriot claimed by the lord of his tenant, a release was awarded, which was drawn up of *all reliefs, duties, and amercements*, and this release being pleaded to an action of debt on an obligation, it was insisted, though the word *duty* might in strictness extend to a bond debt, that yet it ought not to have this construction in the present case, it being placed between the words *relief* and *amercements*, which shewed that the parties intended duties of the same nature; but it was adjudged otherwise; and that the word *duty* working an extinguishment of the bond at law, the force of the word was not to be controuled by the intention of the party.

Cro. Ells.
370.
Owen, 71.
S. C.
Raym. 109.
S. C. cited.

But in the following cases the intention of the party has been principally regarded:

As where in debt upon an obligation the defendant pleaded a release of all errors, and all actions, suits, and writs of error whatsoever; it was adjudged, that the release extended only to writs of error, and did not release the obligation, though the word *actions*, had it stood singly, would have done it.

Hetl. 9. 15.
Abree v.
Page.

If a man receives 10*l.* of another, and by his deed acknowledges the receipt thereof, and thereof releases, acquits, and discharges him, and of all actions, suits, debts, duties, and demands; by this release nothing is discharged but the 10*l.* and the action and demands thereof, for the last words have reference to the first, and so are limited by them.

2 Roll. Abr.
409. cited
by Tanfield,
to have been
adjudged
Trin.
5 Jac. 1. in
B. R.

3 Mod. 277. Carth. 119. Show. 155. S. C. cited, and doubted of by Holt, Ch. J. who said, that no such case was to be found.

In the case of *Hen v. Hanson* it was held, that a release, made in performance of an award, did not discharge a growing rent, though the release contained general words, for this reason (*inter alia*) that it was not the intention of the parties.

Lev. 99.
Sid. 141.

So, in the case of *Morris v. Wilford*, a release of the wife's customary part, with general words, was held only to extend to the special matter recited.

2 Jon. 104.
2 Lev. 214.
2 Show. 46,
pl. 32. 3 Keb. 814. 840.

So, where the plaintiff released all demands on his own proper account; it was adjudged by the whole court that an obligation taken by the plaintiff in his own name in trust for the children of *J. S.* was not discharged thereby.

2 Lev. 272.
Stokes v.
Stokes.
Vent. 35.
S. C. by the

name of Nokes v. Stokes.

So, where in covenant to pay an heriot *post mortem J. S.* or 40*s.* at the election of the plaintiff, the death of *J. S.* was set forth, and that afterwards the plaintiff chose to have the 40*s.* for which he brought his action, and assigned the breach in the non-payment; the defendant pleaded, that the plaintiff released to him all actions and demands, &c., but this release was made in the lifetime of *J. S.*, and there was an exception in it of heriots; upon demurrer, it appearing that neither the heriot nor 40*s.* were in demand at the time of the release given, and it appearing plainly by the exception in the release not to be the intention of the parties to release the heriots, judgment was given for the plaintiff.

2 Mod. 281
2 Lev. 214
Vent. 314
Trevil v.
Ingram.

3 Mod. 277.
3 Lev. 269.
Show. 150.
Carth. 119.
Cole v.
Knight.

A. recovered against *B.* a judgment for 600*l.* and made *J. S.* and *J. D.* his executors, and died; *B.* made *C.* his executor, and devised a legacy of 5*l.* to *J. D.* and died; *J. D.* by deed acknowledged the receipt of the 5*l.* of *C.* and thereby released the said legacy, and all actions, suits, and demands which he had against *C.* as executor to *B.*, and after argument in *B. R.* it was adjudged, that nothing was released but the 5*l.*

Ld. Raym.
235. Thorpe
v. Thorpe.
(a) *Vide* the
arguments
in this case
in *B. R.* as
reported.
Salk. 171.
pl. 3.
Lutw. 245.
Ld. Raym.
664.

In *assumpsit* against the defendant for 7*l.* the plaintiff declares, that whereas he had mortgaged to the defendant certain copyhold lands redeemable upon payment of such a sum of money, the defendant in consideration that the plaintiff would release to the defendant his equity of redemption, assumed to pay to the plaintiff 7*l.* The plaintiff avers, that he did release his equity of redemption, but that the defendant has not paid the 7*l.* The defendant pleads this release in bar of the action, because, after the words *equity of redemption*, the scrivener had added, *and all actions, duties, and demands*; and on demurrer the question in (a) *C. B.* was, whether this 7*l.* was released by those general words? and adjudged that it was not.

3 Roll. Abr.
410. *Vide*
Dyer, 56.
307. 2 Roll.
Rep. 255.
Palm. 218.
2 Brownl.
300. Cro.
Ellis. 14.
2 Mod. 280.

If an obligation be dated and delivered the 23d of *January* 5 *Jac.*, and obligee make a release, which is dated 22d of *January* 5 *Jac.*, but delivered after 23d of *January*, and by this deed he releases to the obligor all actions *usque diem hujus presentis temporis*; this release shall not discharge the obligation, for *hujus presentis temporis* shall be taken the present time when the deed was dated.

3 Mod. 182.
Dixon v.
Terry.

In trespass, assault and battery, the defendant pleaded a general release of all actions, &c. from the beginning of the world *usque ad diem datis* of the said release; and it happened that the battery was done upon that very day in which the release is dated; so that it was held that this action was not discharged, for the release did not include that day, and the defendant should have traversed all, &c. after the date of the day of the release.

(L) What Right or Interest shall be said to be released; and herein, of Misrecitals and Exceptions in Releases.

Co. Lit. 274.

A Release of a bare right for a day or an hour, &c. is as good as if it was made to the other and his heirs.

Co. Lit. 274.

A release may be on condition, but a condition cannot be released on condition.

Lutw. 638.
per Treby,
Ch. Just.

But a release on condition that releasee shall pay releasor so much money, is not good; but if the release be worded in this manner, that if the releasee pay so much at a day to come, then he releases, &c. this is a good release.

3 Roll. Abr.
407.
(b) Leon.

If one man finds the goods of another, and the owner releases to him who is in possession; this vests the property in him, (b) but such release must be by deed.

If one makes a lease for ten years, remainder for twenty years, and he in the remainder releases to the first lessee, the releasee shall have thirty years for his term, for ten years shall not be drowned, because a chattel cannot be drowned in a chattel. Co. Lit. 273.

The lord paramount cannot release to the tenant *paravaile*, saving to him part of the services, but the saving in that case is void. Co. Lit. 305. b. But, if there be lord and tenant by fealty, and 20 s. rent, the lord may release all his right in the feignory, saving fealty and 10 s. rent; but the lord, upon his release to the tenant, cannot reserve a new kind of service.

A release of common in one acre is an extinguishment of the whole common. And. 235. Show. 350.

An (a) entire thing cannot be released as to part; but, if a man be bound to perform two things, the obligee may discharge the party of one of them. 3 Bull. 232. (a) What shall be said Moor, 413. an entire thing, vide Palm. 247. Owen, 21.

A release of covenants shall release the bond for performance of covenants. So, in the case of (b) *Hen v. Hanson* it was agreed, that if the rent was released, the covenant for payment of it was released likewise. Dyer, 356. (b) Lev. 99. Sid. 241.

If a man brings an appeal of *maibem*, and after releases the action, the release shall bar him to have an action of battery of the same battery. 43 Aff. 39. 2 Roll. Abr. 413.

If a rent-charge issues out of three acres of land, and he, who has the rent, releases all his right in one acre, the rent is all extinct, because all issues out of every part, and it cannot be apportioned. 2 Roll. Abr. 414.

When execution is had of twenty acres, by a release of one acre, the execution is gone, and, is a discharge of land and body. And. 266. Owen, 21. Hetl. 79.

A release of all advantages of account, is a good bar to an action of debt upon that account. 3 Co. 152.

If I release to A. all actions which J. S. has against him, the release to A. is good, and the last words shall be (c) rejected; for a deed may be qualified and abridged by latter words, but not totally destroyed. Dyer, 56. pl. 21. (c) If a release be limited as to one obligee, Lit. Rep. 191.

proviso that the other shall not take advantage of it, the proviso is void.

A release to A. and B. of all actions, is a release of all several actions which the releasor has against them, as well as all joint actions. Ld. Raym. 235.

A release excepting one bond, excepts suits and actions for that bond. Cro. Eliz. 726.

If A. recite that he had recovered judgment against B. before the justices in *Derby*, whereas in truth the judgment was had in B. R., this misrecital, it is said, will make the release void. Dyer, 50. 87. & vide Plow. 191. 395.

THE Profession have already been apprised by Mr. FEARNE, that the former collection in this *Abridgment* under the title "REMAINDER," seems to be an extract from a Manuscript Treatise, apparently of the Lord Chief Baron GILBERT, upon that subject. In the following pages of this volume they will find the whole of that Treatise, which I am enabled to lay before them, by the unsolicited kindness of Mr. HARGRAVE, who, as soon as he was informed I was engaged in the editing of this work, was pleased to communicate the Manuscript to me, with a permission to print it at length. Such a favour, so conferred, I acknowledge with gratitude and with pride: whilst it adds to the value of the Work, it does honour to the Editor. The parts of the Treatise which never before appeared in print, I have distinguished by including them between inverted commas: the other parts I have marked with a single inverted comma. The additional collections of the Compiler of the *Abridgment* are left without any distinguishing mark; and the passages for which I am responsible are, as usual, inserted between crotchets.

HENRY GWILLIM.

Remainder and Reversion.

ALL that it seems necessary to observe by way of introduction to the ensuing head, is, that after such time as the feudal property came to be extended and enlarged to a perpetual and durable estate, and that donations were frequently made to the feudary and his heirs; this gave him the absolute ownership and property in the feud, and, consequently, as absolute a power of disposing thereof to such persons, and upon such terms, as he thought fit; so that if he aliened the estate to any person for life, or years, or any like interest, as the whole benefit he intended the person should be capable of, yet he left a reversion in himself, which being alienable, he might at the same time limit it to go over to any other person after the first interest determined. And this he might likewise limit and circumscribe as he thought fit, and make a further limitation over to any third person, and so on till he gave it out in as large a manner as he himself enjoyed it. All the limitations after the first were called ‘Remainders,’ either from their being a part of what remained and was left in the donor; or, from the nature and manner of their existence, as not being to come to the person intended, till after the preceding estates spent. But, because upon such donations made, the donors either reserved particular services to themselves, or in default of such reservation the law created and raised to them certain duties and services to be done by the tenant, as a recompence and consideration for his enjoying the feud; therefore the tenant could in no case alien or dispose of the feud without a particular licence of his lord for that purpose, since this would have been a breach of that trust the law had invested him with, and might have endangered the peace and security of the lord by subjecting him to the person of his greatest enemy. And as the tenant in such case had no power to alien without his lord’s licence, so neither could he alien in such a manner as to leave his lord for any time, though never so small and inconsiderable, without a tenant to do his services, which the lord could in no sort be supposed to dispense with by his licence. For besides the danger that might possibly happen in that interval, the services being created at the same time with the feud, and coming to the lord in lieu thereof, were to be as perpetual and unalienable as the enjoyment of that was to be. And since the services to be performed were such as none who were uncertain of enjoying the feud during their lives, would either undertake or think themselves under a sufficient encouragement to perform as they ought, because, if they held the feud but for years, and should happen to survive those years,

“ they

Cowell; and
Terms of
the Law, tit.
“Remain-
der.” Co.
Lit. 49. a.
143. a. 26.
57.
Moor, 344-
Vaugh. 269.

Co. Litt.
43. a. b.
2 Inst. 65,
66. 501.

9 Co. 135.
Co. Lit. 269.
a. b.

4 Co. 57, 8.

1 W. & A.
pl. 567.

“ they would then become destitute of a provision and support for
 “ their lives, notwithstanding all their former labours and services
 “ to the lord ; and, consequently, from such tenants the lord could
 “ not expect a faithful and zealous discharge of their duties ;
 “ therefore the services were always to be performed by such as
 “ held the feud for life, at least ; and, consequently, the tenant
 “ could not by his alienation leave the lord without such a one.
 “ For this reason it was, that if a lease was made for years, re-
 “ mainder to the right heirs of J. S. there would be no tenant of
 “ the freehold to do the services. So, if a lease were made for
 “ life, or a gift in tail, to begin at a future day or time, such lease
 “ or gift were made void ; for until the commencement, the les-
 “ see or donee would have nothing, and, consequently, be under
 “ no obligation to do the services ; and the lessor or donor in the
 “ mean time having parted with their interest *pro tanto* would be re-
 “ gardless of the services. To prevent, therefore, this inconveni-
 “ ence and danger to the lord, the law adjudged such lease, gift, or
 “ remainder to be void ; and, consequently, the first tenant continued
 “ tenant still to the lord, and as such was obliged to a performance
 “ of the services. These reasons, though they now seem antiquated,
 “ may perhaps be of equal force with the reason now commonly
 “ urged from the danger of suffering the freehold to be at any
 “ time in abeyance, expectancy, or suspense, because the rights of
 “ strangers would suffer thereby for want of a person in the mean
 “ time to charge with a præcipe for recovery thereof. But yet it
 “ was not absolutely necessary, that the estate of freehold or inheri-
 “ tance should be the present and only subsisting interest : for if a
 “ lease were made for years, remainder for life, or in tail, and
 “ livery thereupon, this remainder was good ; for here was no
 “ time wherein the lord was without a tenant of the freehold,
 “ and his being obliged to all the feudal services might perhaps
 “ be one reason why so little regard was had to the interest of the
 “ lessee for years, he being no ways able to controul or impeach
 “ the acts or disposition of the freeholder.

“ Another thing observable is, that as the tenant could in no
 “ sort alien without his lord’s licence, nor could that licence be so
 “ interpreted as to deprive the lord of a tenant qualified to do his
 “ services, so, when he had, by a sufficient provision, taken care
 “ of his lord, he might then carry over the disposition to any other
 “ person as far as he pleased. For it would have been unreason-
 “ able to compel him to assign over the whole fee to any other
 “ person, when no exigencies of the tenure required it, and
 “ would also have taken away his power of providing for others,
 “ whom he might lie under equal obligations to take care of.
 “ Hence came the notion of remainders ; and the reason why they
 “ were to be limited and pass out of the grantor at the same time
 “ with the particular estate, seems to arise from the nature of the
 “ licence formerly given for alienation. For as the tenant could
 “ not alien at all without his lord’s licence, so neither could he
 “ alien for any longer time, or to any other person, than such
 “ licence warranted. Therefore, if he had a mind to dispose of
 “ the feud to several persons in succession, he was to procure a
 “ licence

licence for that purpose, and by proper limitations to let in all persons within the benefit of it at the same time, lest by death or otherwise he might be afterwards prevented from pursuing it. And these remainders are now limited of such sorts of inheritance as will not come within the rules of this reasoning. And though licences for alienation are ceased, yet it has been thought fit to observe the rules deducible therefrom in the limiting and settling of such remainders. But, before we enter into a particular division of this head, it will be necessary to observe further, that anciently the tenant being possessed of the entire property in the feud, might, upon his alienation in fee, have erected a seignory to himself, to arise out of the tenancy. And this practice was encouraged, because it multiplied feudal tenants, and brought greater force into the field. But, though these seignories were so far in the nature of reversions, that upon determination of the tenancy in fee by escheat or forfeiture, the tenancy came back again to the first tenant, and he became seised thereof in fee as he was before; and though the seignories themselves were then alienable, as the reversion now is, and carried with them the rents and services, as a grant of the reversion now does; yet, whether they might have then limited a remainder over upon a tenancy in fee, as they may now do, where the reversion would otherwise vest in themselves, is uncertain, since there was no reason of convenience to multiply such remainders, though they found it convenient to multiply such seignories. But, however it happened before the statute of *quia emptores*, yet, after that statute, no one could have disposed of the fee without a remainder upon it. For the fee in all cases by that statute was to be holden of the first feudal lord; and, consequently, the tenant, who made the alienation, had nothing further to expect in the tenancy either as a seignory, reversion, or escheat; but these now belonged to the first feudal lord, and therefore the tenant could not dispose of what belonged to another: for the reason of making that statute was, that the tenant might not erect seignories to himself to prevent the escheat to his lord: hence it plainly followed, that every remainder must depend upon a particular and less interest than the fee, and therefore was confined to three cases, *viz.* to estates for years, which is the least certain interest the law knows, to estates for life, and to estates-tail. The estates for years and for life were the ancient ones at common law, and were the terms for which people usually disposed of the feudal interest: the estate-tail came in upon the construction of the statute *de donis*, which made the inheritance to be certainly descendible. And when the statute *quia emptores* followed it so near, they then construed the fee conditional in the donee to be an estate-tail, and the ancient seignory in the donor to be a reversion. If they had not made such construction, the statute of *quia emptores* had shut out the donor, which had been to carry the matter farther than either statute intended; and therefore to preserve the force of both statutes, that which was before called a seignory, was

Co. Litt.
22, 23. a.
2 Inst. 335.

“ now

Remainder and Reversion.

“ now called a reversion, that the donor might have his own interest preserved, and yet not be said to erect an intermediate feignory between him and his lord, which the statute of *emprors* had forbidden. And all this plainly shews, that a feignory and reversion are in their own nature much the same.

“ But for the better understanding of this head, we shall consider,

(A) Of what Things a Remainder may be made.

(B) What Words are sufficient to create a Remainder.

1. Of the Propriety of the Words made use of to pass the Remainder.
2. Of the Description or Designation of the Person who is to take the Remainder.

(C) Of the several Kinds of Remainders as distinguished into Remainders vested, or in Contingency or Abeyance.

(D) Of Remainders in Abeyance or Contingency; what Estate is sufficient to support them; where they are to take Effect; and by what Means they may be destroyed or prevented from coming in effect; and therein, of Remainders by Way of executory Devise or future Interest.

(E) Of Remainders that arise on Conditions Precedent or Subsequent.

1. Of the Difference between a Condition and a Limitation, and in case of the Condition when it precedes the vesting of the Remainder as the Cause thereof, and is annexed to the first Estate, and when it is annexed to the first Estate absolutely without any Regard to the Remainder.
2. Between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.
3. Between a Limitation over in such Case of a Will, and where no Limitation is made over.
4. Between Remainders that are to arise upon Conditions agreeable to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of the Law.
5. Between such Words as actually make a Condition, and such as are only descriptive of the Manner when and how the Remainders are to arise and take place.

(F) Of

) Of Cross Remainders, or those arising by Implication and Construction of Law.

) Of vested Remainders, and of the particular Estate to support them in their Creation; how long it must continue; and when by Determination, Grant, or Refusal thereof, the Remainder is discontinued, barred, or destroyed, and when not.

1) In what Cases a Remainder or Reversion shall be subject to the Acts or Charges of the particular Tenant; and therein, of the Remedies for him in the Reversion or Remainder by Entry, Action, or Receipt.

1) To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates.

A) Of what Things a Remainder may be made.

"All that it seems necessary to observe for explaining and clearing this point will be resolved by putting a case or two, wherein it has been holden doubtful if the remainder were good.

"A man seised of lands in fee grants thereout a rent-charge to one for life or years, remainder over to another in fee or in tail, &c. It was doubted, whether this remainder were good, because this rent had no existence at all before the grant; and the grantor cannot be said to have any part of the rent left in him, as he would of land, because he first gave being to the rent, and bounded the time of its existence, which being run out, nothing thereof remains to grant over to another; and a remainder is to be granted out of that which would otherwise be a reversion in the grantor, which here this rent cannot be, being newly created. But in this case, by the better opinion of the books, and a judgment lately in point (a), such remainder of a rent newly created has been holden good. For, as the grantor might at first have granted it in fee or for ever, having such perpetual and durable interest in the fund out of which it was to arise, so he may share and divide the grant, and give part thereof to one, and part to another in succession; and the rather, because the particular estate and remainders are but as one estate, as to the grantor, being limited to pass out of him all at the same time. And as to him, it makes no difference, whether one or more take benefit jointly, or in succession one after another. But (b), if he grant such rent for life or years, without going further, he cannot after grant the reversion thereof to another, because he has no reversion in him for the reasons before given. The reason of this case will go likewise to commons, estovers, &c. newly created."

Plowd. 35.a.

1 Brook, 252. pl. 8.
254. pl. 54.
58.
2 Ro. Abr. 415. pl. 2.
26. 70. 76.
78.
(a) 1 Lev. 144.
1 Sid. 285.
2 Keb. 29.
(b) Mo. pl. 109.

4 Mod. 275. In the case of *The King v. Kemp*, it was held, that the king may
 280, grant an estate in an office to commence *in futuro*, or upon a con-
 Ld. Raym. tingency, for he hath no inheritance in the office, or the execu-
 49. tion of it, but in point of interest only to grant. And it was
 Skin. 446. said, there was a diversity between offices in fee existing, and
 pl. 4. such as were granted only for life, which being as a new thing
 See 2 Salk. 465. pl. 2. created, might, as a rent *de novo*, be granted to commence in
 Carth. 252. *futuro*.
 356.
 2 Salk. 465.
 pl. 2. Comb. 334. *Rex v. Kemp*.

Show. P. C. ' If one be created baron, viscount, earl, &c. by patent, and
 5. 21. ' after, in the same patent, the same honour be granted to another
 ' in remainder, yet this operates as a new grant, and not as a re-
 ' mainder; for the king had no reversion of that honour in him,
 ' though he had still the same power of appointing one in succession
 ' to take it, as he had of granting it to the first.

9 Co. 48. ' So, if one hath the office of park-keeper, forester, gaoler, she-
 And. pl. riff, &c. to him and his heirs, he may grant these offices to one
 201. ' for life, remainder to another for life, &c. for *omne majus continet*
 ' *in se minus*, and as they are grantable over in fee, so may
 ' they be granted in succession to one for life, with remainders
 ' over, &c.'

Lev. 220. A licence to sell wine may be granted to one for life, re-
 Bridg. Rep. mainder to another for life; because by such licence not only an
 123. authority passeth, but an interest, by way of restitution to that
 which was the subject's right before it was prohibited by
 statute.

" But before we leave this head, it may be proper to inquire
 " into the reasons and practice of limiting remainders in personal
 " goods or chattels; for these in their own nature seem incapable
 " of such a limitation, because, being things transitory and by
 " many accidents liable to be lost, destroyed, or otherwise im-
 " paired: besides, the exigencies of trade and commerce requiring
 " a frequent circulation thereof, it would put a stop to all trad-
 " ing, and occasion perpetual suits and quarrels, if such limita-
 " tions were generally tolerated and allowed. But yet in last
 " wills and testaments, such limitations over of personal goods or
 " chattels have sometimes prevailed; especially, where the first
 " devisee had only the use or occupation thereof devised to him;
 " for then it was holden, that the property continued in the ex-
 " cutors of the testator, and that the first devisee had no power
 " to alter or take it from them. But in either case, if the first
 " devisee did actually give, grant, or sell such personal goods or
 " chattels, the judges would very rarely allow of actions to be
 " brought by those in remainder for the recovery thereof. Hence
 " it came to pass, that it was a long while before the judges of the
 " common law could be prevailed with to have any regard for a
 " devise over even of a chattel real or a term for years, after an
 " estate for life limited therein, because the estate for life being
 " in the eye of the law of greater regard and consideration than
 " an estate for years, they thought, he who had it devised to him
 " for

37 H. 6.
 30. a. Dy. 7.
 pl. 8. 359.
 pl. 52.
 Cro. Car.
 347.
 Plowd. 521.
 b. 542. b.
 Br. tit. De-
 vise, pl. 13.
 5 Co. 16, 17.
 1 Ro. Abr.
 610. pl. 4.
 Godolph.
 Abr. 356.
 Swinb. 137.
 1 Bulstr.
 192.
 8 Co. 95.
 2 Benl. pl.
 57.

for life, had therein included all that the devisor had a power to dispose of. And though they have now gained that point upon the ancient common law, by establishing such remainders, and have thereby brought that branch out of the Chancery, (which court frequently helped the remainder-man by allowing bills to compel the first devisee to give security, &c.) yet it was at first introduced into the common law under a new name, and took all the sanction it has since received from thence; an account whereof, and how far it has been carried, may be seen at large in the Duke of Norfolk's case. But, as to personal goods and chattels, the common law has provided no sufficient remedy for the devisee in remainder of them, either during the life of the first devisee, or after his death; therefore the court of Chancery seem to have taken that branch to themselves, in lieu of the other which they lost, and to allow of the same remedy for such devisee in remainder of personal goods and chattels, as they before did to the devisee in remainder of chattels real or terms for years.

3 Ch. Ca. 1.

"Therefore, where a man devised 600 *l.* a-piece to two daughters, and the residue of his personal estate to his son, and if either of his children died during their minority, the survivors to be heirs to the deceased by equal portions; the son died, and the one sister brought a bill against the executors and the other sister to have her own 600 *l.* and the half of the brother's personal estate; she had a decree accordingly; but was forced to give security to pay back her own 600 *l.* in case she died during her minority; though it was said, if she died during minority leaving issue, it would be a hard case.

1 Ch. Ca. 199.

"A devise was made of the use of goods, plate, and household stuff to one for eleven years, and after to another, and held a good devise, and a decree to deliver them accordingly after the eleven years.

2 Ch. Rep. 137.
Jolly v. Wills.

"So, upon a devise of the use of certain books, jewels, and rarities, to one for life, and after of the things themselves to another; he in the remainder brought a bill in the lifetime of the first devisee to have security for their forthcoming after the death of the first devisees; and the court, being assisted by two judges, held the remainder good; but ordered them to move for the security another time."

1 Ch. Ca. 130.
Vauchell v. Lemon.

A farmer devised his stock (which consisted of corn, hay, cattle, &c.) to his wife for life, and after her death to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them: but the Master of the Rolls said, the devise over was good; but added, that if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useles, the defendant was only to answer the value of them at the time of the sale. And an account was decreed to be taken accordingly.

Abr. Eq. 3 1.
Hale v. Burrodale.
[Where the things limited over are of a perishable nature, the modern way, I believe, is of the file.]

to direct them to be sold, and to allow the tenant for life the interest of the produce

1 A. gives his sister by will 10 *l.*, and directs that such part of his personal estate, as his wife should leave of her subsistence,

1 P. Wms. 651.
Upwell v. Halfey.

should go to the sister: whatever the wife has not employed in that way, shall go over and be accounted for.

- 1 Ch. Rep. 151. "But, where a man devised debts and personal estate to one, whom he intended executrix, for life, and after her death to another; the executrix died, and he in remainder brought a bill against her executor for the said personal estate; the bill was dismissed, and the remainder holden void, the first devisee being executrix, in whom the personal estate vested and attached by a right prior to the devise, and so belonged to her executor."

3 Co. 44. *contra*. There, the devise is, to the executrix for life, remainder over, and the executory devise adjudged good.

- Salk. 231. *A.* being possessed of a term for ninety-nine years, devises it to *B.* for life, and after to six others successively, for their lives, if the said term should so long continue; and all the seven persons being dead, and the term continuing, it was adjudged, that it should revert to the executors of the testator, and that it did not vest in the survivor of the devisees so as to transmit it to his representatives.

- 1 P. Wms. 666. But a devise of a term for years, or personal chattel to one for a day or an hour, is a devise of the whole term or interest, if the limitation over is void, and it appears at the same time that the whole was intended to be disposed of from the executors.

- 2 Ch. Rep. 230. 200. "Where money, goods, or other personal chattels, are devised to one and the heirs of his body, or to one, and if he die, without heirs of his body, the remainder over, this remainder is totally void, and the courts will not allow of a bill by the remainder-man to compel security to have the money, &c. after the death of the first devisee; but it shall go to his executors or administrators. For the first devise gives the absolute property of personal estate, as a like devise of real estate before the statute *de donis* gave a fee, upon which no limitation could be made further; and as the heirs are the representatives to take a real estate, so are the executors to take a personal estate; and this is not within the statute *de donis*, but remains at common law."

- See *Stevens v. Sawney*, 1000. *Don't*. If *A.* devise that his goods and furniture shall remain in his house to be enjoyed according to the limitations of his will, by those entitled to the house, the first that would be tenant in tail of the house becomes absolute owner of the goods.

- 1 Br. P. C. 435. *Duke of Bridgewater v. Egerton*, 2 Vez. 122. 1 Br. Ch. Rep. 281. notes. *Duke of Marlborough v. Spencer*. 5 Br. P. C. 592. *Foley v. Burnell*, 1 Br. Ch. Rep. 274. *Dom. Proc.* 6. April 1785. *Vaughan v. Burdett*. 3 Br. Ch. Rep. 101.]

- 4 Ch. Rep. "But, where a devise was of money and goods to one for life, and if the devisee died without issue, then to go over to another, this was held a good devise over; for the first limitation being expressly for life, the words after could not enlarge it by implication, as they would a real estate, and then it falls within the common rule of other cases,

“ One by will devised 1300 *l.* to his daughter *A.*, to be paid at her age of 21 years, and if she died without issue before 21, then to go over to *B.*, provided if she married before 21 without consent of certain persons, then to go over to *C.* She did marry before 21 without such consent; and upon a bill brought by *B.* it was decreed, that *A.* should give security, &c. for the money, if she died before 21 without issue; and the Master of the Rolls who heard the cause said, the law was now settled accordingly. But there, the decree was so ordered as to serve both contingencies, viz. that upon her marriage before 21 without consent, the money should go to *C.*, yet so that if she died before 21 without issue, it should go to *B.* according to the devise.”

Pawlett v. Doggett, MSS. Gilb.

(B) What Words are sufficient to create a Remainder.

x. Of the Propriety of the Words made use of to pass the Remainder.

“ THE word *Remainder* is no term of art, nor is it necessary to create a remainder. For any other words, sufficient to shew the intent of the party, will create a remainder; because such estates take their denomination of remainders more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word *remainder* to make them such. Therefore, if a man gives lands to *A.* for life, and that after his death the land shall revert and descend to *B.* for life, &c. this is a good remainder, and may be pleaded as such.

Roll. Abr. 416.
1 Brook, 253.
Plow, 29.
134. 157. b.
159. 170. b.
542. a.
Dy. 125. b.
1 Roll. Rep. 319.

“ So, if lands be given to one and the heirs male of his body, and to him and the heirs female of his body, this limitation to the heirs female is a remainder; because it is not to take place till the estate to the heirs male is spent.

Co. Lit. 377. a.

“ So, if lands are given to a widow, and to the heirs of the body of her late husband on her begotten, this is a remainder to the heirs of the body of the husband; because it cannot take effect till after the widow's death, who hath an estate for life.

Co. Lit. 26.
b. 226. a.
2 Mod. 210.

“ So, an estate limited to *A.* for life, or in tail, & *post decessum ejus*, or *pro defectu talis exitus*, to *B.* and the heirs of his body, is good, though there be not the word *remainder*. So, if a lease be made to *A.* for life, and that after his death *B.* shall have the profit, this is a good remainder to *B.* “ And in the common limitations of settlements at this day, the word *remainder* is seldom used.”

Plow. 159.
Moor, pl. 54.
Dyer, 125.
Roll. Rep. 319.
Cro. Elis. 10. 742.

“ So, a lease to *A.* for life, and that after his death his children shall have it, is a good remainder.

6 Co. 17. b.
Raym. 83.

“ Nay, though an estate be limited expressly as a remainder, yet, if it be not so in construction of law, the word *remainder* will have no force to make it such. As, where *A.* was seised of lands in fee, and he and *B.* levied a fine to *C.* in fee, who granted

Cro. Elis. 727. 768.
792.
Moor, pl. 795.

Co. Lit. 299. ' and rendered to *B.* in tail, rendering rent, and if *B.* died without
 Raym. 142. ' issue, *tenementa prad. integrè remanerent* to *A.* and his heirs; *B.*
 ' suffered a common recovery; and *A.* distrained for his rent:
 ' this was adjudged a reversion, and as such the rent passed with
 ' it to *A.*, and was chargeable upon the land in whose hands so-
 ' ever it came, by virtue of a contract which cannot be destroyed
 ' by the recovery.

Cro. Elis. ' But here it may be proper to take notice of a set of words
 216. ' sometimes used in leases for years, which are so far a part of the
 Leon. 218. ' limitation and description of the first interest, that they cannot
 Co. 153. ' again be made use of to pass any further interest in the same
 Dy. 253. ' land. As, if one make a lease to *A.* for eighty years, if he so
 3 Leon. 195. ' long live, and if he happen to die within the said term, *then the*
 Swinb. 123. ' *lands for the residue of the said term, or for so many years as shall*
 God. Abr. ' *be then remaining of the said term, to go over to another*; this li-
 356. ' mitation over is void; because the time, or term, of eighty years
 2 Roll. Abr. ' was not absolute to *A.*, but was determinable upon his death,
 415. ' and by his death the whole term is at an end; as if a lease
 1 Bullstr. ' had been made to him barely for his life, and then to limit
 193. ' the residue of a term, when nothing thereof remains, is re-
 Bro. 321. ' pugnant and void. But some opinions incline, that a devise in
 Co. Lit. 45. ' such a manner would be good, by reason of the intent of the
 Plow. 198. ' party and the equivocal signification of the word *terminus*, which
 Moor, ' may, though not strictly, signify also the time or space of eighty
 pl. 441. ' years, as well as the estate or interest for eighty years determin-
 ' able as aforesaid. But now, if a lease be made to *A.* for eighty
 ' years, if he so long live, and if he die within the said term,
 ' *then the land to go over to another for the residue of the eighty years*,
 ' this is a good remainder; because, though the term or interest
 ' be determined, yet the land, and part of the years, still remain-
 ' ing, those years may be made the measure of the succeeding in-
 ' terest, as any other number of years may be.'

Mod. 195. ' *J. S.* seized of lands in fee by indenture demises them to *A.* for
 520. contr. ' life, *habendum* to the said *A.*, *B.*, *C.*, and *D.*, his three sons, for
 vide 1 Leon. ' their lives and the life of the survivor of them successively: after
 195. ' the death of *A.* it was adjudged in this case, first, that if the sons
 1 And. 259. ' could take, it must be by way of remainder, they not being par-
 ' ties to the deed, and then it must be as joint-tenants, which could
 ' not be by reason of the word *successive*. Secondly, that they could
 ' not take in succession, for the (a) uncertainty whose estate or in-
 ' terest was to commence first.

Hob. 113. ' *J. S.* seized of lands in fee by indenture demises them to *A.* for
 Hutt 87. ' life, *habendum* to the said *A.*, *B.*, *C.*, and *D.*, his three sons, for
 Windmore ' their lives and the life of the survivor of them successively: after
 v. Hobart. ' the death of *A.* it was adjudged in this case, first, that if the sons
 ' could take, it must be by way of remainder, they not being par-
 ' ties to the deed, and then it must be as joint-tenants, which could
 ' not be by reason of the word *successive*. Secondly, that they could
 ' not take in succession, for the (a) uncertainty whose estate or in-
 ' terest was to commence first.

good. Leon. 246. Godb. 220.

2. Of the Description or Designation of the Person who is to take the Remainder.

“ AS to the description or designation of the person who is to take the remainder, so far as it falls within the names of purchase allowed of by law, I shall not here enter into it, that being equally applicable to possessions as well as remainders.”

“ All

“ All that seems here proper to come under consideration is, how
 “ far a limitation in remainder to a man's own right heirs, or the
 “ heirs male or female of his own body, or to the right heirs of
 “ another person, shall be good as a remainder, and how far not.
 “ As to the limitation to a man's own right heirs, or the heirs
 “ male or female of his own body, this is void, because, say the Co. Litt. 22
 “ books, no one can make his own right heir a purchaser either of
 “ a fee-simple or a fee-tail, without departing with the whole
 “ estate. But this being a reason that carries little satisfaction or
 “ instruction with it, we must therefore seek higher, and endea-
 “ vour to fetch the reason of it from the old constitution whereon
 “ all our law seems to be founded, that is, from the nature of the
 “ feudal tenure, and the relation that was at first established be-
 “ twixt the lord and his tenant. And then clearly the reason
 “ seems to be this: when donations came to be made to the feu-
 “ dary and his heirs, or heirs male, or heirs female of his body,
 “ under certain duties and services, these words, “ heirs, &c.”
 “ being words of limitation, and appropriated to measure out the
 “ length or continuance of the estate intended to be given, and of
 “ the present tenant only, the lord could have notice how far he
 “ would be capable of performing the services, but not of the
 “ heirs, or heirs male or female, &c. who were not then *in esse*,
 “ and yet were to be liable to the same services, when they came
 “ into the tenancy: therefore the lord was to have the tuition and
 “ education of such heirs, &c. in case they happened by reason
 “ of their minority to be incapable of performing the services,
 “ that so he might by his care and discipline secure to himself
 “ tenants always capable thereof, either in their own persons, if
 “ they happened to be males, or by proper marriages with his
 “ tenants, if they proved to be females. And this was the more
 “ reasonable, because he gave the tenancy to the heirs, or heirs
 “ male, or heirs female, &c. as well as to the tenant himself; and
 “ all who came under that description were equally in his view,
 “ and within the words of his gift. But now, if the tenant might
 “ have broken through this provision of his lord, and have given
 “ the tenancy to his heirs, &c. by his own immediate gift, then
 “ all these ends of the tenure had been frustrated and defeated;
 “ for they coming to the tenancy, not by the donation of the
 “ lord, but by the disposition of the tenant, though they would
 “ have been still liable to the naked services, yet the lord had lost
 “ the advantages of wardship, marriages, &c. which were annexed
 “ only to those who came in upon the terms of his own donation
 “ by descent; and since they, as heirs, were equally included in
 “ the first donation, and upon the death of their ancestor were to
 “ come in, in virtue thereof, therefore the law construes such gift
 “ or disposition of the tenant, whether in possession or remainder, to
 “ be totally void; either for that then it came too late, the tenancy
 “ being vested in them immediately upon their ancestor's death,
 “ and therefore it was fruitless to give them what they had al-
 “ ready; or to prevent the mischiefs that might accrue to the
 “ lord by settling in such tenants, as for the present might not be
 “ capable

"capable of doing the services, and for want of a proper education under the lord, would never after be qualified for them. And this seems to be the true reason of that so often *decantatum* in our books, that a man cannot make his own right heir, or heir male, or female, a purchaser, without departing with the whole fee. And therefore when the tenants found that this would not do to defeat the lord of the wardship and marriage of their heirs, they then found out the way of making feoffments and other dispositions to their eldest son apparent by name in their lifetime, and then, though they died leaving him a minor, and not capable of the services, yet the lord lost the advantages of wardship, marriage, &c. But to meet with this devise, and others of the like kind, the statute of *Marlb. c. 6.* and other subsequent statutes were made, which have secured the lords against all the evasions of their tenants to defeat them of the advantages of their feignory."

1 Inst. 109,
110, &c.
Co. Litt. 76.
78.
6 Co. 78.
Plowd. 82.
a.

Dyer, pl. 20.
Moor, 720.

'Therefore, if a man makes a lease for life, or a gift in tail by deed, remainder to another for life or in tail, remainder to himself and his heirs, or to his own right heirs only, this remainder to himself or to his heirs is void, because the fee continued still in him, and then he cannot give himself what he had before, and he cannot give to his heirs as such what the law gives them by a prior right to vest at the same time with his disposition to them.'

Lern. 182.
Moor, 284.
And. 283.
Fenwick v.
Mittford.

So that if one levies a fine to the use of his wife for life, the remainder to the use of his eldest son, and the heirs male of his body, and for want of such issue, to the use of his own right heir, this limitation to the use of his right heir is merely void, and he hath a reversion and not a remainder in him.

Dy. 156.
Grafwold's
case.
Hob. 30.
2 Roll. Abr.
415. pl. 1.
Co. Litt.
22. b.
Bendl. 40.
2 Leon. 25.
2 Mod. 209.
2 Vent. 378.
2 Roll. Rep.
239. contra
per Co. ar-
guendo.

Co. Litt. 22.
Bendl. 49.
Hob. 30.
(a) So, if
one cove-
nants to
stand seized
to the use of
his heirs

"So, where *A.* by indenture gave lands to *B.* for life, remainder to the heirs male of the body of *A.*, remainder to his own right heirs; *A.* died, leaving two sons; the eldest had issue a daughter, and died; it was adjudged for the daughter against the uncle; either, because the estate to the heirs male was void, the fee being cast upon him by the death of the ancestor, in virtue of the first donation; or, because, admitting it to be good, then it was vested in the eldest son by purchase, being the first taker, and consequently ceased upon his dying without issue male, and then the daughter is heir of the fee-simple." 'But, if a man makes a feoffment in fee to the use of himself for life, remainder to the heirs male of his own body, this is a good estate-tail executed in himself, for the law conjoins his estate for life and the remainder to the heirs male of his body, to prevent that remainder's being lost by forfeiture or determination of the particular estate before it can vest, and the limitation is good by way of use, because it is (a) raised out of the estate of the feoffees, as if they had given it to him in such manner.

male on the body of his second wife, he takes an estate for life by implication, and so it is an estate-tail executed in himself. *Pybus v. Mittford*, Vent. 372. 2 Lev. 75. Raym. 228. Mod. 98. 182. 159. 3 Keb. 229. S. C. adjudged. [In a subsequent case, where the use was limited to the remainder himself for 99 years, remainder to the use of the trustees for 25 years, remainder to (the use of) the heirs male of his own body, remainder to his own right heirs; the court held the limitation to the

heirs male of the body to be void, because there was no preceding freehold limited to support it, and that it should not be implied *contrary to the intent* of the conveyance; that there the estate took effect by transmutation of possession out of the seisin of the trustees, and not like Fenwick (should be Pybus) and Mitford's case, where the owner covenanted to stand seised to the use of the heirs of his body. And Powell, J. held, that even in that case, if there had been an *express estate limited to the covenantor*, it had been different. *Adams v. Savage*, 2 Salk. 679. 2 Ld. Raym. 854. 6 Mod. 114. S. C. So, where *A.* by marriage settlement conveyed certain lands to the use of himself for 99 years, if he so long lived, and after to the use of trustees for 200 years, remainder to the use of *the heirs male of his own body*, remainder to his own right heirs; upon a case referred to the judges of C. B. from the court of Chancery, they held the limitation to the heirs male of the body of *A.* void, no freehold being limited to any person precedent to that estate; and that no estate of freehold could *result* to *A.* for his life by implication; because another estate, *viz.* for 99 years if, &c. was expressly limited to him, which would be inconsistent with a freehold by implication. *Rawley v. Holland*, Vin. Abr. tit. "Uses," F. pl. 11.]

‘ So, if a man makes a feoffment in fee to the use of *A.* for life, or in tail, remainder to the use of *B.* for life, or in tail, remainder to the use of himself and his heirs, or to the use of his own right heirs, yet the use being of the same nature with the land, comes back to him in the same manner as that would have done, and then having only disposed of part of the estate, the use returns, and brings with it the land for the residue of the estate undisposed of, as if it had never been out of him, and, consequently, such residue shall go to the heirs by descent, and not vest in them by purchase.’ “ And therefore a lease for 1000 years made by the feoffor was holden good against the heir, because it took effect out of the reversion, which the use brought back to the feoffor himself.”

‘ So, where one made a feoffment in fee to the use of himself for years, remainder to the use of *A.* his son and heir apparent, and the heirs male of his body begotten, remainder to the use of the right heirs of the feoffor for ever, and after *A.* died, leaving two daughters only, and then the feoffor conveyed the same lands to another of his sons in fee; it was adjudged a good conveyance, and that the daughters of the eldest son, though they were heirs at law, took nothing by purchase, for the eldest son dying without issue male in the lifetime of the feoffor, if the last remainder could have taken effect at all, it ought then to have so done, because the lease for years was not sufficient to support it till it came *in esse* afterwards, for then there would have wanted a tenant of the freehold in the mean time; and upon the death of *A.* it could not take effect, because his father was then living, and could have no heir during his life; and therefore the remainder was void, and the whole estate reverted in himself, by the resulting of the use in the same manner as if the limitation had been at common law without any use.

‘ So, where the husband was sole seised in fee, and a stranger levied a fine to the husband and wife, and the heirs of the husband, and they rendered to the consor for life of the husband, remainder to *D.* for life, remainder to the right heirs of the husband, the husband died, and then *D.* died; by the opinion of the court of wards and the three chiefs, it was held to be no remainder to the husband, but his ancient reversion, because the husband cannot limit a remainder to his right heirs where the fee was never out of him, and therefore the interest of the wife

Cro. Eliz.
321.
Dyer, 133.
Leon. 182.
2 Co. 91.
Moor, 284.
744.
Co. Litt.
22. b.

Co. 130.
2 Roll. Abr.
418. 791.
Poph. 3.
Moor, 720.
Cro. Eliz.
334.

Dyer, 237.
pl. 11. 190. a.
2 Roll. Abr.
414.
Leon. 102.

' was not gone by her joining in the grant and render, but that she should have it during her life against the heir of the husband.'

" And there a case is cited, where such fine calling it a remainder was not received: for if it were, this would be an easy evasion to defeat the lord of wardship, marriage, &c. of the heir, though his ancestor always continued seised of the ancient fee till his death, and the same by priority of right attached in his heir immediately upon his death, as included within the words of the first donation.

2 Br. 6.
Pl. 93.

" If a man had made a feoffment in fee before the statute of uses, to the use of himself for life, remainder to A. in tail, remainder to the right heirs of the feoffor, and died, and then A. died without issue, the heirs of the feoffor being within age, he should be in ward for the use coming to the feoffor in lieu of the land, for so much as was not disposed of shall be of the same nature with the land itself, and then such a remainder of lands in possession had been void, because it vested in the heir by descent in virtue of the first donation, which was the elder title. And so it shall be, where it is limited by way of use.

Dy. 172.
Pl. 12. 237.
Pl. 30.
Cro. Jac. 40.
2 Co. 92.
9 Co. 126.
332.

" But, where a man makes a feoffment in fee upon condition to re-enseff him, and the feoffee gives it to the feoffor for life, remainder to another in tail, remainder to the right heirs of the feoffor; there, in such case, his heir shall not be in ward by the common law, because, though he is in by descent, and not by purchase, as shall appear hereafter, yet, he is not in of the old reversion; for both the fee and the use of it were out of the feoffor, being made to a special intent, and therefore he takes it by descent as a remainder, for this shuts out the lord from the wardship, &c. because the intervening remainder upon the death of the feoffor is not held immediately of the lord, and so his ancestor died not seised of the fee within the tenure of the lord; as in the other case of the reversion he did; for that was held immediately of the lord, though he could not have the fruit of it till the determination of the intermediate estate. But in the other case, if the remainder-man in tail had died without issue, living the feoffor, then clearly upon his death, his heir would be in ward, because his ancestor died seised within the homage and fee of his lord. But this point of the wardship belongs to another head, and therefore no further occasion to explain it here.

Co. Litt.
22. b.
Dy. 362.
1 Co. 137.

" If one makes a feoffment in fee to the use of himself for life, or in tail, remainder to the use of the feoffee, yet the feoffee hath no reversion, but it is in nature of a remainder, although the estate of the feoffor is executed by the statute, and the feoffee is in by the common law, which concurring with the statute law shall be preferred, since that can give him no more than what he has already by the common law. And the reason why this is a remainder seems to be, because the estate first moving from the feoffor, the use immediately resulted back to him in fee, and then, when he limits that use to himself for life or in

tail only, with remainder to the use of the feoffee, though this cannot give him what he has already, yet it may well serve to declare in what manner he shall have it; and the use being limited in remainder, so shall be the estate, which takes it supported under such limitations.

“ One makes a lease for years, rendering rent, and after by will devises a further term to the lessee rendering the same rent, and devises over the inheritance to a stranger. The question was, if this should pass to the stranger as a remainder, or a reversion; because the term and inheritance being both devised by will, which could not take effect till the devisor's death, he could have no remainder of that new term, and consequently could not devise such reversion to another. But yet by the better opinion, this should be a reversion, because the rent would not be incident to it as a remainder; and in wills, the intent of the party is principally to be regarded. *Sed quæ* because the rent may well go to the executors of the testator.

“ A copyholder surrenders to the use of *A.* for life, and after to the use of the right heirs of the copyholder; and at another time he surrenders the said reversion to the use of *B.* in fee, and dies; and then *A.* dies; and the heir of the copyholder enters. And by *Coke*, he may; for the land remains in the lord till his death, and then his heirs shall be in by purchase, and not by descent; and if so, he had nothing in him to make a surrender of. And he said, the difference was between this case and where the surrender is, to the use of himself for life, remainder to another in tail, &c., remainder to his own right heirs, there, his heirs shall have it by descent. *Sed quæ* of this case (*a*), for it appears by the books,” “ that if a copyholder surrenders to the use of his last will, and devises to *A.* for life, remainder to *B.* in tail, or surrenders to the use of himself for life, remainder to the use of *A.* for life, remainder to the use of his will, in these cases the reversion is so in the copyholder, that he may in his life surrender to the use of any other; so that all who come in upon such surrenders are in by the copyholder, not by the lord, for that nothing remains in the lord, but so much as is not disposed of remains in the copyholder as strongly as if it had been limited to him.” “ And that in these cases the heir may enter before or without admittance; and it is likened to a feoffment in fee to the use of his last will, notwithstanding which he may dispose thereof in his lifetime: And it is also agreed, that a surrender to the use of the right heirs of *J. S.* who is then living is void, or to an infant *en ventre sa mere*, or to the use of one after his death, because the freehold cannot expect. And yet in these cases, if the estate might continue in the lord in the mean time, they might be good; and *Coke* agrees in the principal case, that if the ancestor had taken an estate for life, his heirs should have it by descent, and not by purchase; therefore it seems to be the same where the law gives him an estate for life, as in this case it does, till the future use comes

2 Leon. 33.
Machell v.
Danton.

1 Leon. 102.
Allen v.
Palmer.
Supplem. to
Co. Copyh.
3.
Cro. Jac.
376.
Cro. Eliz.
148. 441.
Leon. 102.
4 Co. 23.
[(a) This
distinction
taken by
Coke is
questioned
by our au-
thor in his
Law of
Tenures
(pag. 172.)
and also by
Mr. Fearce,
(Contingent
Remaind.
86. 4th ed.)
It has in-
deed been
recognized
in the case
of *Roe v.*
Quartley,
1 Term Rep.
634.; but,
as it is now
settled, that
the surren-
deror of a
copyhold
taking the
ultimate li-
mitation is
in of his old
estate, (see
Roe v. Gris-

“ in

5th, 4 Burr. 295c. Smith v. Trigg, 1 Str. 437. Thruftout v. Cunningham, 2 Bl. Rep. 1046.; it should seem, that the above case of Allen v. Paine, (notwithstanding its recognition in that of Roe v. Quartley) not now law. See Watkins's G. Trin. 456. Co. Copyh. 97. Suppl. 3. 13. 15. 75. Cro. Ja. 376.]

Hob. 30. 10 Co. 41. Vent. 372. ' If a man seised of lands in fee by his will in writing deviseth them to one for life or in tail, remainder to his own right heirs, this is void as a remainder, and the heir shall be in of the estate by reversion by descent, because immediately upon the death of the ancestor the estate descends to the right heir, and so preventeth him from taking by the disposition of the will.'

Salk. 241. pl. 2. Com. 72. pl. 45. Clark v. Smith, & vide title Descent. So, if a man devises land to his heir at law, paying a sum of money or an annual rent, yet the heir, notwithstanding such incumbrance or charge, takes by descent, and not by purchase.

Salk. 242. pl. 3. 2 Ld. Raym. 829. Com. 123. pl. 86. Redding v. Royston. But, where the estate devised is altered in quantity or quality there, the devisee, though heir at law, takes by purchase; as where A. seised in fee of lands, hath issue B. and C, his daughter B. hath issue D. and dies; A. devises his lands to D. in fee; D. dies without issue; his heir of the part of his father shall take the whole by purchase, and not any part by descent.

4 Mod. 380. Carth. 272. Ld. Raym. 33. Tipping v. Coffins; et vide Preced. Chan. 435. S. C. cited. A., in consideration of a marriage intended between him and B. and of a marriage portion, made a feoffment in fee to the use of himself and his heirs till the marriage, and after to B. for life, then to trustees and their heirs during the life of A., to support contingent remainders, then to the first, second, and other sons of his body in tail male, then to the heirs male he should have by any other wife, and for want of such issue to the heirs of the body of A., with remainder to his own right heirs; the marriage took effect, and they have issue only a daughter; then A. levies a fine to the use of himself for life, remainder to his wife for life, remainder to C. in fee with warranty; and the question was, What estate was vested in A. by the first deed, viz. Whether the heirs of the body should take by purchase or descent? For if by purchase, then the fine levied afterwards was no bar to them. And the court was of opinion, that they must take by purchase, because where the ancestor has no estate for life, as in this case he has not, they cannot be words of limitation; and here the estate is expressly limited to trustees and their heirs during his life; and though a man cannot make his own right heirs purchasers by the name of heirs, either in a conveyance by way of use, or by his last will, yet he may make them so of an estate-tail, which is a newly created estate, different from what the law makes.

Eq. Rep. 20. Preced. Chan. 338. Eure v. Howard. A settlement was made by A. to the use of himself for fifty-nine years, if he should so long live, remainder to trustees and their heirs during his life to support contingent remainders, remainder to B. his son for ninety-nine years, if he should so long live, remainder to trustees and their heirs during his life to support contingent

ent remainders, remainder to the first and other sons of *B.* in male successively, with other remainders over, remainder to right heirs of *A.* Then *A.* by will devises all his lands in reversion, reversion, or remainder to trustees and their heirs, in fee, by sale or mortgage to raise money for payment of his debts and legacies: and if this limitation to his own right heirs vested in reversion in fee in himself, so as to be subject to his disposition, if the heirs were to take by purchase, was the question; all the intermediate remainders being determined. And it was argued on the reason of the above case of *Tipping* and *Coffins*, that the heirs must take by purchase, because he had only an estate for life, and the freehold during his life was expressly limited to trustees and their heirs, and therefore against his own express limitation he should have no resulting use or estate for life. But on the other side it was argued, that the reason of the resulting estate for life was, because it might possibly happen that all the intermediate estates might determine before the death of *A.*, as by his and trustees joining in a feoffment, &c., which would be a forfeiture of their estates, &c., and therefore of necessity he must have a resulting use for his life: And my Lord Chancellor was of this opinion, and said it was his old reversion in him, and payable by will. But note, this was a remainder limited to his right heirs.

It appears by what has been already said, "That wherever an ancestor takes an estate for life, and after in the same conveyance a remainder is limited mediately or immediately to his right heirs, or to the heirs male or heirs female of his body, that in such case the right heirs or heirs male or female, &c. shall not be purchasers, but shall take by descent.

Co. 93.
Shelly's
case.
Moor, 136.
And. 69.
and the S. P.
cited in
numberless cases.

Therefore if a lease be made to *A.* for life, remainder to the heirs male or heirs female of his body, or to his right heirs, in his case the remainder is executed presently in *A.*, and he is seized in fee or in tail, according to the respective limitation.

2 Roll. Abr.
417.
Roll. Rep.
317.
Raym. 163.
Lit. 66.
578.
Co. 104.
2 Roll. Abr.
415.

So, if one make a lease to *A.* for life, or a feoffment in fee to the use of *A.* for life, remainder to *B.* for life or in tail, remainder to the right heirs of *A.*, or to the heirs male or female of the body of *A.*, in this case the heirs or heirs male or female of *A.* shall not be purchasers, but shall take the remainder by descent from *A.*, for it was so executed as a remainder in *A.* that he might give or forfeit it as such in his lifetime.

And the reason of these cases seems to be, either the prejudice that might ensue to the lord, or to the donor, by the loss of wardship, marriage, &c. if such heirs should be purchasers, because they then claiming nothing from their ancestor by hereditary succession, would not be liable to the terms and conditions annexed to the hereditary succession only, and then every one would make his heirs purchasers; or from the prejudice that might happen to the heirs themselves, by the loss of such remainder, if the ancestor should do any thing to forfeit or determine his estate for life after the determination of the intermediate

[2 Burr.
1106.]

"diate

" diate estate; for they not being capable of taking such remainder when the preceding estates ended, they could never lay claim to it; and so an unwary ancestor might defeat his of the purchase; or lastly, from the conformity and parity of reason these bear to a limitation to *A.* and his heirs, or the male or female of his body; for, as this gives an estate for by implication and more; so the other gives him the same express words and more, *et expressio eorum quæ tacite insunt operatur.* And though there be the interposition of another estate between them, that only breaks the order of the limitation, not the operation of the words, which being the same in both cases, ought to have in both cases the same operation of construction. But, if a lease be made to *A.*, or a feoffment of the use of *A.* for years, remainder to or to the use of *B.* for years, or in tail, remainder to or to the use of the right heirs, or the male or female of the body of *A.*, these remainders are perfectly contingent and uncertain whether they shall ever take place or not; for if the remainder determine living *A.*, they are become void, because *non est heres viventis*, and they cannot take during the life of *A.*, and then these would be a tenant of the freehold, and a tenant to do the services to the lord in the mean time, which the law will not suffer. So, for the same reason, if a lease be made, or a feoffment in fee of the use of *A.* for years, remainder to the use of *J. S.* when then living, or to the wife whom *J. S.* shall marry, these are likewise void. It is no objection in the case of the wife, that she cannot do the services in her own person, for her husband would be obliged to do them for her, and, as a recompence, she would be tenant by the curtesy after her death."

Cro. Eliz.
 355.
 Pethouse v.
 Crane.

" Tenant for life, remainder in tail, remainder to the right heirs of tenant for life; the tenant for life acknowledges a title and dies, he in remainder dies without issue; and the question was, If the right heir of the tenant for life should be charged by this statute, and the lands in his hand liable thereto? and adjudged that they should, for that they came to him by descent from the tenant for life, who had them as a remainder vested in him, and might either grant or charge it."

Ld. Raym.
 326.
 Saik. 254.
 pl. 4.
 Lutw. 719.
 Bates v.
 Bates.

In dower it was found by special verdict, that the husband the demandant was seised of the lands, &c. for his life, remainder to *A.* and *B.* trustees for ninety-nine years, remainder to the heirs of the body of the husband; and the question was, Whether there was such an estate-tail executed in the husband, whereof his wife should be endowed? and adjudged that it was, and that the intervening estate to the trustees being only for years ought not to be regarded.

2 Roll. Abr.
 416.
 [See this
 doctrine
 controverted
 by Mr.

" If a feoffment be made to the use of *A.* and *B.* during their joint lives, and after the death of either of them, to the use of *C.* for life, and after to the use of the heirs or heirs of the body of *B.*, this remainder is not vested in *B.* presently, but is in abeyance or contingency to vest or not to vest as the case shall happen.

appen. For, if *A.* and *C.* die in the lifetime of *B.*, the remainder is void, *quia non est heres viventis*; and both their estates are determined, and yet the remainder cannot take effect. But, if *B.* dies before *A.*, then his heirs, or heirs of his body, shall have it by descent, as a remainder vested in *B.*, for that upon his death before *A.* the whole estate for life is gone, as if it had been limited to *B.* only for life; and if it had been so limited, his heirs or heirs of his body should not have taken by purchase, for the reasons before mentioned.

Having considered the relation of ancestor and heir, let us now consider the relation of testator and his executors, or intestate and his administrators, upon remainders limited to them for years: as for example, if a lease be made to *A.* for life, or for 99 years, if he so long live, and after his death, or after the determination of that estate, remainder to his executors for 20, &c. years, this term vests in the testator himself, and he may give, grant, forfeit, or dispose thereof, as if it had been expressly limited to himself; and if he dies intestate without disposing thereof, it shall go to his administrators; for the testator and executors, or intestate and administrators are correlatives as to chattels, as the ancestor and heir are for inheritances; and as heirs are properly made use of for lengthening out the inheritance to the same person, so are executors for lengthening out chattels to the same person; and as heirs cannot take in the ancestor's life, so executors cannot take in the testator's life, because neither the one nor the other can be known till their death; and therefore as a remainder to the heirs vests in the ancestor himself, where he hath an estate for life therein; so does a remainder to the executors vest in the testator himself where he had before any interest limited to him. But, as heirs may be in some cases a word of purchase, so may executors be so. Therefore if one make a lease to *A.* for 99 years, if he so long live, and if he die within the term, or during the term, then to his executors or assigns for 40 years, in this case, his executors or assigns take by purchase upon the contingency of his dying within or during the term; for, if he survives it, they shall not take at all. And though in this case the term be expressly made determinable upon his death, and therefore he cannot properly be said to die within the term, or during the term, since that dies with him, and his death is the determination of it; yet, it being at first granted for 99 years, if he so long live, his not living so long may well be made the condition of the vesting of a remainder to another; and it being uncertain, whether he will live so long or not, so is the vesting of the remainder uncertain; and by consequence, it cannot vest in the testator himself, since he must be dead before it can be known, whether it will vest at all; and then the executors or administrators, if they shall be construed within the word assigns, being the first takers, shall have it by purchase. Another reason for their taking by purchase in this case may be, that the owner intended not to part with the land any longer, if the first lessee outlived the

Fearne in his
C.R. 32, 33.
4th edit.]

1 Roll. Abr.
911. (3)
2 Roll. Abr.
448. Co.
Litt. 44. b.
319. b.
1 Co. 134.
Br. Abr. 37.
p. 17. Cro.
Eliz. 658.
666. 840.
Moor,
pl. 911.
Yelv. 9. 85.
Spark v.
Spark,
2 Roll. Abr.
47. pl. 6.
Moor,
pl. 244. 459.
4 Leon. 239.
Noy, 32.
Owen, 125.

" 99 years;

“ 99 years; but, if he died sooner, then he was willing to grant it out for a longer time, and therefore likewise the remainder was contingent.

2 Leon. 7.
Dy. 309. b.

“ If one make a lease for life to A., remainder to his own executors for years, this remainder is good, and the executors may take it by purchase; for a man cannot limit such an estate to himself, and therefore the term shall be in abeyance till his death. And this was construed to be a contingent remainder in the executors, because it cannot be to the party himself, for two reasons: 1st, Because he cannot be grantor and grantee to himself; and therefore where there are not proper parties, the one to convey, the other to take a right, the grant were itself a nullity, and would be of no significance, if it were construed a contingent limitation to the executors. 2dly, Because having the old reversion, this term, if raised to the party himself, would be merged, and therefore that the party's intentions may take place, it was construed a contingent limitation to the executors.

Cro. Eliz.
666. Moor,
pl. 244.
Dy. 309. in
marg. 314.
1 Leon. 346.
2 Leon. 5.
3 Leon. 20.

“ And here the difference is between where a stranger limits an estate for life, the remainder to the executors of the tenant for life, for there the term for years in remainder is vested in the tenant for life, because the word executors is no more than a prolongation of his interest; and where a man limits an estate to himself for life, the remainder for years to his own executors, there, since it cannot, for the reasons before mentioned, admit of that construction, therefore it is a contingent term in the executors, who take it by purchase. But, where such a limitation is expressly mentioned to be for the performance of the will, they do not take *jure proprio*, but as assets to fulfil the intention of the testator.

Moor, pl.
459 1024.

“ One levied a fine to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his executors for 20 years, or to them, without any remainder to his wife; and after he levies a fine, or makes a feoffment to other uses; and then by his will makes three executors, and dies. The term to the executors shall never arise: for whether the term were in abeyance, as the books say it was, so that he himself could not grant, forfeit, or release it; or, whether it is vested in the testator himself, yet by such fine or feoffment, it is confounded and gone; because if it be an interest vested, it passeth by the feoffment; if it be not vested, the feoffment destroys the particular estate, and then the contingent remainder sinks of course.

Yelv. 85.

“ If a lease be made to A. for life, and after his death to the executors or assigns of B., this is no interest in B., but only a mere power in him to name executors or assigns who shall take the term.

3 Leon. 196.

“ But, if one make a feoffment in fee to the use of himself for life, and after his death to the use of his executors for 20 years, remainder over; this limitation is absolutely void, and the other remainders shall vest presently, for the reason of the interval between the death of the feoffor, and the

“ this

making out letters of administration, before which time there is no person to take it; and there can be no occupancy of it in the mean time, for the law will not create new estates to supply the intention of the parties."

Of the several Kinds of Remainders, as distinguished into Remainders vested, or in Contingency and Abeyance.

If an estate be limited, either at common law, or by way of lease, to one for life, or in tail, remainder to the right heirs of J. S. who is then dead, this is a good remainder, and vests presently in the person who is heir at law to J. S. by purchase; and though a daughter be then heir at law, and after a son be born, yet shall the daughter retain the land against him; for she being heir, and coming within the description at the time when the remainder was limited, it then vested and settled in her immediately as a remainder by purchase, and shall not by any accident after be defeated.

So, if the land be of the nature of gavelkind, yet the eldest son only as heir shall take it, and not all the sons; for the custom extends only to descent of inheritances, and not to purchases, and is to be taken strictly."

But, if J. S. be living at the time of the remainder limited to his right heirs, this puts such remainder in abeyance or contingency, that is, in no person, but *in nubibus*, till the contingency happens. For in the feoffor or donor it is not, because he has limited it out of him, and all remainders must pass out of him at the time of the limitation, though they do not presently vest in the person intended; and in the right heirs of J. S. it cannot vest, because he cannot have heirs during his life; so there is no person *in rerum natura* within the description, to take it; therefore it is in the mean time in abeyance or expectancy, to vest or not vest, as the case happens: for if J. S. dies during the particular estate, then the remainder presently takes place in his heirs; but, if the particular estate determines by death or otherwise in the life of J. S., then such remainder is become totally void, and can never vest, but the estate settles again in the feoffor or donor, as if no such limitation in remainder had been; and he becomes tenant to the *precipe*, and is obliged to do the services; and though J. S. die soon after, yet his heir can have no benefit by it, not being capable of taking the remainder when it is made.

But here it may be objected, that then these remainders ought to be forfeit to the lord; as well as where his tenant dies without heirs; for they actually passed out of the feoffor: and though they cannot vest in the person intended, yet it is not reasonable they should return to the feoffor against his own grant, and when he has by his own act parted with and given them away; and the lord ought rather to have them by escheat. In answer

2 Roll. Abr.
415.
Co. 95. 103.
Plow. 56.

Hob. 31.
1 Co. 103.
Dav. 31.
1 Br. Abr.
254. pl. 42.

Co. 135.
Co. Litt.
378. a.
2 Co. 52.
2 Roll. Abr.
415.
Plow. 28.
556.
Poph. 74.
Moor, 720.
3 Co. 20.
10 Co. 50.
Raym. 145.
Pollex. 56.

“ to this objection, it is to be observed, that the reason of the cheat is the death of the tenant without heirs: so are the words of the writ—*Præcipe A. quod reddat B. decem acras terre pertinentiis, &c. quas C. tenuit et quæ ad ipsum B. reverti debent, tanquam escheata sua eo quod prædictus C. obiit sine herede.* But *J. S.* neither died without heir, nor, if he had, was he ever tenant to the lord: for nothing vested either in him or his heirs, and therefore the lord can have no escheat as from them; and as to the feoffor, he or his heirs are still *in esse*; and since the grantor could not take the remainder, and no other person has right to claim it, it must return back again, and settle in the feoffor, as if no disposition thereof had been made.”

Co. Litt. 3.
Co. 66.
2 Co. 51.
Hob. 33.
Moor, 104.
Dyer, 337.
2 Leon. 218.
Roll. Rep.
254.

“ But, if there be no such person as *J. S.* at the time of the limitation, though he be after born, and die during the particular estate; yet his heirs shall never have the remainder. So, if a remainder be limited to *A.*, son of *B.* in tail, &c. or to *E.*, wife of *D.*, where in truth there is no such *A.* or *E.*, though *B.* has a son after called *A.*, or *D.* marries one *E.*, yet they can never take the remainder; because if there be such persons as the words of the gift import, there, the remainder ought to vest in them presently, and they will never after be made capable of taking it; but, if there be no such persons then *in esse*, none who come within that description after can lay claim to it, because the limitation was present to such persons. But a remainder limited *primogenito filio*, or *proximo heredi masculino* of *A.*, or *proximioribus hæredibus de sanguine puerorum*, or *seniori puero* of *A.* or to the right heirs of *A.*, there being then such *A.* *in esse*, or to the wife that *A.* shall marry; these are good remainders, and shall vest when such persons come *in esse* as are within the description; because here appears no present regard for any person in particular, and therefore if they answer the description at any time before the particular estate determines, it is time enough; and so there is a diversity between a remainder limited to one by name in particular, and such remainder limited by description, or circumlocution, or between a general name and a special name.”

1 Br. Abr.
234. b. pl. 5.
Hob. 33.

“ Lands devisable by custom, were devised to *A.* for life, remainder to *B.* in tail, remainder to the next heir male of the body of the devisor, and to the heirs male of his body; the devisor dies; *A.* enters; *B.* dies without issue; and after *A.* dies; and then one *C.* as heir of the devisor, viz. daughter of *D.*, son of the devisor, enters and aliens in fee, and after hath issue *E.*, who, as heir male of the body of the devisor enters upon the alienor who brings trespass. *Optima opinio*, that as the first who entered as heir to the fee-simple was a female, and there was no heir male of the devisor to take when the remainder fell, he who is born after shall not have it.”

20 Co. 85.

“ *A.* makes a lease to *B.* for life, and after the death of *A.* to remain to *B.* and his heirs; this remainder is contingent, and cannot vest presently, for if *A.* survives *B.* it is void; because otherwise the operation of livery would be interrupted during the

the life of *A.*, for he cannot give himself any estate, his livery operating to pass estates from him, not to give any to him who had the whole before; and therefore during his life the operation of the livery must cease, and by consequence no remainder can take effect in virtue of that livery, which *pro tempore* being at an end, all that depended thereon ceases too, and can never after be revived; for the livery must carry out all the estates at once from the feoffor, and if he comes again into the possession before, they can all take effect, this breaks the force of the livery, and brings back again to him all that such livery had taken out from him, and then they can never take effect but by a new livery. And this is the reason of the common case, that one cannot give lands to another to begin after his death, because being to make livery presently, if that cannot operate presently, it can never operate at all; for it is a contradiction to give lands to one by a solemn livery, which is an act executed and works presently, and yet by words to restrain that operation to a future time. But in the principal case, where *A.* dies first, there, no interruption is of the livery, for *B.* had an estate for life by virtue thereof; and before that determines, the same livery, which carried the remainder in abeyance, for the uncertainty of its taking effect, does upon *A.*'s death direct and settle, or bring down the remainder to *B.* and his heirs.

"If a lease be made to *A.* for life, remainder to the right heirs of *J. S.* and *J. N.*, and after *J. S.* dies, and then tenant for life dies in the life of *J. N.*, the remainder for a moiety vests in the right heirs of *J. S.*, and upon the death of *J. N.* his heirs shall take nothing, because not *in esse* to take when the remainder fell; and the right heirs of *J. S.* cannot take the whole, because that was limited to them and others jointly. 1 Br. Abr. 253. pl. 21.

"If brother and sister are, and lands are let for term of life, remainder to the right heirs of the brother, and after the brother dies, and then tenant for life dies, and the sister enters, she shall retain the land against a son or daughter of the brother born after, because this vested in her by purchase. Ibid.

"If a lease be made to *A.*, *B.*, and *C.* for their lives, and if *B.* survives *C.*, then to remain to *B.* and his heirs, this remainder is in abeyance, because, though the person be certain, yet since it depends on *C.*'s dying before him, till that be known, the remainder cannot vest. So, if a lease be made to *A.* for life, and after the death of *B.*, who is a stranger, to remain to *C.* in fee, or to *A.* in fee, these remainders are in abeyance or contingency, and depend on *B.*'s dying before *C.* or *A.*, for if he survives them, the remainder cannot take effect. 3 Co. 20. 10 Co. 85. Co. Lit. 378.

"If a lease be made to *A.* for life, remainder to the abbot of *D.* and his successors, though the abbot be then dead, so as there is then no abbot at all, yet the remainder shall be good, if an abbot be made before the death of *A.* So of a remainder to a mayor and commonalty, dean and chapter, prior and convent, &c., though there be then no mayor, or dean, or prior. So of a remainder to the bishop of *D.*, parson of *D.*, or other sole Co. Lit. 264. Hob. 33. 2 Co. 51. 10 Co. 31. Moor. 104. Roll. Rep. 256. 2 Bulf. 275.

‘ corporation, and his successors; for these remainders not being
 ‘ limited to them by name specially, but to them generally, and to
 ‘ whoever comes within the description before the determination
 ‘ of the particular estate, is capable of taking by virtue thereof, are
 ‘ good remainders in abeyance, &c. But if there be no such cor-
 ‘ porations at the time of the limitation, then the remainders
 ‘ are totally void; and none created after, though by the same
 ‘ name, can take these remainders, though a patent be then passing
 ‘ to make such corporation.’

Challoner
 v. Bower,
 2 Leon. 70.

“ A. having issue two sons and two daughters, devises his lands
 “ to his younger son in tail, and for want of such issue to the
 “ heirs of the body of his eldest son, and if he die without issue,
 “ then to his two daughters in fee, and dies: the younger son
 “ dies without issue, living the eldest, who has issue; and if this
 “ issue should take the remainder, his father being alive, was the
 “ question? It was urged, that though in case of a grant he could
 “ not, yet being here in case of a will, the intent of the deviser
 “ should prevail to carry it to him. But the court was strongly
 “ against it, and held no difference as to this between a grant and
 “ a devise, and would suffer no witnesses to be heard to prove the
 “ testator’s intent, but gave judgment for the daughters.

Hob. 74.
 Barn’s case.
 2 Vent. 374.

“ If one covenant, upon proper considerations, to stand seised to
 “ the use of A. for life, remainder to the right heirs of B., in this
 “ case the remainder is not drawn out of the covenantor, and put
 “ in abeyance till the death of B., but there is a reversion left in
 “ the covenantor, out of which the remainder, when it happens,
 “ shall be drawn. And this differs from the remainders before
 “ mentioned, which arise out of the estate executed either at
 “ common law, or upon a feoffment to uses, as will appear here-
 “ after.”

Mow. 23.
 Rayn. 144.

‘ If a man make a lease to A. for life, and that after the death
 ‘ of A., and one day after, the land shall remain to B. for life, &c.
 ‘ this is a void remainder, because not to take effect immediately
 ‘ upon the determination of the first estate, and so during that
 ‘ time there would be an interruption of the livery, and no tenant
 ‘ of the freehold, either to do the services, or answer to strangers’
 ‘ precipes.

2 Leon. 7.

‘ A lease is made to A. for life, remainder to the right heirs of
 ‘ B., and after B. purchases the estate of A., yet the fee is not
 ‘ executed in B., but the remainder to his right heirs continues
 ‘ distinct; for if A. dies first, the remainder will be void; and if
 ‘ B. dies first, yet there will be an occupancy during the life of
 ‘ A., and the remainder immediately upon B.’s death vests as a
 ‘ remainder in his right heirs.

Co. Lit. 24,
 25. 164. a.
 Hob. 31.
 Co. 102.
 Dyer, 374.
 2 Roll. Abr.
 476.
 2 Br. Abr.
 295. pl. 5.

‘ If a lease be made to A. for life or in tail, remainder to the
 ‘ heirs male of the body of B., if B. hath issue two sons, and the
 ‘ eldest dies leaving a daughter, and then B. dies, living A., yet
 ‘ the youngest son shall not take this remainder; for he who takes
 ‘ by purchase and original vesting, must answer the description ex-
 ‘ actly, which here the youngest son does not, for he ought to be
 ‘ heir as well as male, and this he is not, for the daughter of the
 ‘ eldest

eldest son is heir, and she cannot take because she wants part of the description too, not being male, and therefore neither of them can take, but the remainder shall be void. So, if such lease or gift in tail be made to *A.*, remainder to the heirs female of the body of *B.*, and he have issue a son and a daughter, and die, living *A.*, yet the remainder shall be void for the reason before-mentioned. Otherwise it is, if a gift be made to one and the heirs male or heirs female of his body, &c., for there, *per formam doni* they shall take by descent though another be heir, for there, the whole estate-tail is in the ancestor, but in the other cases the ancestor takes nothing.

“ If a lease for life, or a gift in tail be made to *A.*, remainder to the right heirs, or heirs male, or heirs female of the body of *J. S.*, who is then or after attainted of treason or felony, and is executed or dies, and then after *A.* die; yet this remainder is become void, and can never take effect; because none can be heir to a person attainted, nor can he have heirs male or heirs female of his body to take by purchase. But, upon a gift to a man and the heirs male or female of his body, if he were attainted before the statute of 26 *H. 8.* and at this day, if he be attainted of felony, such heirs shall take by descent *per formam doni*, upon construction of the statute *de donis*, *W. 2.* But, if a remainder be given by act of parliament to the right heirs of *J. S.*, who is attainted of treason or felony, this remainder is good, because the act takes off the disability, and restores the capacity as to such remainder; especially, if the attainer be taken notice of in the act; for then it is in nature of a restitution, and *parliamentum omnia potest*; and though a person attainted can have no heir, yet by such description it is sufficiently known who is meant by it, and then the act super-venes with its absolute power to enable him to take.

“ Three brothers are—the second settles his estate to several persons in tail successively, remainder to his own right heirs: the eldest brother is attainted of treason and executed, leaving several children: the second brother dies without issue: all the estates-tail determine; and the youngest brother being dead, his issue claimed the reversion as heirs to the second brother, and the defendant claimed by escheat, and had a verdict in ejectment. For though the blood of the elder brother be corrupted, so that his issue cannot take; yet, they, being heirs at law, stand in the way of the youngest brother, so that he or his issue cannot take, and therefore the land must escheat. But this more properly belongs to another head, and therefore I shall here consider it no further.

“ If one makes a lease for years either at common law or by way of use, remainder to the right heirs of *J. S.*, who is then living, or to the wife whom *J. S.* shall marry; these remainders are void; because, till the death or marriage of *J. S.*, there is no person to take the freehold, and that cannot be in abeyance, as has been proved already. But it is said, if such limitation were by way of use before 27 *H. 8.* it would have been good; because

254. pl. 62.
2 Br. 94. b.
pl. 1. 95.
pl. 40.

Br. Abr.
253. pl. 42.
254. pl. 61.
2 Br. Abr.
94. b. pl. 1.
95. pl. 40.
1 Co. 103.
Hob. 31, 32.

1 Lev. 75.
St. Tr. 53.
1 Keb. 349.
615. 745.
Wheatley v. Thomas.

3 Keb. 351.
Collman v. Barton,
Cro. Car.
435.
Hob. 314.
Co. Lit. 8. a.

1 Co. 130.
1 Co. 10. a.
Sir T. Raym.
83.
Poph. 42a.
Co. Lit.
217. a.
Dav. 34.
4 Leon. 21.

4 Mod. 256.
1 Co. 135.
Godb. 319.
contra

" because the estate in law continued in the feoffee, and they
" were tenants to the lord, and all precipes were to be brought
" against them. And though one book seem *contra*, yet the rea-
" son there given is only, that the remainder ought to be limited
" to one *in esse*, which seems to carry very little weight in it
" when no reason of necessity or convenience requires it; and
" therefore the other opinion seems to be law."

Moor, 488.
pl. 686.
3 Co. 20.
Raym. 144.

" So, if one makes a lease to *A.* for twenty-one years, if he or
" if *B.* shall so long live, and after the death of *B.*, or after the
" death of *A.*, to the first son of the body of *B.* in tail, and so to
" the second, &c. in tail, remainder to *C.* in fee; all these re-
" mainders are void, because the first estate being but for years;
" and the remainder not to take effect immediately after whole
" years, but at a future time, after the death of *A.* or *B.*, which
" may be long after, and so during that time there would be an
" interruption of the livery, and no tenant of the freehold, there-
" fore these remainders are void; and though it happen that *A.*
" or *B.* die within the term, yet till their death the freehold would
" be carried into abeyance, and could not vest in those in remain-
" der for the uncertainty of the death of *A.* or *B.* within the term;
" and therefore the happening of that after, cannot save the re-
" mainder which was void before. But, if such lease had been
" made, and then it had been limited, after the determination
" of that estate, or after the expiration of the said term, to *C.* for
" life, or in tail, &c. this had been a good remainder executed
" presently, as if a lease for years had been absolutely to one, re-
" mainder to another for life, &c. for here was no interruption of
" the livery, or want of a tenant of the freehold.

Plow. 83.
Vaugh. 46.

Raym. 140.
Corbett v.
Stone.

" *A.* by indenture makes a lease to *B.* for forty years, if *A.* so long
" live; and after his death to *C.* (who was no party to the deed) for
" one thousand years, and then *A.* levies a fine to different uses, and
" dies, and five years pass after his death, and then the plaintiff
" claiming under *C.* and *D.* entered, &c. By the arguments and
" reasons of the case, it seems clear, that this is no remainder at all
" to *C.* and *D.*; for first, presently it cannot vest by reason of the
" lessor's life interposing, and therefore it is no remainder vested.
" Secondly, as a contingent remainder it cannot be good; because
" then it ought to have a particular estate to support it, and ought
" to be in abeyance, or contingency, to vest or not vest when that
" determines: but here, the first lease is no such particular estate;
" because that reaches not to the commencement of the remainder,
" nor is the remainder limited with any regard to the particular
" estate; because it is not to commence upon the determination of
" that, but at a future time, viz. upon the death of the lessor. And
" there is no contingency at all in the case, for it is to take effect
" at all events, upon the death of the lessor, be it before or after the
" end of the term, and therefore it can be no other than a future
" *interesse termini* to begin after the death of the party that grants it,
" which being but for years it may well do; because it cures by
" way of contract. And though the grantee there was no party to
" the deed, and therefore, as objected, could take nothing, yet it
" appears

[*vide*
Feam's
C. R. 430.
4th. edit.]

appears that judgment was given for the plaintiff; which proves, first, that the grantee had an interest; secondly, that this interest was not barred by the fine and five years nonclaim after the death of the grantor, not being touched, devested, or turned to a right. Thirdly, that though the grantee was no party to the indenture, yet he might well take by virtue thereof, if he gets the indenture to make out his title, for the grantor cannot derogate from his own grant, or avoid his own acts.

“ But, if a man devises lands to *A.* for five years from *Michaelmas* next ensuing, and after to *B.* and his heirs, and dies before *Michaelmas*, yet is the remainder good, because till *Michaelmas* the freehold descends to the heir, and he is tenant to all the purposes, either of doing the services, or answering to strangers' precipes. For here is no livery to operate presently, and therefore no inconvenience to allow of such future limitations, as it would be, if it were by deed executed with livery. And in *Noy* it was held, that a devise for years, remainder to the right heirs of *J. S.*, was good, if *J. S.* died within the term, because the freehold in the mean time descended to the heirs, and was not in abeyance.”

“ If a man surrenders copyhold, or makes a feoffment in fee of freehold lands to the use of his wife for life, remainder to the heirs of the body of the surrenderor and his wife, this is a contingent remainder not executed in the wife, because he who will take by it must make himself heir of both their bodies, which cannot be before the death of both; and then if the wife, who has the particular estate, dies first, the remainder is become void, because it cannot vest when the particular estate determines. So, if such feoffment or surrender had been to the use of the wife and a stranger for life, remainder to the heirs of the husband and wife, this remainder also is contingent; for though the wife dies, yet it shall not vest till the death of the husband, and if he survives his wife and the stranger, the remainder is become void, for the above reason.

“ *A.*, in consideration of a marriage intended between him and *B.*, covenants to stand seised to the use of himself for life, remainder to his wife for life, remainder to the heirs male of their bodies, remainder to *C.* in tail: the marriage takes effect: the husband and wife join in levying a fine. It was adjudged, that the estates for life to the husband and wife stood so distinct, that they were not merged or confounded in the estate-tail, being limited all in one and the same conveyance, and that the fine levied by them was not any discontinuance either of the estate-tail or remainders; for if the estate-tail should be executed in the husband and wife, then the wife would have an estate in possession, whereas by the conveyance she was only to have a remainder: also, the husband would have only a moiety, whereas he was to have the whole during his life; but yet the remainder in tail vests in the husband and wife as a remainder; so that the heirs of their bodies shall take it by descent, and not by purchase.”

Cro. Eliz.
878.
Poph. 4.
Sir T. Raym.
83. Plow.
156. Co.
Lit. 217. a.
Noy, 43.
4 Mod. 259.
283.
Swinn. 124.
Godolph.
360.

Roll. Rep.
238. 317.
438.
2 Roll. Abr.
416.
Dyer, 99.
Leon. 102.

Lev. 36.
Raym. 36.
Sid. 83.
Keb. 76.
Stephens v.
Brittridge.

"*chose*." "For there is no contingency in the case, but when
 "one dies, the other is tenant in tail executed. So, for the
 "same reason, if a lease be made to *A.* for life, remainder to *B.*
 "for life, remainder to *A.* and *B.*, and their heirs, or to the right
 "heirs of *A.* and *B.*, this remainder continues distinct, and is not
 "executed in possession. And these remainders are so distinct from
 "the possession, that they may be granted as remainders, without
 "affecting the particular estate.

"But, where an estate is limited to *A.* and *B.*, and to the heirs
 "of *A.*, or (which is all one) to *A.* and *B.* for their lives, and
 "after their deaths, to the right heirs of *A.*, or to husband and
 "wife, and the heirs of the body of the husband; or to two men,
 "and the heirs of their bodies, or to the heirs of the body of one
 "of them; these estates are, to some purposes, executed, and to
 "others not, to continue as remainders. For, as to prevent the
 "survivor from taking the whole, they are not executed; because
 "the first words gave them a joint estate for their lives, which
 "shall go to the survivor; and this the limitation after shall not
 "control. Yet they are so far executed in possession, that he
 "who has the inheritance cannot grant it away as a remainder
 "distinct from the possession. And in the case of the husband
 "and wife, between whom there are no moieties, the inheritance
 "is so executed in the husband, that if he makes a feoffment,
 "this will be a discontinuance to his issue; but, if he suffers a
 "common recovery with single voucher, this will bind neither the
 "issue, nor remainder; because his wife was seised of the whole
 "jointly with him, and not partly, and there are no moieties be-
 "tween them; and therefore it cannot be good for any part: but
 "the feoffment deals with the possession, and gives it away by
 "solemn livery; and therefore to preserve the warranty, this
 "amounts to a discontinuance, and the issue shall be put to his
 "formedon in descender, and those in remainder to their formedon
 "in remainder: and if the husband levies a fine, this will bind
 "the issue by the statute of 4 *H.* 7. and 32 *H.* 8. But, whether
 "this will be a discontinuance of the remainder or reversion seems
 "doubtful. But, if the estate were to the husband and wife, and
 "heirs of the body of the wife, there, a fine levied by the hus-
 "band would be no bar or discontinuance to the issue or those in
 "remainder, because he had but an estate for life. But this be-
 "longs to another inquiry.

"Copyhold land was surrendered to the use of the wife for
 "life, remainder to the use of the right heirs of the husband and
 "wife: it was the opinion of the justices, that the fee was ex-
 "ecuted for a moiety in the wife, and the husband thereof seised
 "in her right; so that upon her death, such moiety should go to
 "her heirs, though the husband was then living. So, if a lease
 "were made to *A.* for life, remainder to the right heirs of *A.* and
 "*B.*, this was executed for a moiety in *A.*, and then for the other
 "moiety, in both cases it must be contingent, and if the wife or
 "*A.* die first, will be void; for *non est heres viventis*, and it can-

"not

“ not vest in the heirs of the husband or of *B.* during their lives;
 “ and though there are no moieties between the husband and wife,
 “ yet, in this case, the inheritance may well execute in the wife
 “ for a moiety, because the wife takes the whole, and the hus-
 “ band nothing at all, and so the point of taking by moieties is out
 “ of the case. Also, the heirs of the wife, who are to take a
 “ moiety of the inheritance, need not be heirs of the husband too,
 “ as they must, where such remainder is limited to the heirs of
 “ the body of the husband and wife; for in that case it cannot be
 “ executed for a moiety, because it may happen, that the heirs of
 “ her body cannot take after her death; as, if the husband survives,
 “ they cannot, because they are to be heirs of the body of the
 “ husband as well as of the wife; but in this case, immediately
 “ upon the death of the wife, the inheritance for a moiety may
 “ vest in her heirs. But, if an estate be made to the wife for
 “ life, remainder to the husband and wife and their heirs; or to
 “ *A.* for life, remainder to *A.* and *B.* and their heirs, these re-
 “ mainders are not executed in the wife or in *A.* for a moiety, but
 “ continue distinct as remainders: for otherwise where the re-
 “ mainder is a joint-tenancy in fee, and the survivor shall take
 “ the whole, if this should be executed in possession for a moiety,
 “ this would be against the intent of the deed, and exclude the
 “ benefit of the survivorship.

“ If lands are given to a woman and the heirs of the body of
 “ her husband, who is then dead; it is said, that the wife and
 “ the issue of the husband are joint-tenants for life, with remain-
 “ der to the issue in tail. For, since they are named to take in
 “ possession as the wife, and if they should take only an estate for
 “ life, the donor would have again the land, though there were
 “ still heirs of the body of the husband in being, which by the
 “ words and intent of the gift he ought not to have, since he has
 “ given it to the heirs of the body of the husband, and whoever
 “ answers that description is comprised within the words of the
 “ gift, therefore, they shall also have a remainder in tail.”

2 Roll. Abr.
 426. pl. 1. 2.
 6 Co. 17.

“ Where one devised lands to *A.* and his heirs, during the life
 “ of *B.*, and after the death of *B.*, to the heirs male of the body
 “ of the said *B.* now living; it was adjudged in *B. R.*, and affirm-
 “ ed in parliament against a judgment in the Exchequer-chamber,
 “ that *C.*, who was the son and heir apparent of *B.* at the time of
 “ the devise, should take this remainder by purchase, as sufficiently
 “ described and intended by the will, and that it was not a con-
 “ tingent remainder to be void on the determination of the parti-
 “ cular estate before the death of *B.*; and it was held, that the
 “ words *now living* should refer to the heirs male, and not to *B.*
 “ himself, though that was the next antecedent; because the de-
 “ visor took notice before that he was living, and then to refer
 “ those words to him would be a vain tautology, and *C.* was then
 “ heir apparent, and heir in common parlance.” “ But, whether
 “ he should take for life only, or in tail, seems doubtful upon the
 “ whole case.”

Vent. 334.
 2 Vent. 311.
 Raym. 330.
 2 Jon. 99.
 2 Lev. 232.
 James v.
 Richardson,
 or Burchett
 v. Durdant,
 Pollex. 457.
 1 Br. P. C.
 493.

M. 1713,
in *Doms
Procurum*,
Beaumont
v. Long.
1 P. Wms.
229. S. C.
1 Eq. Ca.
Abr. 114.
S. C. 2 Eq.
Ca. Abr.
331. S. C.
1 Br. P. C.
489. S. C.
[(a) Begot-
ten and to be
begotten ge-
nerally bear
the same
construc-
tion. *Vide*
Co. Lit. 20.
b. 2 Vern.
545. 711.
Pr. Ch 491.
2 P. Wms.
457. *Id.* 33.
Fearn's
C. R. 327.
4th edit.]
The court
held, in this
case, the
word *heir*
was used for
*heir appa-
rent*: That
the testator
had taken
notice that
his aunt,
E. L. was
living, and
that she had
three sons;
he could not
therefore
mean that
the eldest
son should
take strictly
as heir, but
as heir ap-
parent he
might. Be-
sides, he
took notice
of his own
heir, and
gave her an
annuity out
of the lands,
which shew-
ed his inten-
tion that the
should not

A. by his will in writing devised all his lands to B. and C., and the survivor of them, for the term of twenty-one years for the payment of his debts and legacies, and after payment the term to cease, and after the end or sooner determination of that estate, he devised the premises to the first son of his body, and to the heirs male of the body of such first son lawfully issuing, and for default of such issue to B. for ninety-nine years, if he so long live, without impeachment of waste, remainder to the first and other sons of B., and the heirs male of their bodies successively, remainder to C. for ninety-nine years, if he so long live, remainder to his first and other sons in tail male successively, remainder to the heirs male of his aunt Mrs. Elizabeth Long, wife of Richard Long clerk, lawfully begotten (a), and for default of such issue, the reversion and remainder to his own right heirs, and by his will gave 150 l. annuity to Dorothy Beaumont his sister, the plaintiff in error, for life, and 500 l. to her children, and to his aunt Elizabeth Long 100 l., and to her children 500 l., and died without issue. B. and C. entered by virtue of the devise for twenty-one years, and afterwards both died without issue; and John Beaumont and Dorothy his wife entered in right of Dorothy as heir at law to the testator, the term for twenty-one years being determined, and the debts and legacies paid; and Thomas Long, eldest son of Elizabeth (she having, at the time of making the said will, three sons, viz. the said Thomas, and two others) entered and brought an ejectment; and in the Exchequer judgment was given by Chief Baron Ward, Price, and Lovell, against Baron Bury, for the plaintiff Thomas Long. But in Trinity term 1713, this judgment was reversed in error in the Exchequer-chamber. And now upon error brought in the House of Lords it was argued, that this reversal should be affirmed. First, because Dorothy being heir at law to the testator, her right, as such, was to be favoured; and all devises to disinherit an heir at law were to be taken strictly. Secondly, that to make this devise good to Thomas Long it must be construed either a contingent remainder, or the words *heirs male* be taken as a *descriptio persone* to vest in him. As a contingent remainder it cannot be good for want of a freehold to support it; all the preceding estates being only for years; besides, if it were good as a contingent remainder in its creation, yet Elizabeth Long, the mother, being living when the particular estates determined, it cannot vest, because *non est hæres viventis*. As *descriptio persone* it cannot vest, for that ought to be such a description as is *vice nominis*, which the words *heir male* (being a legal term, and not accompanied with any other words to determine the sense otherwise, as heir apparent, or heir now living, &c.) cannot amount to, and the word *begotten* doth not determine the sense otherwise; nor does any intent appear to confine the devise to the issue male of Elizabeth Long, then much less to Thomas Long only, as the person described in this devise. But notwithstanding these reasons it was adjudged, that the first judgment should stand, and the judgment of reversal be reversed, though ten of the judges

judges were of opinion that the devise was void, and only the three judges (*Lovel* being dead) before-mentioned held it good *.

have all the lands; and the limita-

tion to his own right heirs was expressly in *default of issue male of the body* of his aunt *E. L.*, so that it was plain that he intended the apparent heir male of *E. L.* should take before his own heir general, and that his own heir should not take whilst there was any issue of *E. L.* Mr. Fearn's observes, that in this case the ancestor did not take the legal freehold. Pa. 322. 4th edit.

[A testator after charging the lands with annuities to his wife, and after her decease to four of his five daughters, and another annuity to his fifth daughter *M.* for seventy years, if she and the testator's son *R.* should so long jointly live, to commence at the expiration of the term of two years thereafter given in the premises to the said *M.*; and the death of testator's wife; and after devising the premises to his said daughter *M.* for two years after his decease, with remainder to his son *R.* (if then living) for ninety years, if he so long lived; he devised the premises so subject, to *R.*'s heirs male, and to the heirs of his daughter *M.* jointly and equally, and their heirs and assigns for ever. And for want of heirs male lawfully begotten of the said *R.* at the time of his decease, he devised the premises to the heirs and assigns of the said *M.* lawfully begotten of her body, to hold to the heirs and assigns of the said *M.* for ever. The son *R.*, at the time of the will, had one son and two daughters; and the daughter *M.* had then one son. On the testator's death *M.* entered, and held the whole of the lands for the two years; when the son *R.* entered and held them till his death, upon which, *M.* entering, the son of *R.* brought his ejectment. Upon the case being argued in the court of *C. B.*, *De Grey*, *C. J.* said, the question was, Whether there was a sufficient designation of the person to make the son of *M.* take as her heir, living the mother? That two hundred years ago it might have been thought not sufficient, because the description was not legally and technically true. But that, within a century past, a more liberal construction of the words of a testator had prevailed; and they had been generally taken in their popular sense, which was most likely to have been his meaning. That in the principal case, the intent of the testator was clear, that the same favour should be extended to the heirs of *M.* as to the heir male of *R.*; he took notice that *M.* was living by leaving her a term, and a subsequent annuity; and meant a present interest should vest in her heir, that is, her heir apparent during her life; he therefore did not think the lessor of the plaintiff was entitled to more than one moiety of the premises.—The rest of the justices agreed in the same opinion, and the plaintiff had judgment as to one moiety only.]

Goodright v. White, 2 Bl. Rep. 1010.

J. S. having issue two sons, *A.* and *B.*, devises in the words following: "I give to my eldest son *A.* all that my farm called *Dumsey*, to him and his heirs male for ever; if a female, my next heir shall allow and pay to her 200*l.* in money, or twelve pounds a year out of the rents and profits of *Dumsey*, and shall have all the rest to himself; I mean my next heir, to him and his heirs male for ever." Upon the death of the testator, *A.* entered

Ld. Raym. 185. Preced. Ch. 468. *Baker v. Wall.*

entered and died, leaving issue a daughter; and it was adjudged that the lands should go to the second son *B.*, and not to the daughter of the eldest, though she was heir general.

2 Vern. 729.
Newcomen
v. Barkham,
Preced. Ch.
461. S. C.

I. S. devised to trustees in trust, after debts and legacies paid, to convey to *A.* his cousin and the heirs male of his body; and for want of such heirs male, then to the heirs male of the body of his great grandfather; and for want of such heirs male, to his own right heirs for ever, and gave to his sister 2000*l.* to be paid out at interest during her life, she to receive the interest, and after her death to her children, and died, and soon after *A.* died without issue; and *C.* being heir male of *B.* the testator's great grandfather, but not heir general, there being a daughter of his elder brother, the question was between him and the testator's sister and heir at law, who had the 2000*l.* devised to her, whether the devise was void or not? And my Lord Chancellor held the devise good, and that *C.* should take as a person sufficiently described and intended by the testator.

2 P. Wms. 1.
Dawes v.
Feyers.
[This case
was again
brought be-
fore the
court in
Gwynne v.
Hooke,
18th Dec.
1740, when
Lord Hard-
wicke di-
rected a case
for the opi-
nion of the
court of
K. B.
(Reg. Lib.
A. 1740,
fo. 310.)

But, where one seised in fee devised his lands to his grand daughter (being his heir at law) for her life, remainder to his own right heirs male for ever, and died, leaving his grand-daughter his heir at law, and also leaving a deceased brother's son, who was the next of kin in the male line; it was held by Lord Macclesfield, that the nephew could not take, that the words *heirs male* must be intended heirs male of the body, and could never extend to an heir male of any collateral line; and it not being said in the will heir male of his body or of his name, the grand-daughter, who was his heir at law, might have an heir male, though not of his name. And he said that this case differed from that of *Brown and Barkham**, that being merely a trust; also that in that case the remainder was limited to the heirs male of the body of Sir Robert *Barkham* the grandfather; whereas here the devise was to the heirs male, without saying of any body.

who certified in confirmation of Lord Macclesfield's order, (Vin. Abr. tit. Devise W. 1. pl. 13. n.) and that certificate was afterwards confirmed, and the bill dismissed with costs. Reg. Lib. *A.* 1741, fol. 646. But in *Wills v. Palmer*, 5 Burr. 2615. on a case sent to the court of K. B. by the court of Chancery, the question arose on both a will and a deed, whether *A.* took by purchase under the description of *heirs male of the body of B.* not being heir general, *B.* being in the first case the grantor; the court certified, that *A.* took an estate-tail by descent; but they added in the certificate, that if a third person had been the grantor, they should have thought that *A.* would have taken by purchase as heir male of the body of *B.* And they also certified, that he did so take under the will. Con's note, 2 P. Wms. 3.] * The case of *Newcomen and Barkham*, *supra*.

2 Jon. 114.
2 Lev. 223.
Raym. 278.
Lille v.
Gray.

* Judgment
was given
for the
plaintiff:
Upon which
a writ of
error was
brought in

A. seised of lands in fee by indenture, covenants to stand seised to the use of himself for life, remainder to *Edward* his eldest son for life, remainder to the first son of *Edward* in tail male, remainder to the second, third and fourth sons of *Edward* in tail male, and so to all and every other the heirs male of the body of *Edward* respectively and successively, and to the heirs male of their bodies according to their seniority of birth; remainder to the lessor of the plaintiff for life, and a proviso, that if *Edward* dies without issue male, that he shall have power to charge the lands with daughters' portions not exceeding 100*l.* a-piece: the cove-

tor dies, and *Edward* suffers a common recovery, and dies without issue male: and the only question was, If *Edward* took estate-tail subsequent to the limitation to his four sons in tail, or he took only an estate for life, with a like remainder to all his four sons in tail male successively, as was limited to the four first? It was adjudged, that he took but an estate for life, and that all other sons should take by purchase. First, Because otherwise the words, *and to the heirs male of their bodies*, would be useless. Secondly, The words *and so*, &c. prove the same intent, which when turned into *Latin* are *eodem modo*. Thirdly, *Severally and successively, according to their seniority*, are also a further proof of his intent. Fourthly, The power to provide portions for daughters would be unnecessary if *Edward* took an estate-tail, because if by a common recovery he might bar it, and charge the lands he thought fit*.

the Exchequer-chamber, where, it seems, the judgment was affirmed, as is observed by Judge Tracy, 1 P. Wms. 90. who, it appears, had searched the record, the reports differing in that matter. *Fearnie*, 105. 3d edit.

* *A.* devises lands to *B.* for life, and after his death to the next heir male of *B.*, and the heirs males of the body of such next heir male; and it was adjudged a good remainder in contingency to the next heir male of *B.* being in the singular number, and so was only a description or designation of the person who should take the remainder after the death of *B.*, and not any limitation of his estate.*

and in several other cases, which *vide* under

Co. 66.
2 And. 37.
Cro. Elis. 453.
Archer's case cited.
Vent. 216.
3 Lev. 433.
title Devise.

If one devises to *A.* for life, remainder to *B.* and the heirs of his body, remainder to *C.* and his wife for their lives, and after their death to their children, they then having children, *C.* and his wife take only an estate for life, with remainders to their children for life, and no estate-tail; but had there been no children, the devise being immediate, the children could not take in remainder, and therefore it must be an entail in the husband and wife.

6 Co. 17.
Wild's case.

If lands are given to a woman and the heirs of the body of her husband who is then dead, it is said that the wife and the issue of the husband are joint-tenants for life, with remainder to the issue in tail; for since they are named to take in possession as the wife, if they should only take an estate for life, the donor would have gained the land, though there were still heirs of the body of the husband in being, which by the words and intent of the gift he ought not to have, since he has given it to the heirs of the body of the husband; and whoever answers that description is comprised within the words of the gift.

2 Roll. Abr. 416.
6 Co. 17.

A. devised lands to *B.* for life, remainder to trustees to preserve contingent remainders during the life of *B.*, remainder to the heirs of the body of *B.* lawfully begotten; and *Verney* doubting whether this was an estate for life in *B.* or tail, sent it as a case to *B. R.*; and notwithstanding the testator's plain intention to pass an estate for life, yet the court held, that where the ancestor takes an estate for life, and in the same instrument a limitation is made to his heirs, or to the heirs of his body, the heir cannot be a purchaser, and that therefore this was a plain estate-tail.

Hil. 23 G. 2.
in B. R.
Colson v. Colson.
2 Stra. 1225.
S. C.
2 Ark. 246.
S. C.
Fearnie, 4th edit. 181.
249.

" If *A.* makes a feoffment in fee to the use of himself for life, the remainder to the first son of his body begotten, and the heirs made

Chudleigh's case, 16.
233.

11 Co. 69.
Co. Lit. 28. a
2 Saund.
362. 366,
387.
Cro. Eliz.
345. m. n.

“ male of the body of such first son, and to the second, &c. in
“ manner; and for want of such issue, remainder to himself
“ the heirs of his body, with remainder to B. in fee; in this
“ till issue, A. is tenant in tail general executed, with remain-
“ to B. in fee. But, if he had issue a son, then all his estate
“ opens and lets in the remainder to such son, and then he is
“ come again tenant for life, remainder to such first son in
“ male, &c., remainder to himself in tail general, remainder to
“ in fee. And this arises upon the construction of the stat-
“ of uses; for before that statute the use being nothing else but
“ the perception of the profits, and no estate in the land itself
“ was not subject to the same rules of law by which the land
“ was governed, nor had the *cestui que use* any other remedy
“ by *subpoena* in Chancery, to compel the tenant of the land to
“ him into the perception of the profits, or convey the possession
“ him. And though that statute by carrying the possession to the
“ use, did in effect take away and destroy the use, for so much
“ was executed in possession, yet it still left in the parties the
“ power of limiting and appointing the uses, as they had before.
“ And when the person, who was to take the use, came in *offe*, the
“ statute supplied the place of the Chancery, and carried the pos-
“ session to the use, if nothing were done in the mean time to
“ hinder the rising of the use; and though the estates were before
“ united, yet by an act of parliament they may well be severed
“ again to let in the intermediate use, since the statute executed
“ the possession only according to the uses when they happen, as
“ well as those that are capable of being executed presently. And
“ therefore in that case, though the wife of the tenant in tail had
“ by the intermarriage title of dower, yet it is defeated again by
“ the birth of a son, which turns the estate-tail to an estate for
“ life by the terms of the settlement under which only the title
“ of dower accrued, and therefore must be subject to be defeated
“ by the terms of the same settlement.”

Poph. 5.
Moor. 104.
Perk. 162.
56.
Dav. 35.

“ If one makes a lease to A. for life, remainder to him who
“ first comes to St. Paul's church, &c. this is a good remainder
“ in abeyance or contingency, but can vest in none till he quali-
“ fies himself to take it by coming to St. Paul's church; nor can
“ any one grant it away, though he should happen after to come
“ there first.”

Cro. Car.
102.
Yelv. 86.
Poph. 5.
10 Co. 51.
Cro. Eliz.
580.
1 Leon. 245.
Co. Lit.
378. b.

“ If one makes a feoffment in fee to the use of himself and his
“ wife, and to the heirs of the survivor of them, or to the heirs of
“ such as dies first; this is in the nature of a contingent remain-
“ der to the survivor, or who dies first, and after the contin-
“ geney happened, the heirs shall be in by descent; but by a feoff-
“ ment before it takes place, the remainders will be destroyed.
“ But these contingent remainders cannot be granted over, be-
“ cause they are in no person to grant; therefore, where a lease
“ was made to the husband and wife for 21 years, remainder to
“ the survivor of them for 40 years, and the husband granted away
“ this remainder; it was holden a void grant, though he survived,
“ because till the contingency happened, he had nothing in him
“ 10

grant, release, or surrender. So, if a lease be made for life, remainder to the right heir of *J. S.* who is then living, if the eldest son of *J. S.* grants this remainder, and then *J. S.* dies, it upon the determination of the particular estate, the grantor may enter, because his grant was void, having nothing in him to grant. And in the case of the husband and wife, if lands are given to them, and to the heirs of the body of the survivor of them, and they both join in a lease for 21 years, observing all the circumstances requisite by 32 *H. 8.* yet this lease shall not bind the issue for the above reason.

10 Co. 591

A lease was made to *A.*, *B.*, and *C.* for their lives, remainder to the assigns of the survivor of them for 99 years. *B.* was the survivor. It was holden, that the 99 years was an interest vested in him, which he might well dispose of, as he thought fit, and not a bare power only of nominating one to take it. For *assigns* is a word proper for the limitation of a further interest to the same party, in case of a chattel, as heirs is for the inheritance, and yet both vest in the party himself; for assigns are either in fact, or in law, as executors, &c.; and it appears before, that a remainder to his executors in such manner vests in the party himself; and so it does in case of such a limitation to his assigns, who for want of an actual assignee, will be his executors."

Clerk v. Sydenham, Yelv. 85. Plowd. 288. Vide supra.

One levies a fine to the use of himself for life, and after his death to the use of his two daughters till his son *B.* should return from beyond sea, and should come to the age of twenty-one years, or die, and after such return and age of twenty-one years, or death, which should first happen, to the use of the said *B.*, and the heirs of his body begotten; *B.* returns from beyond sea: it was adjudged, that this was a good remainder, and should vest in him immediately upon his return, though he was not then twenty-one; for the last disjunctive *or* is to be applied to the whole sentence, and makes it disjunctive in all, and though his coming from beyond sea, or to twenty-one years, are uncertain, yet his death is certain; and therefore this remainder does not depend altogether upon uncertainties. And in this case it seems the heirs of his body shall not take by purchase, though his death had happened first, and so the remainder could not vest in himself, for the limitation being to him and the heirs of his body, whoever takes by virtue thereof, must take as from him, and consequently will be in by (a) descent, and not by purchase.

Cro. Eliz. 269. Leon. 249. Co. Lit. 225. La Voss's case. Fearne's C. R. 19. 4th edit.

* So, if one devises lands to *A.* for life, *si tam diu sola viverit*, and after her death or marriage, remainder over to another, this is a good remainder, because it is certain one of the two contingencies will happen. But, if one gives lands to *A.* till *B.* comes to twenty-one years of age, and when *B.* comes to such age, then to remain over, this remainder is contingent, and uncertain whether it will ever vest, for if *B.* dies before such age, the remainder is become void. So, where land is given to a woman so long as she shall remain sole, or to *A.*, till *B.* comes from Rome to England, and after her marriage, or *B.*'s coming to England, then

(a) 1 Co. 98. Shelley's case. 2 Leon. 389. 3 Leon. 182. 3 Co. 20. Dyer, 142.

then to remain to *C.* in fee, these remainders are contingent and uncertain whether they shall ever vest or not, for if the man never marries, nor *B.* comes to *England*, these remainders will not vest, but are become void. So, if lands are devised to for life, and if the devisee be disturbed, that then the land shall main over to another in fee, this creates no remainder till such disturbance, and if that never happens, the remainder fails likewise for these remainders are not to arise but upon such acts done and therefore if they fail, so does the remainder.

Alden v. Hare,
Poph. 97.
20 Co. 85.

One levies a fine to the use of *A.* and the heirs male of his body, till he or the heirs male of his body attempt to alien, sell, and then to the use of *B.*, &c.; *A.* dies without issue, without any attempt, &c.; *B.* will have no estate; for his remainder was not to begin but upon such attempt precedent, and that not happening, the remainder never takes place.' "And *vide infra*, that a remainder to commence after such attempt, is repugnant and against law."

Flow. 23.
2 Co. 20.
Raym. 144.
Co. Lit.
378.

A lease is made to *A.* for life, remainder to *B.* for life, and if *B.* dies before *A.*, that then the land shall remain to *C.* for life, this is a good remainder, if the contingency happens, otherwise not; and in the mean time the estate continues in the lessor and is not in abeyance, being expressly limited to go over, if such contingency happens, therefore till it does happen, nothing is divested out of the lessor.

Holcroft's case, Moor, 486. Sir T. Raym. 429. S. C. cited.

"*A.* by indenture covenants to levy a fine to the use of himself for life, and after his decease to the use of *B.* his son, for long and until he attempt to alien, and then to the use of *C.* and the heirs male of his body during the life of *B.*, and immediately after his decease, to the use of the first and other sons of *B.* in tail male successively, remainder to *C.* in tail. It was objected, that no use vested in *C.* till *B.* attempted to alien, for the use to *C.* and all the limitations after depend on *B.*'s attempt to alien. But it seemed to the court, that it should be intended in the limitation of the use, that after *B.*'s death without issue male, *C.* should have the land, be there any attempt to alien or not, by reason of the words, and immediately after his decease to the first son, &c.; for the use which was to arise upon the attempt to alien, is only restrained to the use for the life of *B.*"

Mob. 30, 31.
2 Br. Abr.
255. pl. 83.
Flowd. 25. a.

"If one devise land to *A.* and the heirs of his body, provided that if *A.* happen to die without heirs of his body, that then it shall remain to *B.*, this is a good remainder vested presently, and no contingency at all, but the ordinary limitation of a remainder upon an estate-tail. So, in a lease for life, upon condition that if the lessee die, then it shall remain, &c. this is a good remainder executed presently."

Luxford v. Cheeke,
2 Lev. 125.
Sir T. Raym.
427. S. C.
by the name

"One devises lands to his wife during her natural life, if she does not marry, but if she marries, then presently after my son *A.* to enter and enjoy, to him and the heirs male of his body; it was adjudged, first, That by this will the wife had an estate for her widowhood only; secondly, That this was a remainder vested

vested in *A.* presently to take effect in possession upon the death of *Brown v. Cutter.*
or marriage of the wife, which should first happen, and not
a contingent remainder to take effect only in case the wife
married. *3 Leon. 182.*
[In *Lady Anne Fry's*
case,

Ventr. 203. Hale expressed a similar opinion, where, he said, it is all one as if the estate had been devised to her for life, and if she marries, then to remain, which had been but an estate *quam diu sola viverit*.—In a case where a testator devised lands to his wife during her widowhood, and if she should marry again, that then his daughter should enter, provided that if his wife married and survived his daughter, the estate should return to her; Lord Hardwicke took a distinction between the devise of an estate during widowhood, with remainder over, and a devise during widowhood with remainder over on her marrying again within a limited time. *Jordan v. Holkham, Amb. 209.* Where there was a devise to a wife provided she remained a widow; but in case she married a second husband, then to testator's nephew when he should attain the age of twenty-three years; it was held, that the widow had an estate till the nephew attained the age of twenty-three years, though she married before. *Doe v. Freeman, 1 Term Rep. 389.*]

One devises lands in this manner: My will is to entail all my lands to my nephew *A.*, and the heirs male of his body, and, for default of such issue, to his brother and the heirs male of his body, &c. *habendum* to them severally, and to the heirs male of their bodies, to the only intent and true meaning of this my will, and so long as they and every of them do perform and keep the true meaning thereof touching the entailing all my said lands in manner following; and therefore I give all my said lands to *A.*, and the heirs male of his body begotten, until he or they make any acts to alter or discontinue the estate-tail, and then to *B.*, and the heirs male of his body, with other remainders over, and dies, *A.* enters; *B.* dies, leaving issue *C.*, and then *A.* levies a fine; and it was objected that *C.* could not enter, because the remainder devised to his father was contingent, and not to arise but upon *A.*'s alteration of the estate, and not before or otherwise, and then *B.* dying before that contingency happened, the remainder could not vest. But it was adjudged, that the remainder to *B.* was not contingent, but an immediate devise, and that otherwise the intent of the deviser, which was to give to every one in remainder successively, would be destroyed, though it was holden that the limitation over upon his alienation did not so defeat the operation of the fine, as to prevent the discontinuance wrought thereby, and give him in remainder immediate title of entry thereby, for that such clause tended to a perpetuity, and was condemned in law upon the reason of other cases there cited.

Foy v. Hinde, Cro. Jac. 696.
Jon. 57.
Raym. 429.

A. in consideration of a marriage intended between *B.* his nephew and *C.* the daughter of *D.*, and of 200 marks paid by *D.*, makes a feoffment to the use of *B.* and *C.* for their lives, and after carnal copulation to the use of the issues of their bodies, remainder to *B.* and the heirs of his body begotten, &c. The marriage never takes effect, but *B.* marries another woman, and hath issue by her; and *A.* married also, and had issue; and after the death of *A.* and *B.* the question between their children was, 1st, If the use should arise to *B.* and *C.* for their lives by reason of the money paid, though no marriage was had? 2d, If the remainders which were limited after the marriage are not now prevented from rising, by reason no marriage

Moor, 101.
pl. 247.
Dy. 334. b.
Calthrop's
case.

“riage

"riage was had? As to the first, the justices thought, the
 " would well arise, though no marriage was had, because it was
 " limited out of the estate of the feoffee, which was an estate
 " executed, and needed no consideration to raise the use. But
 " it had been by way of covenant to stand seised, they held, no use
 " would arise; because the marriage was the principal consideration,
 " and that failing, the consideration to raise the use failed
 " likewise, and the money would not be sufficient. As to the
 " second point, they thought the consideration of name and blood
 " sufficient to raise a use to *B.* who was *A.*'s nephew, and that
 " might be independent on the other limitations, which were
 " to arise but upon the marriage had. But no judgment was
 " given."

" Lands were settled to the use of the husband and wife for
 " their joint lives, and after the death of either of them, to the
 " heirs of the body of the wife by the husband to be begotten, and
 " for default of such issue, the wife surviving the husband, to the
 " use of the wife for life, and after her death to the heirs of her
 " body begotten; the husband dies leaving issue by the wife, and
 " she marries again and suffers a common recovery; and the principal
 " question was, Whether this was an estate-tail executed in
 " the wife, or that the remainder was contingent? It was argued,
 " that the remainder depending on their joint lives, and being
 " limited to the heirs of the body of one of them, so that it
 " may be frustrate, if the wife survives, must needs be contingent,
 " because by the death of the husband the joint estate for life is
 " determined, and yet the remainder to the heirs of the body of
 " the wife by the husband cannot take effect, for *non est heres vi-*
 " *ventis*. But *per cur.* clearly, and with some displeasure at the
 " argument, the words *heirs*, &c. are not words of purchase, but
 " of limitation to the wife, and the estate vests in her presently,
 " and is not in contingency; as if an estate be limited to a woman
 " *durante viduitate*, remainder to her heirs or the heirs of her body,
 " this is a fee-simple or fee-tail executed in her presently; and
 " though she afterwards marries, yet that shall not destroy the
 " estate that was well vested and settled in her before; and here
 " the remainder closes with the particular estate to all purposes but
 " dividing the joint-tenancy, and is no more than an estate to the
 " husband and wife, and the heirs of the body of the wife."

33d. 247.
 Raym. 126.
 Keb. 883.
 Merrell v.
 Rumsley, &
 wife Perk.
 Sect. 337.
 5 Co. 9.
 2 Roll. Abr.
 418.

Perk. § 337.

" And they seemed to rely upon the case in *Perkins*, where lands
 " were leased to *A.* and *B.* for the life of *C.*, remainder to the
 " right heirs of *A.*; then *C.* died, living *A.* and *B.*, and after *A.*
 " takes wife and died, living *B.* It is there said, that the wife of
 " *A.* shall be endowed, because *C.* died, living *A.* the husband, so
 " that the freehold and inheritance were united in the husband
 " during the coverture. Which case, if it be law, may give some
 " colour to the principal case. But it seems to me not to be law;
 " for the rule is, that where by possibility the particular estate
 " may determine, before the remainder can take effect, there,
 " such remainder is contingent; and by the death of *C.* the par-
 " ticular estate is absolutely determined, for the remainder can-

not then take effect, because *A.* cannot have heirs during his life. And this is no infringement of the other rule, that wherever the ancestor takes an estate for life, and after in the same conveyance a limitation is made to his right heirs, or the heirs of his body mediately or immediately, that in such case the remainder vests in the ancestor himself, and by consequence the heirs shall be in by descent, and not by purchase; for here, *A.* took no estate for his own life; and though it was an estate of freehold, yet it was so limited, that without any act or default of his it might determine during his life; and since the life of *C.* was made the measure of the continuance of the estate of *A.* and *B.*, it is more reasonable to give it *A.* after *C.*'s death, than it is to give it *B.* likewise: but both their estates are to be bounded and circumscribed by the life of *C.*, and when he dies, living *A.*, who can then have no heir to take the remainder, it seems in reason, the remainder is destroyed. So, in the principal case, when the estate is limited to the husband and wife during *their joint lives*, this is no absolute estate for their lives so as to go to the survivor, but the death of either of them determines that estate, and the remainder being limited to the heirs of the body of the wife who survived, and can have no heir during her life, seems to be defeated thereby. And note, they seemed to agree, that if an estate were made to the husband and wife during *coverture*, remainder to the heirs, or heirs of the body of the husband, that this was a contingent remainder. And there seems no difference in reason between such a limitation, and where it is *durante viduitate*, or to two for their joint lives, or to two during the life of a third person, with such remainder over; because in all those cases the particular estate determines, before the remainder can take effect. And the case in 2 *Ro. Abr. supra*, seems expressly to contradict the principal case, and the reason of it. So the case *supra*. But in the principal case, if the wife had died first, there had been no doubt but the heirs of her body had taken by descent, she having had the whole during her life. And this seems to differ much from a limitation to baron and feme, and the heirs of the body of the feme; for there, whichever of them dies first, yet the survivor shall hold during life. *Ideo quare* of these matters. As to the second point of the case, if the second limitation to the wife should take effect, because it was upon the dying without such issue, whereas there was issue so begotten living at the death of the husband; the court said, there was no colour for it, for such heir and such issue is all one, for unless in the heir, it is not such issue. Note, this objection seems to make the second remainder to the wife conditional upon the husband's not leaving issue at the time of his death, which here he did. But the limitation is not confined to his leaving issue at the time of his death, but is general, and for default of such issue or heir, and seems not to differ from the common limitation of remainders after estates-tail, and therefore may well vest as a remainder in the wife immediately upon the husband's death.

5 Co. 9.

1 Sid. 247.

Quere.

[See Fearn's C. R. 432, 433, &c. whether the doctrine of the principal case is vindicated, and Rolle's distinctions are controverted.]

fo Co. 85.

“ One makes a feoffment in fee to the use of himself for life, and after to the use of such person and persons to whom he shall demise any part of the premises for life or years, and after the performance of his last will, and to the use of such persons and persons to whom he shall by his last will devise any of his or estates, and after to the use of *B.* in tail, with other remainders over. These remainders are contingent, and not executory in *B.* and the others till the death of the feoffor, because the feoffor hath such power that by his will he may give away the whole fee-simple, and therefore till his death it being uncertain whether they will ever vest or not, they must needs be contingent, and then the use of the fee in the mean time vests again in the feoffor. But *quere* in this case, if he afterwards makes a feoffment in fee, or commits a forfeiture, if those in remainder may not enter presently: for such feoffment is not in pursuance of his power, and if it be not warranted by that, it cannot be good at all. For if it should, he might then derogate from his own grant, and avoid it in what manner he pleased. And if it be so, that those in remainder may enter in such case, then the remainder must be vested in them before, and cannot be contingent; for the feoffment which gives away the whole estate to another, can never operate so as to vest it in them at the first time too. Besides, the account given of these remainders is consistent with their being in contingency; for all contingent remainders pass out of the feoffor at the same time with the particular estate, and are carried into abeyance till the contingency happens; but here it is said, the use of the fee is vested in the feoffor till his death, which cannot be; therefore, it seems more reasonable to construe these remainders to be vested presently, though subject to be divested and taken out of them by the feoffor, if he pursues his power in devising away the whole. But, if he makes such feoffment, it should seem, he can never after execute his power, for that was inclusively given away and extinguished in the feoffment, whether those in remainder may enter for the forfeiture or not; and if they cannot then their estates are absolutely in the power of the feoffor, and his reserving to himself a power to defeat them in such a particular manner was altogether idle, which seems not reasonable.”

(D) Of Remainders in Abeyance or Contingency; what Estate is sufficient to support them; when they are to take effect; and by what Means they may be destroyed or prevented from coming into effect; and therein, of Remainders by way of executory Devise or future Interest.

“ A Contingent remainder must vest during the particular estate, because if remote contingencies should be allowed to hang over titles, no man would know when he was (sic) to

is purchases. The law therefore has appointed how long such contingencies are to expect, which is, only during the continuance of the particular estate, and then the remainder must come a being; since remainder *ex vis termini* signifies a remaining part of a particular estate preceding. Whether such particular estate determine by effluxion of time, or by merger of the particular estate in a greater, it is all one; for if the contingent remainder do not vest before such merger, it can have no being afterwards; since the particular estate is the sole limitation on which the remainder is to take place.

* Contingent remainders arise either at common law, or by way of use, and are also to be destroyed two ways: 1st, By the merger of the particular estate which supports them; for the particular estate being, as hath been said, the sole time of limitation in which these contingencies are to take place, the merger of that estate is the destruction of the remainders; and this, whether such remainders be limited at common law or by way of use. But then every particular estate upon which such remainders depend must be taken away; for the remainder is the remaining part of each particular estate, when there are more than one in the limitation; and each particular estate is the time appointed by law when such contingent remainders are to take place; and therefore the destroying of one of these particular estates is no destruction of the remainder. Hence it is, that if an estate be limited to *A.* for life, remainder to *B.* for life, with contingent remainders over; if *A.* makes a feoffment, this does not destroy the contingent remainder, because *B.* hath a right to enter and recontinue his estate, which therefore in judgment of law subsists in him; and therefore that estate is not gone within the compass of which the contingent remainder is to vest. So it is, if *B.* had only a right of action; as, if a descent had been cast upon the heir of the feoffee of *A.*, and put *B.* to his real action; because he who hath the right to the estate, hath, by the better opinion, in judgment of law, the estate in him.

“ 2dly, Such contingent remainder arising by way of use, may be also destroyed by taking away the seisin out of which the use ariseth. For the statute of the 27 *H.* 8. hath executed the seisin of the feoffee to the uses limited, so that if there be no seisin at the time when the use is to take place, such use must be destroyed; because no seisin or possession can be executed to it; and therefore if the person in whom the legal seisin is, made a feoffment for value without notice, such feoffee comes into a good title at law, and there is no reason in equity to take it from him, and by consequence, in such cases, the seisin out of which the use ariseth is destroyed. And therefore if a man covenants to stand seised to the use of himself and his heirs, till an intended marriage of his son takes effect, and after the marriage to the use of his son for his life, remainder to his wife for her life, with contingent remainders to the issue of the marriage, the father makes a feoffment in fee for value, without notice of the

a Roll. Abr.
796.
Wells v.
Villars,
1 Vent.
138.

“ uses before such marriage; such uses are destroyed; and the
 “ the marriage takes effect, they can never arise, because the
 “ out of which the uses were to arise is destroyed. Otherwise
 “ is, if the feoffment had been without value, or with none
 “ because such feoffees had only acquired a seisin which
 “ would make liable to the uses as a mere substitute of the fe
 “ The same law of a lease for years reserving rent for the time
 “ the continuance of such lease; because such lease is value
 “ Otherwise, of a lease for years reserving no rent; because
 “ no valuable consideration.

2 Roll. Abr.
 796.
 Wegg v.
 Villers.
 [Vide
 Fearn's
 C. R. 433,
 434, 435,
 436, 437,
 &c.]

“ If a man makes a feoffment to J. S., to the use of himself
 “ life, remainder to his daughter on her marriage for her life,
 “ mainder to her first son, remainder to his own right heirs,
 “ he makes a feoffment in fee, or grants the reversion with
 “ value, that will not displace the contingent remainders;
 “ cause the feoffee comes in as a volunteer, and therefore
 “ not disturb a valuable settlement. But, if such feoffor
 “ J. S. join in a feoffment for value without notice, it will dis
 “ the remainders, for the former reason. But, if he himself ma
 “ a feoffment for value without J. S., such contingent remain
 “ by the better opinion, will arise out of the first livery to J. S.
 “ they happen within the life of the daughter, which is called
 “ *scintilla juris* in J. S. to be executed to the contingent
 “ The reason of which is, that since there is a particular
 “ still continuing in the daughter, within the compass of wh
 “ the contingent remainders may still vest; and since before
 “ statute there was a seisin continuing in the feoffee, and the
 “ tention of the statute was to preserve and not to destroy
 “ estate, therefore, in support of the statute, the law rather
 “ suppose a seisin in feoffees to be executed to the conting
 “ uses, if they happen within time, than suffer such conting
 “ uses to be destroyed by limitations subsequent to them.

Co. 134.
 138.
 Popl. 82.

“ Let us in the next place see by what means these contingent
 “ remainders may be destroyed or prevented from ever arising.
 “ And here the rule is, that if the contingent remainder
 “ not vest either during the particular estate, or at the instant
 “ of the determination thereof, such remainder is for ever destr
 “ ed. The reason whereof seems to be, to prevent the inconve
 “ nience and danger that might otherwise ensue to purchasers
 “ allowing such remainders to take place wherever they happened
 “ for if but the latitude of a day were given to their vesting
 “ the particular estate ended, they might as well arise one hundred
 “ years after; the reason of such allowance being the same; and
 “ since by the limitation they ought to vest when the particula
 “ estate determines, if they cannot so do, they shall never after
 “ take effect, be they limited either at common law or by way of
 “ use.

2 Leon. 178.

“ Therefore, where one made a feoffment in fee to the use of
 “ himself for life, and after to the use of his first son and his
 “ heirs; the father and feoffees, before any issue, infeoffed J. S. and
 “ his heirs for a valuable consideration without notice, and then
 “ the

Father died leaving issue a son who enters; by the better opinion, the contingent use to the son was destroyed; because by the feoffment the particular estate was determined, and the son being *in esse* to take advantage of the forfeiture and wrong done to his remainder, shall never after set it up against the purchaser; and the feoffees, by their joining in the feoffment, have excluded themselves of any entry to revive the remainder, that were necessary, as (a) a release by them after the feoffment of the father would likewise have done.

(a) 2 Roll. Abr. 797.

One made a feoffment in fee to the use of himself for life, remainder to the use of his eldest son in tail, remainder to his own right heirs, and before issue, suffered a recovery, and died leaving a son. It was holden, that in this case the son should not avoid the recovery by 32 H. 8. because the remainder was not in him at the time of the recovery, as by the words of the statute it ought to be. But, it was holden, that he might avoid the recovery by the common law; because, says the book, the recompence could not extend to such remainder as was not *in esse* at that time. But this is against the express resolution of the cases after mentioned; for a common recovery is now but a common assurance, and therefore if tenant in tail, remainder to the right heirs of J. S. suffers a common recovery, giving J. S., yet the remainder is barred, though it was then in abeyance, and the recompence in value could not extend to it."

2 Leon. 224.

A. had issue B. and C. his sons, and made a feoffment in fee to the use of himself for life, and after to the use of the feoffees and their heirs during the life of B., remainder to the use of the first, second, and other sons of B. in tail male, remainder to the use of C. and the heirs of his body, remainder to his own right heirs, and dies; the feoffees infeoffed B. in fee, without consideration, and with notice of the first uses, and after B. hath issue a son, and if he was barred by the feoffment of the feoffees, was the question? It was adjudged, upon solemn argument in the Exchequer-chamber, that he was barred; for the feoffment of the feoffees divested all the estates and future uses, and though B. had notice this was not material, the estate out of which the uses were to arise being divested and gone; and the new estate given by the second feoffment shall not be subject to the uses limited by the first feoffment; and there being no son of B. to enter when the particular estate determined, as in this case it did by the feoffment, which was a forfeiture thereof, he shall never enter after; for the statute 27 H. 8. c. 10. executes no uses but when the estate continues in the feoffees to serve them, and not when that is divested, and the use itself turned to a right. Also it was held in the same case, that if there had been no alteration of the possession, but that B. had died before the birth of his son, he should never after have the estate, the remainder to C. being then executed, and the son of B. born out of due time. And they agreed that the preserving such contingent uses would create perpetuities, and tend to the destruction

1 Co. 136. a.
6 Co. 42. a.
2 Roll. Rep. 217.
Poph. 139.
Copwood's case.
1 Leon. 260.
constr. per Wray.

Co. 120.
Poph. 70.
Chudleigh's case. —
[See various observations on and arguments drawn from Chudleigh's case, in Fearn, 198.
217. 225.
248.
3d edit. 3.]

* Vide Stat. 10 & 11 W. 3. c. 16. stat. 312.

Rell. Abr.
119.
Uvedal v.
Uvedal.

* It is proper to observe, that Chancery will not admit of waste by collusion between tenant for life and the person entitled to the first vested estate of inheritance, to the prejudice of future issue. See the case of Garth and Sir John Hind Cotton, 1 Ves. 514. 546.

of families, who, upon no occasion whatever, could dispose of their estates.

* *A.* tenant for life, remainder to his first, second, and other sons in tail male successively, remainder to *B.* for life, and so to his first, second, and other sons in tail male, then *B.* having issue a son, and *A.* no son, *A.* cuts timber trees; the son of *B.* who then tenant in tail shall have them, for the property thereof is in him by reason of his inheritance, and the remainder to the first and other sons of *A.* is no impediment, being but a possibility which may never happen, and is of no regard till it does happen, but may be destroyed by feoffment, &c.*

Cro. Car.

252. Biggot v. Smith.

3 Mod. 309.

S. C. cited.

Ld. Raym.

376. S. C.

cited.

Vent. 189.

† In this

case the particular estate

was not subsisting at the

husband's

death, when

the fee

should have

vested, for

his second feoffment had destroyed it during the coverture; and though the wife's right of entry took effect at the instant the remainder should have vested, yet it was insufficient, for it should have been then actually existing. Fearn, 434. 4th edit.

* One made a feoffment in fee to the use of himself and his wife and to the heirs of the survivor of them, and after the husband made a feoffment in fee, and died; the wife entered, and in feoffment a stranger, and died; and the question was, Whether by the wife's entry the fee should vest in her, being the survivor, so as her issue might enjoy it? It was adjudged, that the husband's feoffment had destroyed this future contingent use of the fee, for whatever cannot accrue at the time of the death of the party who first dies, cannot afterwards, by any act, be revived; and though in this case the wife had a joint estate for life with her husband, yet, during the coverture, she was bound by his feoffment, and so could not prevent the destruction of the contingent fee, which was not to take effect till the death of one of them †.

Cro. Car.

364.

Boreton v.

Nicholls.

* So, where one hath issue two sons *B.* and *C.*, and makes a feoffment in fee to the use of himself for life, remainder to the use of *C.* for life, remainder to the first son of *G.* who should have issue of his body, and to his heirs for ever; and, for default of such issue, to the use of the first daughter of *C.* who should have issue of her body, and to her heirs for ever; and so to the second, &c. remainder to the right heirs of *C.* for ever, and dies; *C.* enters, and hath issue a son, who dies without issue; then after *C.* levies a fine with proclamation, and *B.* enters as for a forfeiture of his estate for life; it was adjudged against *B.*, for the fee vested presently in *C.*, and the other limitations were but contingent, and so barred and destroyed by the fine, there being then none in esse to take them; and then the fee was immediate to his estate for life, and so the fine good, and no forfeiture.

Cro. Jac.

168.

Bell's case

cited.

* If one make a feoffment in fee, or covenant to stand seized to the use of himself for life, and after to the use of his first son in tail male, &c., and, before the birth of any son, make a feoffment in fee, this destroys the contingent remainder to the son, so that it can never after arise.

“ One made a feoffment in fee to the use of himself for life, remainder to the use of his wife for life, remainder to *A.* his eldest son for life, remainder to the eldest issue of *A.* which should be at the time of his death, remainder to *C.* in fee; *A.* hath issue *B.* his eldest son; the feoffor dies; his wife releases to *A.* for years, and he makes a feoffment in fee to *D.*, to whom *C.* levies a fine; the wife dies, then *A.* dies—it was adjudged, that, by this feoffment, the remainder to the eldest son of *A.* which should be at the time of his death, was destroyed, though he had then a son actually born; because it was contingent and uncertain whether that son would continue to be his eldest at the time of his death; for he might die, and another be his eldest; and therefore the remainder could not vest in him in his father's life, and by consequence being in contingency was destroyed by the feoffment, which determined the particular estate before the remainder could take place. But note, if the wife had entered, this had revived the contingent remainder, for her right of entry was sufficient for that purpose; or if she had survived *A.* then, though she had died before entry, yet might the feoffees, after her death, enter and revive the contingent remainder.

Cro. Eils.
630. Moor,
pl. 726.
Smith v.
Belmy. 1 R.
Rep. 297.
Like case.

2 Roll. Abbe.
794-

“ *A.* makes a lease for life by indenture, with livery to *B.*, and if it fortune *B.* to marry any wife who shall survive him, then the land shall remain to such wife for her life; *proviso* if *B.* does not in writing, or last will, declare his mind that she shall have it, then it shall not remain to her; *B.* before marriage makes a feoffment to *C.*, to whom *A.* levies a fine, and suffers a recovery, and after *B.* marries, and makes a declaration, that his wife shall have the remainder, &c.; then he and his wife levy a fine to *C.*, and after he makes another like declaration and dies; and his wife enters. And by certificate of two judges to the Chancellour, her remainder was destroyed by the feoffment, because the freehold was thereby determined before the remainder could take effect; also the possibility of the wife was inclusively given away in the fine, and then the declaration was to no purpose. And so it seems it would have been, if he had made such declaration, and after had made the feoffment, for that declaration had only made the remainder absolute to the wife who should survive him, which being contingent, and uncertain who that would be, would be barred and destroyed by the feoffment.”

Moor,
pl. 750.
Powle v.
Veer.

“ *A cestuy que use* in fee 1 H. 8. devises, that his feoffees shall be seised to the use of *B.* his son for life, remainder to the next heir of the body of *B.* and *C.* his wife for life, remainder to the next heir of the said heir begotten, and for default of such issue to the use of the heirs of the body of *B.* and *C.* his wife for the life and lives of every such heir or heirs, and for default of such heirs, to the use of the heirs of the body of *B.* remainder to the right heirs of *B.* and if any one of the said heirs shall let, set, alien, or mortgage his right, title, or interest, or suffer any recovery to be had against him by his consent, &c.

1 Leon. 256.
Manning v.
Andrews.
Vide 1 Co.
138.
Mo. 371.
that such
limitations
of perpetual
freehold are
against law
and void;
because
thereby lands

would lose
their ward-
ships, ef-
cheats, &c.
Idem quere.

“ that then the use limited to such heir shall be void during his
“ life, and the feoffees shall thenceforth be seised to the use of
“ the heir apparent of such offender, as if he were dead. *A. dies;*
“ *B.* hath issue by *C.* a son named *D.* and dies, in 31 *H. 8.* *C.*
“ dies; *D.* enters, and hath issue two sons, *E.* and *F.* then *D.*
“ 4 *El.* by indenture and fine conveys to the defendant with war-
“ ranty, and afterwards, 6 *Eliz.*, *E.* levies a fine to him with war-
“ ranty likewise. Afterwards *E.* hath two sons, who are now
“ living. The heir of the survivor of the feoffees within five
“ years after the full age of *F.* and seven years after the fine
“ levied, enters to revive the use limited to *F.* who enters, and
“ lets to the plaintiff. And by *Geoffries J. B.* had an estate-tail,
“ because the estates are limited to go in a course of descent from
“ heir to heir of his body. But by *Gawdy* and *Southcote J.* every
“ issue of *B.* and *C.* hath estate for life successively with a re-
“ mainder in tail expectant, as heirs of the body of *B.* and such
“ remainder in tail shall not be executed in possession by reason
“ of the mesne remainders for life limited to the heirs of the
“ body of *B.* and *C.* for their lives, which, though they are but
“ contingent, shall hinder the closing of the estate for life with
“ the remainder in tail in possession. But by *Wray C. J.* and, as
“ it seems, the better opinion, *B.* and *C.* have but estates for life
“ by express limitation; but the remainder to the heirs of the
“ body of *B.* which is an estate-tail, closes with their estates for
“ life, and gives them an estate-tail in possession, subject to open
“ and let in the contingent remainders to the heirs of the body of
“ *B.* and *C.* for their lives respectively; then *D.* by his fine severs
“ his two estates, forfeits his estate for life, and lets in *E.* his
“ heir apparent for his life, and *E.* by his fine lets in *F.* his then
“ heir apparent by purchase, which the sons of *E.* born after shall
“ not divest. But by *Geoffries J.* *E.* being in by forfeiture of *D.*
“ his father, his estate shall not be again subject to the forfeiture
“ by his alienation; or, if it be, yet *F.* can have no more than
“ *E.* had at the time of the forfeiture, which was but during the
“ life of *D.* his father, and not the inheritance in tail, for that
“ continued in *D.* subject to no forfeiture. As to the regrefs of
“ the feoffees, *Geoffries J.* held, that *F.* taking in his turn as heir
“ of the body of *B.* and *C.* which was contingent, they ought to
“ enter to revive the use to him, but that their entry by fine and
“ nonclaim was barred. *Southcote J.* thought they could not en-
“ ter at all, because the statute takes out all the right from them,
“ but that *F.* might enter, and was not bound to the five years,
“ having no right at the time of the fine levied, his right com-
“ ing by the fine of *E.* as the *causa causans*. But *Wray* was clear,
“ that no estate was left in the feoffees to warrant their entry;
“ but that the contingent uses, when they happen, should vest
“ without such entry: then, when *D.* levied a fine, he gave an
“ estate of inheritance to the defendant, having the entail and
“ fee annexed to his estate for life, and *B.* by his entry could
“ gain only an estate for life as next heir apparent according to
“ the

the will, and by his fine he could give only that estate for life, and so by the fine of *D.* the right of the entail and fee were clearly barred and gone; and by the fine of *E.* his estate for life was gone; and so *F.* to whom no estate was specially limited; but who was to take only as heir apparent to *E.* had no cause to enter. *Quere* of this case."

One devised lands to *A.* for life, and after to the next heir male of *A.* and the heirs male of the body of such next heir; *A.* having issue *B.* his son, made a feoffment in fee to *C.* upon whom *B.* entered; it was adjudged, first, that this was good as a contingent remainder; secondly, that by this feoffment of *A.* who was but tenant for life, the contingent remainder was destroyed, for every remainder ought to vest either during the particular estate, or at least *eo instanti* that the particular estate determines; and here by the feoffment the estate for life of *A.* was determined by forfeiture; and since the remainder could not then take effect, for *non est heres viventis*, it can never after rise.

Co. 66.
Cro. Eliz.
453.
Hob. 338.
& vide
2 Leon. 219.
Moor, 104.
2 Sid. 67.

So it is, if a lease be made to *A.* for life, remainder to the right heirs of *J. S.* if *A.* makes a feoffment living *J. S.* the remainder is gone. But in these cases, if *A.* had been disseised, yet the remainder might have taken place; for, as the right of the particular estate was subsisting, so the right of the remainders which depended upon it was in the same condition, and *A.* by his re-entry shall restore not only his own estate, but the contingent remainders likewise. But in that case, if *J. S.* dies, and then *A.* dies before any re-entry, then the feoffees must enter to revive the use to his right heirs; because, until such entry, the disseisin continues, and the use to draw after it the possession, until that possession be restored, it cannot be carried to the use, and none have right to the possession but the feoffees."

1 Co. 130. b.
134. b.
135. b.
129. a.
2 Sid. 67.

If one makes a gift in tail to *A.* remainder to the right heirs of *J. S.*, and *A.* makes a feoffment in fee, and then *J. S.* dies, and after *A.* dies without issue, yet the right heirs of *J. S.* shall never have the remainder; for by the feoffment of *A.* the estate-tail, and all remainders, were discontinued and vested in the feoffee, and there was not any particular estate in fact, or in right, to support the remainder when it should happen; and upon the death of *J. S.* this remainder was as capable of vesting as a remainder, as ever it could be after, his right heir being then certainly known; but since by the feoffment of *A.* the whole estate-tail, and the right of it, as to himself, was determined, and yet the remainder could not then take effect, it shall never afterwards. Otherwise it would be, if *A.* had only been disseised, for then the right of the estate-tail had preserved the right of the remainder. And so it seems the law is at this day upon a feoffment to the use of *A.* in tail, remainder to the right heirs of *J. S.*

Co. 135. b.
& vide
2 Roll. Abr.
796.
2 Sid. 64.
129.
Vent. 182.

A. tenant for life, remainder to his first son in tail, remainder to *B.* for life, remainder to his first son in tail; *A.* having a son accepts

Vent. 182.
2 Lev. 35.
2 Keb. 572.

*Lloyd v.
Brooking.*

(a) 3 Lev.

437.

Duscombe,

S. P.

3 Saund.

251. and

2 Vern. 755.

[*followed to be*

good law by

Lord Hard-

wicke in

Hooker v.

Hooker, Ca.

temp. Hart.

23.

Ellis v. Of.

Borne, 2 P.

Wms. 610.

Manfel v.

Manfel,

Ca. temp.

Talb. 252.]

Wegg v.

Villers,

2 Roll. Abr.

796.

2 Ventr.

288. S. C.

sited.

3 Mod. 310.

“ accepts a fine from *B.* and then makes a feoffment in fee, and
 “ then *B.* has issue a son born—the remainder to him is not de-
 “ stroyed; for the acceptance of the fine displaced nothing; and
 “ though the feoffment displaced all the estates, yet the right left
 “ in the first son of *A.* shall support the right of the contingent
 “ remainders. For though the feoffment of *A.* was a forfeiture of
 “ his estate for life, yet his son, who was next in remainder, and
 “ had a right thereto, was not bound to take advantage thereof,
 “ but might stay till the death of *A.* and as he might then have
 “ entered, so, if he dies, whereby the remainder and right of entry
 “ go over to another, they may likewise enter, after the death
 “ of *A.* or before, as they think fit. And it is there said, the
 “ way to preserve such contingent remainders is to limit the use
 “ to the husband for life, or more modernly to him for years,
 “ then to the use of the feoffees for the life of the husband, and
 “ then to limit the contingent remainders; or, if it were to the
 “ husband for life, remainder to trustees and their heirs during
 “ the life of the husband, remainder to the heirs or heirs male of
 “ the body of the husband, yet is not the fee or fee-tail executed
 “ in the husband otherwise than as a remainder (a), by reason of
 “ the interposing limitation to the trustees, and therefore in such
 “ case the wife of the husband shall not be endowed.”

“ *A.* covenants to stand seised to the use of himself for life, re-
 “ mainder to his wife for life, remainder to *B.* his daughter for
 “ life, remainder to the first son to be begotten of the body of *B.*
 “ and after to divers other sons of *B.* in like manner, remainder
 “ to his own right heirs; and after, for disturbing the rising of the
 “ contingent estate, grants his reversion in fee without considera-
 “ tion, and with express notice of the first uses; and afterwards
 “ makes a feoffment in fee, and dies: his wife enters: *B.* dies,
 “ and then the wife dies. It was adjudged, 1st, That this grant
 “ of the reversion, which was in himself, and out of which the
 “ contingent remainder was to arise, (being by way of covenant
 “ to stand seised,) could not prevent the contingent remainder
 “ from rising, because the grantee had express notice of the set-
 “ tlement, and therefore took it subject to the uses limited there-
 “ by. 2d, That this feoffment did not destroy the contingent
 “ estate; for this was a forfeiture of his estate for life, and of the
 “ estate for life of the wife in remainder during the coverture, so
 “ that the daughter might have entered for the forfeiture during
 “ the coverture, which right of entry was sufficient to support
 “ the contingent remainder. But it is there said, it would have
 “ been more doubtful, if the daughter had not had an estate for
 “ life, but that the contingent remainder had depended imme-
 “ diately upon the estate for life of the wife, because the feoff-
 “ ment of the husband passed his estate and the estate of the wife
 “ too, during the coverture; and then neither of their estates were
 “ in esse to support the contingent remainders, and that in such
 “ case the contingent remainder should be destroyed.—This was
 “ upon a conveyance made by Sir Edward Coke.

Note, It was held by *Glyn, C. J.* in the above case, that if the feoffment of the Lord *Coke* had preceded the grant of the reversion, this had for ever destroyed the contingent remainders, and that no entry by those in remainder could have revived them. And therefore there seems a difference between such contingent remainders as are to arise out of the estate of the person who makes the feoffment, and such as arise out of the estate of a third person. Where they are to arise out of the estate of the person who makes the feoffment, they are thereby for ever destroyed, because there can be no *scintilla juris* left in him against his own feoffment to serve them, when they come *in esse*. But, where the *scintilla juris* is in a third person, there, if the first estates are reduced in possession before the happening of the contingency, the *scintilla juris* is likewise restored to such third person sufficient to serve them, when they come *in esse*; and therefore in the above case, he having granted his reversion out of which the contingent uses were to arise, though he himself after made a feoffment by disfeisin, yet, upon the entry of the wife after his death, the *scintilla juris* in the grantees of the reversion revived to serve the future use. But, if after such feoffment, they had released all their right, &c., or, if they themselves being lawfully in possession, had made such feoffment, the contingent remainders could never afterwards have arisen. But, where such feoffees to uses enter and disfeise the tenant in possession, and make a feoffment in fee, there, by the entry of those in remainder in whom an estate certain was settled, the disfeisin is purged, and by consequence their *scintilla juris* restored to serve the contingent uses.

2 Sid. 159.
[Mr. Fearn, after explaining very fully this doctrine as to the necessity of an actual entry to restore or reduce contingent uses after they have been divested, adds,—But we ought to be very cautious how we at this day admit such a doctrine in practice; a doctrine which would lead us to conclude, that in common cases of strict settlement upon marriage, where the conveyance is by way of use, if the father, the

first tenant for life, were by feoffment, &c. to divest the estates, leaving them a right of entry, the contingent remainders to the sons, &c. could not take effect; unless the mother, supposing her to take a remainder for life and to survive the father, or else the trustees to whom the remainder for preserving contingent uses was limited, or else the general grantees or releasees to whom the lands were conveyed to the uses expressed, should actually make an entry into the lands; an opinion which, with all due deference to what was delivered by the court of K. B. in their arguments upon the case of *Wegg v. Villers*, I cannot persuade myself would hold at this day; for, First, as to what was resolved in the case of *Wegg v. Villers*, we are to observe; that as there was, besides the right of entry in the daughter, an actual entry made by the mother in that case; the point, whether the mere right of entry in the daughter would have been sufficient, without any entry by her or by the mother, or by the grantees, was not the question which came before the court; nor of consequence, did the judgment of the court in that case depend upon or decide the doctrine in regard to that point. And as to the other cases put and agreed to by the court in their debate of the principal case, the opinions upon them were really extrajudicial; and, indeed, so far as they respected the supposed necessity of an entry to restore or reduce contingent uses; they appear to have been founded on an artificial strain of reasoning, much too subtle and metaphysical to bear any great stress. If we are to infer (as is said in the arguments in *Chudleigh's case*) a *scintilla juris* in the mothers, that may enable them to enter and restore their possibility of a *seisin*, (or if the contingency has happened, their actual *seisin*), to serve the contingent uses; what is it that confines us to such narrow and insufficient limits, in regard to the measure of this *scintilla juris*? Why not extend the inference one degree further, and suppose such a *scintilla juris*, as may be competent to serve the contingent uses, without the unnecessary circuitry of an actual entry? The latter inference is certainly more adequate, and better adapted to the end proposed; and what is there discoverable in the statute of uses, which excludes this and admits the former? Nay, how does it appear that any thing, contained in that statute, puts us to the necessity of recurring to any *scintilla juris* at all in the feoffees, or any entry to be made either by them or by the *cestui que use* under any preceding vested use, in order to restore and reduce a contingent use to the capacity of taking effect, whilst a right of entry subsists in any preceding *cestui que use*? On the contrary, does not the statute expressly enact, that where any person, &c. is seized to the use of others, such other persons, i. e. the *cestui que use*, shall be deemed and adjudged in lawful *seisin*, estate, and possession, &c. to all intents, constructions, and purposes in the law, of and

in such like estates as they had in the use, &c. (a) ? And must not these words, *to all intents, constructions, and purposes in the law*, be referred to the legal properties, qualities, and capacities of estates of the like degree or measure at common law ? If so, the *cestui que use* become entitled to, and take by virtue of this statute, estates possessing and bearing in themselves all the qualities, properties, and capacities of estates at common law, of the like degree or measure ; now one of the legal qualities or capacities, of an estate at common law, of the degree or measure of freehold, is, that after it is divested and turned to a right of entry, such right of entry will support a contingent remainder ; and one of the qualities or capacities of a contingent remainder at common law is, a capacity of being supported by such right of entry : why then do not, a preceding vested use, of the degree or measure of freehold, and a subsequent contingent use, respectively, acquire these legal qualities, properties, or capacities, amongst other qualities or properties of estates of like nature and degree at common law ? If they do, it is obvious there can be no necessity for any actual entry by any body, to restore a contingent use, where there subsists a right of entry in a *cestui que use* of a preceding vested freehold to support it ; but such right of entry shall will preserve its capacity of vesting and taking effect. If we deny this, we at the same time deny that the *cestui que use* have lawful seisin, estate, and possession, &c. to all intents, constructions, and purposes in the law, of such estate as they have in the use. I think, that a little attention to the apparent operation of the statute of uses, in relation to this point, will be sufficient to prevent our too hastily admitting a doctrine, which, without the aid of metaphysical subtleties, seems hardly reconcilable to the express force of that statute. *Fearne's C. R.* 442. 4th edit.]

Heyns v. Villars.
2 Sid. 64.
98. 129.
157.

" This case was upon the same conveyance with that of *Wigg v. Villars* : but the case, as there put, is, that after such conveyance to stand seised, Sir *Edward Coke* made a lease for years, and then granted the reversion without any consideration, and the lessee attorned, and after Sir *Edward* entered, and made a feoffment in fee before the birth of any son, and then died, and his wife entered : and then, it was agreed, that by the lease for years and the grant of the reversion, the whole estate of Sir *Edward*, out of which the contingent uses were to arise, is transferred, and that the lease for years should be good against the contingent remainders, but not against the remainders that were actually vested, as shall appear hereafter : but, as to the reversion, that being granted without consideration, was liable to serve the contingent uses when they came in esse, in the same manner as if it had not been granted over at all : then, by such lease and grant of the reversion, the whole estate being out of Sir *Edward*, his feoffment after was a disseisin, and divested all the estates in esse, and turned them and the contingent remainders to a right, which right was restored again to possession by the entry of the wife after his death.—But there, it was clear, that when the wife entered, she revived the estate to herself for life, and the contingent remainders also. And it is said in *Vincentis*, 189. that it had been a question, whether a right of action would support a contingent remainder ; but that a right of entry would, was never doubted. And there it was agreed, that if *A.* makes a feoffment in fee to the use of himself for life, remainder to *B.* for life, remainder to the first son of *B.* in tail, &c., remainder to his own right heirs, that in this case a feoffment by *A.* will not destroy the contingent remainders, because the right of entry in *B.* for the feoffment preserves them, and if he does so enter, all the estates in remainder are re-vested, so that his son after his death may

1 Co. 130.

(a) *Vide* 2 Co. 54. a. Moor, 212. 1 Leon. 258. 1 Mod. 155.

" enter

enter without any re-entry by the feoffees. But, if after such feoffment *B.* dies before entry leaving a son, he cannot enter though his contingent estate be not destroyed; but in such case the feoffees must enter by the *scintilla juris* left in them for such purpose to revive the contingent uses for the reason before given.

"If one makes a feoffment to divers others with several contingent remainders, and no estate is left in the feoffees, and after they enter and disseise the tenant in possession, and make a feoffment in fee, yet, if the tenant in possession, or any of those in remainder in whom an estate certain was settled before the feoffment, re-enter, by this all the contingent remainders are reduced *in statu quo*, &c., and may be executed by the statute of uses; for the feoffees are but conduits to convey the estate, and have no power to destroy any contingent estate. But, upon such settlement, if the estates *in esse* are divested by disseisin, feoffment, &c. before the contingencies happen, and afterwards they happen, and then the estates *in esse* determine before any re-entry; if the feoffees release all their right in the land, or make a feoffment, or any other way bar their right of entry; in this case, the contingent uses can never be revived to be executed by the statute, because the feoffees have barred their *scintilla juris*, and none *in esse* can enter.

1 Roll. Abr.
797. pl. 130
16.

"If one on marriage of his son, &c. covenant to stand seised to the use of the son for life or for 99 years, if he so long live, remainder to two strangers during the life of the son, upon trust to support contingent remainders, with remainder to the first and other sons in tail; this remainder to the two strangers is void, because there is no consideration; and then, by consequence, there is no estate to support the contingent remainder to the sons."

2 Lev. 52.
54.
3 Keb. 120.

"If tenant for life, with contingent remainders to his first and other sons, before the birth of any son, make a feoffment in fee, with condition of re-entry, the contingent remainders shall never arise, though the condition be broken, and a re-entry made before the birth of any son; because the feoffment, though upon condition, was a forfeiture and determination of the particular estate, and the remainder not being capable of taking place is gone for ever, for the recovery does not purge the forfeiture."

Show. P. C.
151.

"*A.* tenant for life, remainder to his first and other sons in tail male successively, remainder to *B.* in tail, remainder over; *A.* before the birth of any son surrenders to *B.* and then a son was born. In this case it was held that by the surrender the contingent remainder was gone and destroyed; but the principal question in this case was, if the surrender was effectual, because *B.* knew nothing of it till five years after the birth of the son, and then he agreed to it; and this in *C. B.* and *B. R.* was adjudged to be no such surrender as should destroy the contingent remainder; but the judgment, as to this point, was reversed in the House of Lords, against the sense of all the judges except two. But it afterwards appearing, that at the time of the surrender *A.* was non

Ld. Raym.
313.
Carrh. 212.
Show. P. C.
150.
3 Lev. 284.
2 Salk. 427.
pl. 2. 576.
618.
Comyn, 45.
pl. 30.
3 Salk. 300.
pl. 10.
2 Vent. 198.
3 Mod. 301.
Comb. 438.

'compas,

Thompson
v. Leach.

“ *compos*, this was held a void surrender, and not only voidable : and therefore no estate passed by it, and then by consequence the contingent remainders were not touched.

2 Sound.

380.

1 Lev. 39.

3 Keb. 17.

Purfoy v.

Rogers.

4 Mod. 284.

3 Mod. 310.

S. C. cited,

and in several

other books.

“ *A.* tenant for life, remainder to her first and other sons in tail male successively ; *A.* takes a husband, and, before the birth of any son, the reversioner in fee grants and conveys his reversion to the husband and wife by fine, and then *A.* hath issue a son, and dies. And *per cur.* though if *A.* had survived her husband, she might have avoided and waived the estate taken by the fine, yet the contingent remainder to the son is utterly destroyed, there being then none *in esse* when the particular estate determined, for the husband and wife take by entireties, and therefore the estate for life of the wife was merged before the contingency happened, and the possibility which the wife had, of avoiding the inheritance, given by the fine, and thereby reviving her estate for life, will not preserve it ; for if the contingent remainder cannot take effect when the particular estate determines, be it by surrender, merger, feoffment, or otherwise, it can never after arise.”

2 Sound.

386.

3 Keb. 12.

“ *A.* tenant for life, remainder to his first and other sons in tail successively, remainder to *B.* in fee : *A.* and *B.* before the birth of any son, levy a fine of their estate to a third person. This makes no discontinuance or divesting of any estates, because each gives only his own estate. Yet by *Hale* and other good opinions, the contingent remainder is destroyed, because, though the estates pass divided from them, yet they are united in the grantee, and so no particular estate in being to support the contingent remainder.”

4 Mod. 259.

3 Lev. 408.

Salk. 227.

pl. 6.

Carth. 309.

Reeve v.

Long.

“ *A.* seised in fee devises his lands to *B.* eldest son of his brother *C.* for life, remainder to the first son of *B.* in tail, and so to all his other sons in the same manner successively, remainder to *D.* second son of *C.* for life, remainder to his first and other sons in tail successively, and dies ; *B.* enters and dies, leaving his wife *ensent* with a son ; then *D.* enters as in his remainder, and six months after the son is born ; and all this matter being found specially, it was adjudged in *C. B.* for *D.* against the son : first, because this being a contingent remainder to the son, and he not being born at the time when the particular estate determined, this became void : secondly, *D.* being the next in remainder, and having entered before the birth of the son, was in by purchase, and therefore shall not lose his estate by a son born after. And this judgment was affirmed in *B. R.* for they held it plainly to be a contingent remainder, and not an executory devise or a springing remainder, for that would introduce a perpetuity not to be barred by a common recovery, because it would be the same to all the other sons ; but here it being a contingent remainder, and not happening in time, it is gone for ever ; and they relied on *Archer's* case. But upon a writ of error brought into parliament, the judgment was reversed by almost all the Lords, because being in a will, they thought that by the meaning and equity thereof they ought not to disinherit the heir for such a nicety, and that a will was otherwise to be

“ expounded

expounded than a deed; and therefore they construed it an executory devise or springing remainder to the first and other sons, and that the freehold should vest in *D.* till the son was born. But all the judges were much dissatisfied with it, and did not change their opinions, but blamed the judge who permitted it to be found specially where the law was so certain and clear.

Note, That now by the 10 & 11 W. 3. cap. 16. Provision is made, that after-born sons and daughters, to whom remainders are limited in contingency, shall take in the same manner as if they had been born in the father's lifetime, though no estate be limited to trustees to preserve and support such contingent remainders, which act was made by reason of this case, and of the strictness of the law herein.

[*Vide*
1 Term Rep.
634.]

“ One having three sons *A.*, *B.*, and *C.*, devises lands to them severally without limitation of any estate, and that if any of them die, the other surviving shall be his heir. *A.* the eldest dies leaving issue; and if this part should go to his son, or to *B.* and *C.*, was the question. It was adjudged by three justices against *Fleming C. J.* for the son of *A.* because nothing but a freehold passed by the devise, and the reversion in fee descending upon *A.* his eldest son, had merged his estate for life, and that after his death this could not be revived to vest the remainder in *B.* and *C.* But *Fleming C. J.* was of opinion, that this might well vest in *B.* and *C.* by way of remainder, and then the words implied that every one should have it after the other, and therefore, though the freehold of *A.* was merged by the descent of the fee, yet to support the intent of the will, this ought to vest in the surviving sons for their lives.

Cro. Jac.
260.
1 Bullstr. 62.
Wood v.
Ingersole,
Swinh. 112.

“ One having three sons *A.*, *B.*, and *C.*, devises lands to them severally without limitation of any estate, and if any of them die, his part to remain to the others, equally to be divided between them. *A.* dies having first granted the land for 1000 years to the defendant. It was adjudged, that though by the descent of the fee upon *A.* the eldest son, his estate for life was merged, and so the contingent remainders to the other sons were destroyed (for in these cases the remainder must be in contingency, and cannot vest presently, because it is uncertain which of the sons will survive) yet that it should be good to them by way of executory devise, according to the opinion of *Fleming* in the case next before, (for so must his opinion be understood, though it is there said, by way of remainder,) and that this was the most reasonable construction to support the intent of the will. And they said, the case of *Wood v. Ingersole* was best put in *Bulstrode*; for upon inspection of the record the words appear to be if any of my sons die, the one to be the other's heirs, which words import no certainty, which of the survivors, or whether both shall have the part of the son who dies first, and therefore that part of the devise was void, and by consequence would not carry over the estate from the son of *A.* or defeat the lease made by *A.* And *Jones* says, it was resolved in this case by the court, that to support the intent of the will it should be construed, that he devised for life to *A.*, remainder

2 Lev. 302.
Sir T. Jon.
79. 3 Keb.
729. 924.
Fortescue
v. Abbott,
Pollens. 481.

“ to

2 Lev. 27.
 ShT. Raym.
 28.
 2 Sid. 47.
 2 Keb. 29.
 219.
 MSS. Plun-
 kett v.
 Holmes.

" to *B.* and *C.*, equally to be divided between them; and so is
 " the other devise; and that by this construction an actual cross
 " remainder for each one's part should be executed in the other.
 " *Sed quare* of this construction.

" One devised lands to *A.* his eldest son for life, and if he
 " should die without issue living at the time of his death, then
 " to *B.* his second son, and his heirs; but if *A.* had issue living at
 " the time of his death, then the lands should remain to *A.* and
 " his heirs; and died. *A.* entered, and suffered a common re-
 " covery, and died without issue, having by his will devised the
 " lands to the defendant. *B.* entered, and let to the plaintiff; and
 " the question was, if *A.* had by the will an estate for life only,
 " with a contingent remainder to *B.*? or, if the fee was vested in
 " *A.* with an executory devise to *B.*? and, admitting it to be an
 " executory devise to *B.*, if the common recovery barred it? It
 " was argued for the plaintiff, that *A.* had the fee; for though
 " an estate for life only is devised to him, yet by descent of the
 " reversion, the whole fee was executed in him, which merges his
 " estate for life, and then the estate to *B.* can be no other than an
 " executory devise. For when all the fee is given to or vested in
 " one person, with a limitation of a fee to another person upon a
 " contingency, this cannot be a remainder; for a fee cannot be
 " limited upon a fee, as appears before, but of necessity this must
 " take effect as an executory devise. But when only part of the
 " estate, as for life or in tail, is given to one, and the residue to
 " another upon a contingency, as to the right heirs of *J. S.*, who
 " is then living, or to such person as shall be living in such house
 " at such a time, this remainder is contingent. But here, the
 " whole fee is in *A.*, either by the devise, by a transposition of
 " the words, or by descent of the fee, and then the devise to *B.*
 " can be no other than an executory devise, which being to hap-
 " pen within the compass of one life, hath been allowed good
 " (*Cro. Ja.* 590. *Est v. Brown.*) As to the second point, they
 " relied upon the same case, that this cannot be barred by the
 " common recovery. *Sed per totam curiam* it was adjudged, that
 " *A.* had but an estate for life by the will, and the remainder to
 " his heir was not executed; for both the remainders to *A.* and
 " to *B.* are upon a contingency, not a contingency upon a con-
 " tingency, which the law will not allow, (for then by the same
 " reason it might allow a hundred contingencies one after another,
 " and so quite elude the statute of *quia emptores*;) but upon one and
 " the same contingency, which looks several ways. viz. if *A.*
 " hath issue living at the time of his decease, then to him and his
 " heirs; but if not, then to *B.* and his heirs. And the case was
 " thus considered, as if *A.* had been a stranger, and not heir at
 " law. But then considering him as heir at law, and that
 " the reversion descended to him, yet, *per curiam*, not so ab-
 " solutely as to merge and confound the estate for life given
 " by the will against the express words and intent thereof; but
 " there shall be an hiatus or opening to let in the remainders
 " when they happen; and though *A.* happens to be heir at law,
 " yet this being matter *dehors* the will, no use shall be made of it

in expounding the will; and *Archer's* case is express in the point, where, though *Robert* the devisee for life was heir, yet the remainder to his next heir male was a good contingent remainder, and the estate for life, not merged in the fee, should descend on him. And it cannot be supposed, that this consideration escaped a quick-sighted reporter, but was omitted as a thing of no value. As to the second point, if the remainder to *B.* be contingent, there is no doubt but it is barred or destroyed by the recovery, and so it would be, by a bare surrender of the estate for life. And they all agreed, that if, by any construction, it could be made a contingent remainder, it should be so taken, rather than an executory devise, which could not be barred by a common recovery, and so would tend to a perpetuity. And note, they all seemed to agree, that the fee was not in abeyance, but descended to *A.*, subject to such hiatus, and that *quoad B.* the devisee in remainder, *A.* had but an estate for life. *Quere* if the construction in this case does not thwart the second of the two preceding cases, where the court, allowing the remainders to be in contingency, held them destroyed by the descent of the fee upon the eldest son, which merged his estate for life, and therefore they were."

Cro. Car.
158. 360.
1 Co. 66.

[*A.* devised lands to his sister, who was his heir at law, and her assigns for her life, and if she should marry, and have issue male of her body living at the time of her death, then to such issue male and his heirs male for ever; but if she should leave no issue male at her death, then to *G.* and his heirs for ever. The question respected the title of the testator's sister's husband to be tenant by the curtesy of the lands so devised to her; and the court held, that the inheritance was never executed in possession in the sister, during her life, (notwithstanding the inheritance descended on her,) and therefore her husband could not be tenant by the curtesy; it follows, that the descent of the fee did not merge her estate for life, or destroy the contingency.]

Boothby v.
Vernon,
9 Mod. 147.

Father and son are, the father conveys land to the use of himself for life, remainder to the use of the son for life, remainder to the first and other sons of the son in tail male successively, remainder to the heirs of the body of the father, or to his right heirs, and dies before the birth of any son of his son; and if by the descent of the fee or tail upon the son, the contingent remainders were destroyed, was the question? It was argued, that they were not, because the inheritance came to the son by descent, which was an act in law, and not by his own act; and therefore the law, which does no wrong, shall not destroy these contingent remainders, but that upon the birth of the sons the estate shall open again to let in the remainders. But it was adjudged, that the contingent remainders were destroyed by the (a) descent of the inheritance upon the son; and they relied on the case of (b) *Wood v Ingerfoles*, and held, that this case differed from the cases cited, where the estates were united at first upon making the conveyance, and if they should not afterwards open, so as to let in the remainders, the conveyance would de-

Vent. 306.
2 Jon. 76.
3 Keb. 733.
820.
Hartpool
v. Kent.

(a) For this
vide Co. Lit.
28. a.
11 Co. 80.
Lev. 11.
Raym. 28.
Sid. 47.
Plunkett v.
Holmes.
2 Lev. 202.
2 Jon. 79.
Fortescue v.
Abbott.
(b) Cro. Jac.
260.

‘sroy itself; but here, this descent was an act subsequent to the conveyance, and made an alteration in the estates limited thereby, and therefore had destroyed the contingent remainders.’

Hooker v.
Hooker,
Ca. temp.
Hardw. 13.
Fearn's
Ca. R. 502.

[Lands were conveyed to the use of *A.* and his wife for life, remainder to the use of *B.* the son of *A.* for his life, remainder to the first and other sons of *B.* in tail, remainder to *A.* in fee. *A.* and his wife died in the lifetime of *B.* who afterwards died without issue, leaving a wife. The question was, Whether the wife of *B.* was entitled to dower in the lands? It was decreed she was: and Lord Chancellour, with one of the judges, was of opinion, that the estate for life in *B.* was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.]

Vent. 345.
2 Jan. 136.
Raym. 413.
Harrison v.
Balsey.

‘*A.* and *B.* joint-tenants for their lives, remainder to the first son of *A.* in tail, and so to the second, &c. remainder to the right heirs of *B.* Before any issue *A.* releases to *B.* and his heirs, and after hath issue a son; and if by this release, before the birth of a son, the contingent remainders were destroyed, was the question? It was argued, upon the diversity in the above case, that this uniting of the estate for life with the remainder in fee, being by conveyance and act subsequent to the limitation of the contingent remainders, and before they came in being, had destroyed them; for now the estate for life upon which they depended is gone, and the whole fee executed in *B.* and therefore they can never after arise. But by three justices, *dissentiente Dolben*, it was adjudged that these contingent remainders were not destroyed; for to some purposes the whole fee was executed in *B.* immediately upon the first conveyance, and this release of *A.* gave him no greater estate, nor in any other degree than he had before; for after such release he is in of the whole estate by the lessor, as he was before, and as he would have been, if it had come to him by survivorship; and his estate being at first given, subject to these contingent remainders, must open to let them in, when they happen, as it would have done, had no such release been made; and though they were limited immediately after the estate for life to *A.* and *B.*, yet till they came in *esse* they did not prevent the closing of the fee in *B.*, and therefore did not depend absolutely upon the estate for life, and have now no other impediment to hinder their rising than they had at first.’ “Note, *Ventris* reports the same case to be adjudged, that they were destroyed, but gives no reason for the judgment; and the other two reporters were two of the judges that gave the judgment, and therefore are more to be relied upon.”

Roll. Rep.
238. 317.
438. Lane v.
Pannell.
[1746 Watk.
Gilb. Ten.
265. and
notes; and
Fearn's
R. 458.]

‘*A.* copyholder in fee surrenders to the use of his wife and of *B.* for their lives, remainder to the use of the heirs of the body of the surrenderor and his wife; *B.* and the wife are admitted accordingly; after *B.* surrenders his part to the use of the husband, and then the husband surrenders the whole to the use of *C.* and his heirs, who is admitted accordingly; then the wife dies, leaving issue, who brings ejectment for the moiety of the wife;

wife; and adjudged not maintainable; for when *B.* surrenders his moiety to the use of the husband, this makes a severance of the jointure; and when the husband after surrenders the whole to *C.*, he by this hath an estate for the life of *B.* in the one moiety, and for the life of the wife in the other moiety; and though, if she had survived her husband, she might have defeated the surrender of her own moiety, yet now, she dying first, the estate of *C.* as to that moiety is determined; and since he who would claim it must make himself heir of both their bodies, which during the life of the husband he cannot do, and yet the particular estate as to that moiety is determined; therefore the remainder as to that moiety which was contingent is destroyed, and the husband's death can never set it up again; but for the other moiety, if the husband dies, living *B.*, it will take place, else not, being contingent, and not capable of vesting during the life of the husband. And as to the husband's surrender to the use of *C.* and his heirs, this was no such forfeiture or determination of the estate for life as to give an entry to those in remainder, for then that had destroyed the contingent remainder of the whole; and though the wife had survived and defeated such surrender as to her own moiety, yet it appears before, that that would not have revived the contingent remainder, being not capable of vesting when the particular estate ended; but such surrender of the husband works only by way of grant for what he might lawfully pass, and not so strongly as livery of seisin.'

"A copyholder in fee surrenders to the use of his will, and after by his will devises the estate to *B.* for life, remainder to the heir of his body begotten, for ever, and dies. *B.* is admitted, and after surrenders to the lord of the manor to do with it as he pleases, and dies, leaving a son. Now admitting the remainder to the heir of the body of *B.* to be a good remainder, and that such heir should take it by purchase, this surrender of *B.* hath not destroyed it; for this operates only as a grant to the lord of his estate for life, and is no forfeiture to give an entry to a remainder-man; and by consequence continues in the lord to support the contingent remainder, in the same manner as it did in *B.*, there being only a change of the person, but no alteration made in the estate; for it is still determinable upon the death of *B.* as it was before, and not sooner.

lord, the surrender of the baron passed no more than he lawfully might. *Fearne's C. R.* 470 4th edit. So, where copyhold lands were devised to *A.* for life, remainder to his first and other sons in tail, &c. remainder to *B.* in fee, and *A.*, before he had any sons born, bought the reversion of *B.*, and had it surrendered to his (*A.*'s) own use, thinking by that means to merge his estate for life, and so destroy the contingent remainder to his first son; it was agreed, that this surrender of the reversion would not bar the son, because the freehold and inheritance were in the lord; for there is not the like inconvenience as in freehold estates at common law, in respect of contingent remainders, where there is nobody against whom to bring the *precipe*. *Mildmay v. Hungerford*, 2 Vern. 243.]

2 Roll. Abr. 794. (6). *Pawley v. Lowdall*. [So, in the above case of *Lane v. Pannell*, it is observable, that the surrender of the baron to *B.* in fee, did not destroy the contingent remainder; for the legal freehold being in the

"*A.* tenant for life, remainder to *B.* for life, remainder to the first, second, and other sons of *B.* in tail male successively; *A.* and *B.* join in an indenture tripartite between *A.* of the first part, and *B.* of the second part, and *C.* and *D.* of the third

3 Keb. 759. MSS. Haies v. Risley.

" part, whereby *A.* covenants with *C.* and *D.* to levy a fine to
 " other uses: *B.* seals the deed; and it was argued by the sealing
 " it should be said that *B.* joined in the fine, and by the fine all
 " the estates are divested and put to a right, and the contingent
 " estates disturbed; and *B.* is estopped from entering to revive
 " them; and though he hath a son after, yet he cannot enter till
 " the contingent use be revived by entry; which, as this case is,
 " no person has power to do. But *per cur.* clearly—*B.*'s sealing
 " the deed, only shews his consent that *A.* may levy the fine; for
 " he does not covenant, or transfer over his estate in remainder:
 " and admitting that *B.* should be estopped, yet his sons, who
 " claim not under him, are not estopped to say, that there was
 " a sufficient estate continuing to support the contingent remain-
 " ders; and then, if they are preserved, every one, who hath
 " right, may enter in his turn. And after it was adjudged ac-
 " cordingly; and said, there was nothing in the case worth an
 " argument.

Mo. 8. 15.
 Sir Thomas
 Palmer's
 case.

Pop. 22.
 [(a) But,
 here, the
 question
 arises, how
 we are to
 reconcile
 this resolu-
 tion with
 the principle
 that any pre-
 vailing vested
 freehold
 estate will
 support a
 contingent
 remainder;
 for here,
 whatever
 effect the
 forfeiture of
A.'s estate
 for life and
 remainder in
 fee, might
 otherwise
 have had,
 yet as *B.* had
 a vested

freehold, why was not that capable of supporting the contingent remainder to his sons? If indeed there had been an office found antecedent to the birth of a son of *B.*, that *A.* was seized in fee, it might have accounted for the resolution in the above case, by taking away the right of entry of *B.*, according to the distinction I shall notice after the next cited case. But abstracted from a circumstance of that nature, which does not appear in the report of Sir Thomas Palmer's case, that of Corbet v. Tichborn, 2 Salk. 576. of much later date, seems to claim our better attention. It was a case where *J. S.* being tenant for life, remainder to his wife for life, remainder to his first and other sons, &c. in tail, remainder to himself in fee, committed treason, and afterwards had a son, and then was attainted; and upon a trial at law in *K. B.* the court held, that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the lands vesting in the crown during the life of *J. S.*, because of the wife's estate, (viz. a vested estate of freehold in remainder, which was sufficient to support it. For this estate of the wife, it seems, was not turned to a right, or affected by the forfeiture of the husband, nor the crown thereby in possession of any other estate than what *J. S.* was entitled to at the time; as

appears by another case, of *Linch v. Coote*, 2 Salk. 469. where tenant for life, remainder to his first son in tail, remainder to *J. S.* in fee, was attainted of high treason, and died without issue. And upon its being urged, that the whole estate vesting in the king by 33 H. 8. c. 8. without any office finding the special matter, he in remainder, could not enter, any more than if a general office had been found, which would have supposed a fee; it was held, that no other estate vested in the king by the said act, than the party attainted had; just as if a special office had been found; and therefore the remainder-man might enter on the king, the king's estate being determined. For the statute saved the right of others; though it was otherwise where an office found an estate in fee in the party attainted. *Fearne's C. R.* 425. 4th edit.] 2 Jo. 773. Keb. 732. 3 Mo. 196. 374. 389. 391.

" *A.* seised in fee of lands, after 27 H. 8. makes a feoffment in fee to the use of *D.* his wife for her life, and if he survives his said wife, then to the use of himself, and of such woman as he shall happen to marry, for their lives, for the jointure of such wife, remainder to *B.* in fee. Afterwards, *B.* and the feoffees by consent of *A.* join in a feoffment in fee to the use of *A.* and his wife for their lives, remainder in *C.* in tail, remainder to *A.* in fee; and this was by deed and letter of attorney to make livery. Afterwards *B.* levies a fine with proclamation to other uses, and then *D.* his wife dies, and he marries a second wife, and dies; and she, by the assent and command of the first feoffees, and after the five years after the fine, enters to raise the use to herself. And by the better opinion her entry was not lawful; for by the second feoffment all the estates were divested and put to a right. And whether such feoffment were only the disseisin of the attorney, who made the livery, and the confirmation of him in remainder, and of the feoffees; or the disseisin of all; yet by such joining in the deed of feoffment, the feoffees have barred their *scintilla juris*, and cannot enter to revive the future use to the second wife. And *A.* by his fine hath barred himself to enter in right of his wife to reverse the first estates; and his first wife could not enter, being covert; and therefore, there being none to enter to revive such future use, it is by the feoffment destroyed, and the second wife's entry unlawful.

Dyer, 339—
42. 198, 9.
2 Leon. 14.
Pop. 76.
Co. 1. 136.
Brent's case.

[*vide*
Fearne's
C. R. 216,
217, 218,
219, 220,
 &c.]

" *A.* seised of lands makes a feoffment in fee to the use of himself and his wife for lives, and after their deaths, to the use of *B.* their son for life, and after his death, that the feoffees should be seised *ut in eorum pristino statu*, upon condition that they should receive the profits, and pay to *C.* wife of *B.* 20 l. per annum during her life; and after that they should be seised to the use of the heirs male of the body of *B.* The feoffor and his wife die; *B.* enters, and makes a feoffment to *D.*, and dies; and after *C.* dies, and then the heir male of the body of *B.* enters. It was adjudged lawful; and that the feoffment of *B.* was no discontinuance, nor barred the heir of his entry. But this was without any great argument, and no reason given for the judgment. However, it seems well given; for by reason of the intermediate remainder to the feoffees, *B.* was not seised by force of the entail when he entered and made the feoffment, and then, by *Littleton's* rule, his feoffment makes no discontinuance, and, by consequence, as the feoffees might have entered presently for the forfeiture, they being next in remain-

Cro. Elis.
277. *Mason*
v. Nevill.

Co. Lit.
347. (2).
Raym. 37.

Cro. Eliz.
764. 854.
2 Roll. Abr.
611. 792.
794. (4).
Wood v.
Reignold.

der, so, after the death of C., the heir of the body of B. may likewise enter, because then the preceding estates are determined. And if the feoffment of B. made no discontinuance, there is nothing to hinder their entry, though they are in of the entail, by descent from their father, after such entry.

"A. seised of lands in fee by indenture covenants with B., in consideration of a marriage intended between A. and C. daughter of B., to stand seised to the use of himself and his heirs till marriage, and after to the use of himself and C. and the heirs of his body, remainder to his own right heirs; and then before the marriage, he makes a lease for 31 years, reserving rent, to begin after the end of a former lease, then *in esse*. The marriage takes effect: and in ejectment after the death of A. it was held, that this lease should bind the future use to the wife, as a lease upon good consideration by the feoffees at common law should bind *cestuy que use*, but that subject to that lease the use to the wife should arise, because the same seisin and freehold continues, and therefore the use to the wife should arise out of the residue of the estate, and she shall have the reversion and rent reserved upon the lease; for wherever the statute finds a seisin to uses, there, it carries the possession to them; and notwithstanding such lease for years, yet the seisin to the uses continued.

Cro. Jac.
168.
2 Roll. Abr.
293. (1).
Bold v. Sir
Hen. Wyn-
ston.

"And yet we have another case in our books where it was held the wife was not at all bound by such lease. The case was this:—A. covenanted, in consideration of love as to his son, to stand seised to the use of his son for life, remainder to the use of such woman as he should after marry, for her life; remainder to the first and other sons in that marriage, in tail, &c. And after, the son proving extravagant and being in gaol, A. the father, to disturb the rising of the use to the future wife, makes a lease for 1000 years, and then the son marries the gaoler's daughter. And yet it was held, that she was not bound by this lease, but should have the land discharged of it. And the reason given is, because there being a good estate by the first limitation to arise when the wife is known, if this be not destroyed, this cannot be charged or incumbered, because it hath relation to the covenant, and therefore the lease shall be construed to arise out of the reversion which the covenantor had in him, and might lawfully charge. But to difference this case from the former, it is to be observed, that, here, the covenantor had nothing but a reversion in him; he had no estate for life, as he had in the case preceding: besides, this lease was made without any consideration, and for no other purpose, but to defeat the rising of the use to the wife. And if it should be good in possession, being for 1000 years, and no rent reserved upon it, it would defeat the whole settlement; and therefore it is more reasonable to construe such lease to arise out of the reversion which the covenantor had, and might lawfully charge, than to allow it good against the wife who came in upon so valuable a consideration as marriage. But, if such lease had been made

for

for money, or, if a rent had been reserved upon it, then though the lessor had not any estate for his own life, yet such lease had been good against the settlement; because, though it was made in consideration of marriage, yet not being with any woman in particular, nor in consideration of any marriage portion, it would be fraudulent and voluntary, as to any subsequent purchaser for a more valuable consideration, as money or rent is.

Co. 3.
Swine's case.

A. gives lands to the use of B. for life, remainder to his eldest son in tail, remainder to the right heirs of B., and before the birth of any son, B. makes a lease for years, and then a son is born: he shall avoid this lease after the death of B., for the freehold not being altered, so that the contingent remainder may well take place, this lease for years shall not affect it, but shall be construed to arise out of the estates which B. had, and might lawfully charge, and shall be subject as they would have been, to open and let in the remainder, when it happens. But, if such lease had been made for a valuable consideration of money or rent, then it would come within the rules before mentioned, as I conceive.

2 Roll. Abr.
794 (5).

A. seised in fee, levies a fine to the use of himself for life, remainder to the use of such woman as he should after marry, and should survive him; remainder to B. in tail: then A. marries C., and after, by fine, reciting that he was tenant for life, remainder to said C. for life, he and C. grant the said lands to a stranger for 40 years, if he and his wife, or either of them, should so long live: A. dies; and if C. was barred was the question? And *per totam cur.* she was barred by estoppel. Yet they agreed, that if a lease be made to one for life, remainder to the right heirs of J. S. who is living, and after his eldest son grants or levies a fine of such remainder, yet, after the death of J. S. he shall enter, because he had nothing in him at the time of the grant or fine, and therefore such grant or fine were merely void. And there, two judges against two, held, that the fine had extinguished this future use by way of prevention. But a *quære* is made of it, because it was but a grant by tenant for life, which ends with his death. This is the case, as it is reported by Moore. But in Croke, the case is reported to be, that after such settlement the husband and wife levied a fine to a stranger in fee, who granted and rendered the land to the husband for life, remainder to the defendant for 60 years, remainder to the right heirs of the husband; and that the husband died, and B., who had the remainder in tail by the first settlement, entered and let to the defendant; and that after C. married again, and she and her husband let to the plaintiff; and upon special verdict found, it was adjudged for the plaintiff. Which proves, that the wife was not bound even by estoppel, for then it could never have been adjudged for her lessee the plaintiff; and that the joining of the wife in the fine signified nothing. But, then, as it seems, this must prove too, that the fine was not levied in fee as it is reported; for then clearly the contingent remainder to the wife would have been destroyed;

Oro. Elis.
826.
Mo. 634.
Wells v.
Fenton.

Pop. 5.

because by such fine the estate for life of the husband was determined, and an entry given to him in the remainder for the forfeiture, before the contingent remainder could take place; and then, by all the cases before mentioned, it appears to be forever destroyed. And therefore taking it to be only a grant by fine for years, and not for any valuable consideration, then it is determined by the death of the tenant for life who granted it; and though it had been for a valuable consideration, then it determined by the death of the tenant for life who granted it. And indeed, admitting it had been for a valuable consideration, yet I cannot see how it could have continued longer than his life, or beyond the contingent use; for such lease by *cessuy que use* in possession differs from a lease by feoffees to uses at common law, in by agreement so stand seised to uses; for there, in both cases, the use takes effect out of the estate which shall serve and improve the uses; and therefore shall bind or not bind as it happens to be made for a valuable consideration, or voluntarily, as appears before. But, where such lease is made by *cessuy que use* in possession, this takes its effect out of his estate only, and no consequence can continue no longer than that does; and then, when the freehold is not destroyed, the contingent remainder may well rest, nothing being done to disturb or destroy it. *Quere* therefore of this case.

A. covenants upon proper considerations to stand seised or to make a feoffment in fee to the use of himself for life, and after the death of A. to the use of B. his wife for life, for her jointure, without waste, and after to the right heirs of A., provided, that if the heir of A. disturbs B., that then the use to the right heirs of A. shall cease, and that then A. and his heirs, or the feoffees, &c. and all others shall stand seised to the use of B. and her heirs. Afterwards, A. makes a lease for 100 years, to begin after the death of B., rendering 12*l.* rent, and dies. The heir disturbs B. and breaks the condition; yet by the two chief justices it was held, that the future use to B. in fee was checked by this case, though the lease was but an *interesse termini* till B.'s death. B. was an *admit surgens tempore mortis* B., by reason of the lease for years, it is destroyed for ever. But *quere* of this case, by the other cases preceding, it appears, that at most, such contingent uses are only bound by the lease for years, and not by a lease, except where they are made for a valuable consideration. But here, the reason given why this contingent use to the wife is destroyed by making such lease for years, is that time that is given where contingent remainders are destroyed by making a feoffment in fee, whereas the reasons and operations in the one and the other are very different. *Ide* *quere* of this case. Note—Croke cites the resolution of this case, that the reason thereof seems to be, because the use limited to the right heirs was the ancient reversion, and no new estate, and therefore there could not be a condition annexed thereto. But there seems no good reason; for an executory use may as well be limited upon a condition precedent as an executory devise.

“ devise, and then the statute carries the possession after it; and
 “ why it may be created by original limitation, and not out of the
 “ reversion, after other estates, will be difficult to reconcile, since
 “ the reversion is as much the owner's, as such, as the possession
 “ was before any limitation at all made; because the first had a
 “ fee, though it was but a base and determinable fee. But yet in
 “ a will, such limitation has sometimes been held to be good, not
 “ as a direct remainder, but as an executory devise. But this is
 “ not law, because it is the affectation of a perpetuity; since such
 “ contingencies cannot fall till after the entail is spent, which is
 “ too distant to expect.

“ So, a gift at common law, before the statute of *Westm. 2.* to
 “ one, and the heirs of his body, and if he died without heirs of
 “ his body, to go over to another, this was a void remainder, be-
 “ cause the first donee had a conditional fee, which, after issue,
 “ he may dispose of for ever, and bar the donor of his possibility
 “ of reverter; and therefore such possibility could not be good as
 “ a remainder, nor did any formedon in remainder lie at common
 “ law, when all inheritances were fees absolute, or condi-
 “ tional.

“ So, where one devised lands in *London* to the prior and con-
 “ vent of *B. ita quod reddant annuatim decano et capitulo Sancti Pauli*
 “ 14 marks, and if they fail of payment, that their estate shall
 “ cease; and that the said dean and chapter and their successors
 “ shall have it: it was held by *Baldwin* and *Fitzherbert*, the
 “ greatest lawyers of the age, as my Lord *Vaughan* says, that this
 “ remainder was void; because the first devise carrying a fee, no-
 “ thing remained after to be disposed of; and executory devises,
 “ after a fee-simple, were in former ages unknown, which is the
 “ reason that this case is denied by some to be law. And it was
 “ held, that, for the condition broken, the heir of the devisor
 “ should enter; of which more hereafter.

“ But this rule, that a fee cannot be limited after a fee, hath
 “ been long since exploded, in case of devises, and of uses, where
 “ the first estate, though in fee, is limited to determine upon a
 “ contingency that may happen within the compass of a life or
 “ lives in being, or some reasonable time after. And the reason
 “ of giving way to it at first seems to have been, to let men into a
 “ means of providing for the several branches and exigencies of
 “ their own family.

“ The first case we meet with to this purpose, is this. In debt
 “ against *A.* as son and heir of *B.*, he pleads *riens per descent*, but
 “ of the third part of the manor of *D.* the plaintiff replies, that
 “ he had the whole manor of *D.* by descent; and upon issue it
 “ was found, that the said manor was held by knight's service,
 “ and that *B.* father of the defendant, by his will in writing de-
 “ vised it to his wife, till the defendant his son should come to the
 “ age of 24 years, and when he came to the said age of 24 years,
 “ that he should have the whole to him and his heirs for ever, his
 “ wife having a third part thereof during her life; and if her said
 “ son should die before the age of 24 years without issue, then the
 “ whole

Plow. 235.
 a. 339. b.
 248, 249.
 2 Inst. 336.
 Vaugh. 36.

Dyer, 33. 2.
 pl. 12.
 Finch, 45.
 Swinb. 128.
 1 Brook.
 234. (2).
 Cont.
 Vaugh. 277.

3 Chan.
 Cafes, 19.
 22. 31. 36.
 49.

2 Leon. 11.
 3 Leon. 64.
 70.
 Dyer, 124.
 Hynd v.
 Lyon, Cro.
 Eliz. 205.
 2 Roll. Abr.
 626. (3).
 839. (1).
 2 Mod. 291
 [Vide Scott
 v. Scott,
 Ambli. 383.
 contra. B.]

quere of that
case, and
whether it
can be sup-
ported either
by principle
or autho-
rity.]

But wide in-
fra.

Dyer, 330.
1 Vent. 212.
2 Roll. Abr.
829. (3).
Vaugh. 267.
Clache's
case.

“ whole should be to the wife for life; and after her death to C. in tail, remainder to the right heirs of the donor. It was found that the wife was dead, and that the son had attained the age of 24 years; and it was adjudged that he had the fee by descent, and so affets; for the entail with the remainders over not being to arise to A. unless he died before 24; and so that part of the devise being become void by his attaining 24, then it rested wholly upon the first part, which being a devise to his son and heir apparent in fee, is void, and he shall take by descent, notwithstanding such devise. And he could not have an entail in the interim till he attained 24, and then to have the fee as a remainder, because the entail was only to arise to him upon his dying before 24, as a condition precedent; so that neither the tail nor the fee could vest in him presently, by force of the devise; but it was, as if he had left the fee to descend to him, and his heirs, and only said, if my son die without issue before 24, then I give the lands to my wife for life, and after to C. in tail, &c. which is a good executory devise upon the happening of the contingency, and the fee, in the mean time, descends, as it would have done if there had been no will. And whether by the words, *if his son died without issue before 24*, an estate-tail should vest upon such death, or, that they should be only the terms and conditions upon which the executory devise was to take place, and after no estate at all, seems doubtful; though the case of *Gardiner and Shelton*, after mentioned, seems to make for the latter: for, if he died before 24, leaving issue, and that being made the condition upon which the remainder limited after were to arise, could be no condition to vest an entail in himself, because he and his issue, that is, all who could take the entail, were to be dead before the entail could vest, and then it could not vest for want of persons to take it, which would make the devise idle and repugnant as to that part: therefore, these words seem to make no alteration of the estate the law would cast upon the son by descent, but to be wholly relative to the limitations after, as the modus upon which they were to take effect, and not to controul the operation of the law in the mean time, in giving him the fee by descent. And to construe the case otherwise, would make it wholly useless to the purpose for which it is cited by my Lord Chancellour *Nottingham* in the Duke of *Norfolk's* case; for there, either it must create an entail to begin when all the issue who were to enjoy it were dead; or, it must make an entail at large with the remainders over; and then there is no great mystery in the case. The first is impossible, and the latter it cannot be, because it is confined to his dying before 24; for, if he survives that age, it is not to take place.

“ One seised of lands in fee by his will in writing, devises *Blackacre* to A. his daughter and her heirs, and *Whiteacre* to his daughter B. and her heirs, and if she die before the age of 16 years, living A., then A. shall have *Whiteacre* to her and her heirs; and if A. die having no issue, living B., then B. shall have “ the

the part of *A.* to her and her heirs; and if both die, having no issue, then to *J. S.* and his heirs, and dies. *B.* attains her age of 16 years, and then dies without issue in the life of *A.* And first, it was held, by three justices against *Dyer*, that the daughters had an estate-tail upon the whole will, and not a fee determinable upon a contingency subsequent. 2d, That by the words, *if both die without issue*, no cross remainders in tail were created by implication, but that upon *B.*'s death without issue after 16, *J. S.* should have her part presently, without staying till the death of *A.* without issue.

“ A copyholder in fee surrenders to the use of *B.* an infant and his heirs, and if he dies or marries before the age of 21 years, then he surrenders to the use of *C.* and his heirs; this was held a good surrender to the use of *C.* upon such contingency, though *B.* had a fee before, because the contingency was to happen within the compass of a life, or upon the death of one then in being. But it is said by *Rolle*, that the surrenderor died before the contingency happened, in which case the use could not rise to *C.*, though it happened after; because, upon the happening of the contingency, as this case is, the surrender is to operate as a new original surrender to the use of *C.*, and this cannot be when the person who should make it is dead before, any more than attornment after the death of the grantor shall avail the grantee of the reversion. But, if he had surrendered to the use of his will, and then had, by his will, devised such estates, they would be good; because the surrender was made to supply and serve all the contingencies and limitations of the will, and the use in the mean time vested in the surrenderor and his heirs; whereas the surrender in the other case would, according to the wording of such instrument, operate double as to original surrenders. *Quære.*

Cro. Jac.
376.
Godb. 264.
2 Roll. Rep.
119. 137.
253.
2 Bulst. 27.
2 Roll. Abr.
791. 794.
Symphon v.
Southern.
Note—Several books put this case of an infant in ventre sa mere, and turn the defect of this conveyance in the remainder on the want of a person in being to take immediately.
[Mr. Fearnie referring to

this case of *Symphon v. Southern*, in his Essay on Remainders, says, that according to *Croke* it was resolved, that the surrender to the use of *C.* was void, for that a man could not make such a conditional surrender to operate in futuro. On the other hand, Mr. Fearnie says, the same case, as reported by *Rolle*, is cited in *Lex Castumaria* (121.) as an authority, that such future uses are good, and that a fee may be limited on a fee, upon a contingency, in copyhold estates. And this, he says, the case in *Rolle's* Abridgment seems to leave undecided. But, he adds, in *Gilbert's Tenures* (260, 261.) it is said, that such a resolution seems not to be grounded on so good reason, as the contrary resolution in *Croke*; for the use upon a surrender of a copyhold is not like a use or trust at common law: but he who is admitted upon a surrender, is admitted to the legal customary estate, and is not seised to a use; therefore uses upon surrenders are, in general, governed entirely by the same rules, as conveyances at common law, in which such limitations were not allowable; and that upon this principle it seems a fee up on a fee in case of a surrender of copyhold is not good, any more than in a conveyance at common law. But the above opinion of *Gilbert* is, says Mr. Fearnie, I think, excluded by decided cases, for the validity of conditional limitations in surrenders of copyholds, appears to have been admitted in the case of *Stockler v. Edwards*, or *Edwards v. Hammond* (2 Show. 398. and 3 Lev. 132. where the same case seems to be somewhat differently reported. Fearnie's C. R. 372. 4th edit. and *vide* *Weicock v. Hammond*, cited in 3 Co. 20. b. *Brian v. Cawfen*, 3 Leon. 125.) And the decision in the case of *Symphon v. Southern* may be referred to the point of the *bandendum* after the death of the surrenderor being void, taking that as the conditional future operation, which was denied to the surrender. And in the case of *Paulter v. Cornhill*, Cro. Eliz. 361. Beamond, Justice, conceived the limitation of a fee upon a fee, as good in surrenders of copyholds, as in uses of land upon a feoffment. So, says he, in the case of a surrender of copyholds, to the intent the lord should admit *A.*, whom the surrenderor intended to marry, after marriage; until marriage to the use of himself and his heirs, and after marriage to the use of himself and *A.* in tail; the whole court of C. B. held, (*Bentley v. Delamore*, 1 Freem. 267, 268. and *vide* *Calth. Reading*, 31, 32. for the same point; and *vide* *Taylor v. Taylor*, 1 Atk. 386.) that it was

was good enough to limit a remainder upon a contingent fee in copyholds; as in case of mortgage of copyholds a surrender *in futuro* is good, for the freehold remains in the lord. Thus far Mr. Fearn: Fearn's C. R. 416, 417, 418.—But, if we carefully examine the different reports of the case of *Symon v. Southern*, and the other authorities to which Mr. Fearn refers, it will be found perhaps that they do not support the position they are brought to establish, and that the above doctrine of our author, stated in his *Tenures*, remains unimpeached, and must be admitted to be sound law.—As the case of *Symon v. Southern* is reported by Rolle (1 Ro. Rep. 109. 137. 253.) judgment is said to have been given for the party who claimed the ulterior fee. But the report is very obscure, if not contradictory in many parts. The court are there said to have been of opinion with Coke; but Coke's argument, both in *Rolle's Bultrode*, seems incompatible with such an opinion. In *Croke* (Cro. Ja. 376.) the judgment is said to have been given for the party claiming under the heir at law, and so it is said in *Godbolt and Bultrode* (Godb. 264. 2 Bullstr. 272.). In *Rolle's Abridgment* it is first noticed with a *dubitation* (1 Roll. Abr. 791. Uses (P.), pl. 2.); and afterwards, when it is mentioned as adjudged, it is declared, that the ulterior fee never arose, as the contingency did not happen in the life of the surrenderor. *Id.* 794. (S. 3.) pl. 8. In *Lex Cusumaria* (120. th. 15.) the ulterior limitation is said to have been good: but the author rests himself on the first statement in 2 *Rolle's Abridgment* without inserting the *dubitation*. In deed, he only translates from that of Rolle, and, with Rolle, calls the *ulterior fee* a remainder. Therefore it is only in *Rolle's Reports* that the judgment of the court is said to have been given in favor of the person claiming the ulterior fee; and as *Croke*, *Godbolt*, *Bultrode*, and even *Rolle* himself in another and better-considered work, declare that the judgment was given against him; and as the maker of *Lex Cusumaria* is no authority himself, but depends only upon a quotation from Rolle, without noticing the *dubitation* inserted by that writer; this case of *Symon v. Southern* can surely not be regarded as establishing the doctrine that a fee may be limited upon a fee in a surrender of copyholds.—To proceed then to an examination of the *decided* cases mentioned by Mr. Fearn as supporting that doctrine.—In the case of *Stocker v. Edwards*, as reported by Shower, a conditional limitation was said to have been given in a surrender. But, if the case of *Stocker v. Edwards* be the same with that of *Edwards v. Hammond* as reported by Levinz, and Mr. Fearn seems to consider it so, it is indeed “somewhat differently reported by the latter writer. In *Shower*, the surrender was “to the use of the surrenderor for life, and then “to the use of John his youngest son, and the heirs of his body, if he attained the age of 18 years; and “if he died before he attained that age *without issue male*, then to his right heirs.” Whereas in *Levinz*, the limitation was “to the use of the surrenderor for life, and afterwards to the use of his son “son and his heirs, if he lived to the age of 21 years: provided, and upon condition, that if he died before 21, that then it should remain to the surrenderor and his heirs.” But, what puts an end to the application of the case in *Levinz*, is, that in that case the surrender was *to the use of a will*; though that important circumstance is omitted in the translation of Levinz. The words in the original are, that the copyholder surrendered *a son volunt, et devise al use luy meisme par vie, et apres al use son eigne frere a son heire, s'il vivra al age de 21 ans*, provided, &c. as above. The case of *Welcock v. Hammond*, cited by Lord Coke, was also on a surrender to a will, as was the case of *Brian v. Cawfen*, in *Leonard*, and that of *Taylor v. Taylor* in *Atkins*. In the case of *Paulter v. Cornhill*, indeed, *Beaumont*, Justice, conceived a fee limited upon a fee by a surrender to be good enough; for, said he, it shall be as a fee limited upon a feeoffment, and these uses shall rise out of the first surrender. But, as to the point, whether a fee might be so limited on a fee, it is observable, that we are informed by the reporter, that “the court spoke not much thereto, but willed to have it specially found.” The case of *Bentley v. Delamore*, in *Freemantle*, indeed, so far as it goes, countenances the doctrine, that a fee may be limited on a fee by surrender: but that case is very loosely given; and it is there said, that “a surrender *in futuro* is good; and the mischief” [here seems an omission in the report] “for the freehold remains in the lord.” Now the validity of a surrender *in futuro* has already been denied by Mr. Fearn himself.—The only authority which remains is the passage referred to in *Calthorpe*; and that, to be sure, supports Mr. Fearn's position. The words are these: “If a copyhold be surrendered to the use of J. S. and his heirs, until he shall marry A. G., and after the said marriage, then to the use of them two in tail special; if after they do marry, then is the surrender to them in tail, and till then, to him in fee.”

Upon the whole, therefore, we find, that the case of *Symon v. Southern* militates against, rather than supports the doctrine, that a fee may be limited upon a fee of copyholds by surrender; that the passage in *Lex Cusumaria* cannot be a better authority than the book it rests upon; and in truth, that the extract it gives, is not faithfully given, as it delivers that *absolutely*, which was originally accompanied with a *dubitation*; that the case of *Stocker v. Edwards*, in *Shower*, is shaken by the report of what Mr. Fearn himself considers as the same case in *Levinz*; and that the case in *Levinz* was on a surrender to the use of a will; that the cases of *Welcock v. Hammond*, *Brian v. Cawfen*, and *Taylor v. Taylor*, were on surrenders to will also; that in the case of *Paulter v. Cornhill*, the opinion of *Beaumont* was not acceded to by the court, but was itself founded upon a principle which has been repeatedly denied, namely, that the limitation should be considered as a fee limited on a feeoffment. 1 *Brownl.* 127. 1 *P. Wms.* 17. 1 *Ld. Raym.* 627. 1 *Vez.* 257. That the case of *Bentley v. Delamore* is very loosely given, and filled with absurdity; that if it asserts that a surrender *in futuro* is good, it might easily admit the other position; that if it is erroneous in the one instance, it has no great claim to authority in the other; that the doctrine therefore rests on the solitary passage in *Calthorpe*: is it then too much to say, that the main foundation upon which Mr. Fearn has professed to establish his doctrine, fail him, and that therefore, notwithstanding the great authority of his name, we shall not be justified in pronouncing that a fee may be limited

ited on a fee by a surrender of copyholds? Besides, a surrender of copyholds is to be construed as a common law conveyance—if then, as is universally acknowledged, a fee cannot be limited on a fee by a common law conveyance; it follows, as an inevitable consequence, that a fee cannot be limited on a fee by a surrender; for if it may, then a surrender is not to be construed as a common law conveyance; which is contrary to our position.]

“ One having issue, *A.* his only daughter and heir, by will devises lands in *D.* to her and her husband, and her heirs, upon condition, that they should assure lands in *F.* to his executors, and their heirs to perform his will; and, if they failed, then he devised the said lands in *D.* to his executors and their heirs, and died. It was adjudged to be no condition; for that, by the descent to the daughter, being heir, it would be destroyed: but it was held a limitation, or executory devise, to his executors, in case the assurance was not made; and that they might, for breach thereof, enter and sell; for though a fee cannot be limited upon a fee absolute, yet upon a fee determinable it may; and, in this case, it enures as a new original devise to take effect, when the first devisees failed to make the assurance.

Cro. Jac. 592.
Palm. 135.
2 Roll. Rep. 218. 425.
Dy. 33. a. in margin.
Fulmerton v. Steward, & Cro. Elis. 359. the same case by the name of Cleer v. Peacock. Swinb. 106. 120.

“ One by his will devised lands to his mother for life, and after her death to his brother in fee; provided that, if his wife (being then enſient) be delivered of a ſon, that then the land ſhould remain to him in fee, and dies. The ſon is born; and it was held, that the fee of the brother ſhould ceaſe, and veſt in the ſon, by way of executory deviſe, upon the happening of the contingency.

Dyer, 127 a. in margin.

“ One by his will deviſes ſeveral rent-charge or annuities out of his lands to his younger children; and deviſes, that, if his heir paid the ſaid annuities to his children, that then he ſhould have the ſaid land to him and his heirs; and if he failed of payment, then his executors ſhould have the lands; and if they failed to pay them, then his children ſhould have the lands to them, and the ſurvivor of them, and dies. The heir makes a feoffment in fee of the lands, and then the annuities were not paid. It was adjudged, the feoffment has not deſtroyed the contingent limitations, but that for non-payment they could veſt according to the will; and there a difference was taken between contingent remainders, which depend upon a direct limitation, and are to perſons unknown, or not *in eſſe*, and contingent uſes, or deviſes to perſons *in eſſe*, and known, which are to take effect upon a collateral condition or contingency; for theſe cannot be deſtroyed or given away by feoffment, as the others may; but the land is charged with them into whoſe hands ſoever it comes.

2 Roll. Abr. 793. (a). Purflow v. Parker.
2 Roll. Rep. 219.
Palm. 136.
Cro. Jac. 144. Meſme caſe per noſme of Molineux v. Molineux.

“ One deviſed lands to his wife till his ſon came to the age of twenty-one years, and then that his ſaid ſon ſhould have the lands to him and his heirs; and if he died without iſſue before his ſaid age, then his daughter ſhould have the ſaid lands to her heirs. This is a good contingent or executory deviſe to the daughter, if the contingency happens; and, in the mean time, the fee deſcends to the ſon and heir, and if he lives till twenty-

2 Roll. Rep. 297. 217.
Palm 132.
Boulton's caſe, cited to be reported by Lord Chancelloer Ege-ton, 6 & 7 Eliz.

“ one,

" one, though he after die without issue, or leave issue, though
 " he die before twenty-one, yet the daughter is not to have
 " lands; because he is to die without issue, and before twenty-one
 " one, else the daughter cannot take.

Swinb. 116.

Q. If the wife has an estate for life by this implication? [It should seem, she clearly hath.]

" One having issue three sons, *A.*, *B.*, and *C.*, devises
 " lands to his son *A.*, after the death of his wife, to him and of
 " heirs of his body lawfully begotten, in fee-simple; and if
 " die in the lifetime of his wife, that then his son *C.* should
 " his heir, and dies. *A.* hath issue, and dies in the lifetime
 " the wife. It was adjudged, that the issue should have the land
 " after the death of the wife, and not *C.*, for it is in effect a devise
 " vife to the wife for life, remainder to *A.* in tail, remainder
 " *C.* in fee, upon the contingency of *A.*'s dying in the life of
 " wife, and does not abridge the estate-tail expressly given to
 " by his dying in the life of the wife.

Dyer, 354. a.
 Pl. 33.

" *Cestui que use*, 12 Ed. 4., by will devises lands to *B.* his son
 " and his heirs for ever, provided, that if he die without issue
 " living his executors, that the land should be sold by his
 " executors, and dies; then the executors die, and after, the de-
 " visee being dead likewise, the heir of his body brought a writ
 " medon, supposing it to be an entail; the tenant pleads *ne dicitur*
 " *par*; and, upon issue joined, the court was of opinion, that
 " was no entail, &c.: and upon this, and some of the foregoing
 " cases, was the following judgment given.

Cro. Jac.

590.
 Palm. 117.
 2 Roll. Rep.
 216. 1 Roll.
 Abr. 611.
 (9). 835.
 P. (2).
 2 Roll. Rep.
 426.
 Vaugh. 272.
 Peake v.
 Brown.
 4 Mod. 23.
 Swinb. 124.
 2 Leon. 111.

" One having issue three sons, *A.*, *B.*, and *C.*, by his will
 " writing devises lands to *B.*, his second son, and his heirs for
 " ever; and if *B.* die without issue, living *A.*, then *A.* to have
 " those lands to him and his heirs for ever. *B.* enters, and suf-
 " fers a common recovery to the use of himself and his heirs,
 " and then devises those lands to the plaintiff and his heirs, and
 " dies without issue, living *A.* It was adjudged, first, that *B.*
 " had a fee-simple by the devise to him and his heirs for ever;
 " and that the other words did not so correct or qualify it, as to
 " make it an estate-tail, not being, *if he die without issue generally*,
 " but upon the contingency of his dying without issue, living *A.*;
 " so that if he survived *A.*, or died in the life of *A.*, leaving
 " issue, *A.* was to have nothing: and this being a contingency to
 " happen within the compass of lives then in being, though the
 " first devise was a fee, yet the limitation over, upon such con-
 " tingency, was good, and not within the danger of a perpetuity;
 " for the limitation to *A.* is not a remainder directly, which can-
 " not be after a fee, but it takes effect by executory devise, and
 " upon determination of the first estate, by the happening of the
 " contingency, carries over the land to the other. Secondly, it
 " was adjudged, that this, being a mere collateral possibility, was
 " not bound by the recovery, unless he to whom it was limited
 " had been party by way of voucher; for it had no existence at
 " all, when the recovery was suffered, and therefore the recom-
 " pence in value could not extend to it, any more than to a re-
 " mainder limited to the right heirs of *J. S.* who is then living;
 " for

for though that remainder be carved out of the estate of the donor or lessor, yet it cannot then vest for want of a person capable to take it: or, it is rather to be resembled to an estate to *A.* and his heirs, so long as *B.* hath heirs of his body, in which case a recovery suffered by *A.* shall not bar the possibility of the reverter to the donor, it not having any real existence as a reversion or a remainder, but only as a mere possibility; and therefore, whoever comes into the land, takes it subject to such possibility, which, like an infection, sticks to it, and can no ways be drawn out without the concurrence of him who is to have the benefit thereof. And the reason why a recovery will not bar these contingent interests is, because the recovery will not bar any persons but such as are in being to make defence, because such persons are presumed to call in the warranty, and to receive a recompence from the warrantor.

So, where a man devised to *A.* for life, remainder to *B.* and his heirs, and if *B.* die without heirs, then to *A.* and his heirs; it is said to be ruled by *Fleming*, Ch. J. that if *B.* die without heirs, *A.* shall have the land. But this case seems to be no law, and is contradicted by another case which was stronger, and yet adjudged otherwise, where one devised lands to *A.* and his heirs, and if he died before 21 years of age, then he devised the said lands to *B.* and died. *A.* entered, and hath issue a daughter, and died before twenty-one. It was adjudged, that the daughter should have the land. So, where one limited an estate to a man and his heirs, and if he died without heirs in the life of *J. S.*, then to *J. D.* and his heirs; this was held a void limitation, though it was brought within the compass of a life in being: and that the lord should have it by escheat, *per North*, Ch. J.; for in this last case it was a direct limitation after a fee, and was not to abridge the fee at all, but only a provision, that if the fee were out in such a time, another should have the land, which would elude the statute of *quia emptores*, &c. and defeat the lords paramount of their feignories, and so for the first case, which is a direct perpetuity. But for the second case, it seems now to be law, and is within the reason of other cases, where such executory limitations in wills have been allowed good: therefore, where one devised lands to his wife for life, remainder to his son and his heirs; and if he died before his age of twenty-one years, then to remain to *J. S.* in fee; the son entered, levied a fine, and died before twenty-one; it was adjudged, that *J. S.* should have the land; because, say the books, it was a plain limitation.

But, where one devised lands to his son and heir, and if he died before his age of twenty-one years and without issue of his body then living, then to remain over; he survived twenty-one years, and then sold the land, and died; it was adjudged a good sale, because he had the fee presently; for the estate-tail was limited to commence upon a contingency subsequent, which did not happen.

Dyer, 4. in margin.

3 Chan. Cas. 22.

Cro. Eliz. 142.
Mills v. Snowball.

1 Sid. 148.
1 Keb. 531.
Collinson v. Wright.
Cro. Jac. 695. [*Vide supra*, vol. 4. pag. 295.]

Soule v. Gerrard, Cro. Eliz. 525.
Moore, 422.
S. C. by the name of Sowill v. Garret.
[Walsh v. Paterson, 3 Atk. 194. S. C. cited.]

2 Roll. Rep. 220.
Hoe v. Garrell.
Palm. 136.
Swinb. 116.

2 Roll. Rep. 220.

1 Roll. Abr. 835.
Hanbury v. Cockrell.
Hardr. 150.
S. C. cited
Et que fuit Contingent Remainder.
Quare?

Vide the case.

“ One having issue four sons, devises lands to *B.* (one of them) and his heirs for ever; and if he dies within the age of twenty one years, or without issue, that then the land shall be equally divided between his three other sons: *B.* hath issue, the eldest son *C.*, and dies within age; the three sons enter, and let the plaintiff. It was adjudged *per totam curiam*, that this remainder, upon the contingency of his dying before the age of twenty-one years, was utterly void, having before given him a fee-simple; and then it is, as if the limitation were single, that if he died without issue, which explains the former limitation to him and his heirs, and shews what heirs the testator meant, and so makes it an entail. And two justices held, that if the remainder might begin upon the first limitation, yet, by the words and intent of the devisor, this cannot begin till the other part of the limitation be also performed, *viz.* that he die without issue; and that *or* shall be taken for *and*; for the words being *if he died without issue, or died within age, then, &c.* This word *then* shews the beginning of the remainder, *viz.* that it shall be, *when* he dies without issue, and not before; and so all one, whether it be taken as a copulative or a disjunctive. But this case seems not law now; for by the other cases it appears, that in case of a will such limitation, even upon the first part, is good by way of executory devise. And there is a case cited in *Rolle* which seems to be the same case, and is reported only upon the first part of the disjunctive; and adjudged good, not as a condition, but as an executory devise. And as to the other part of the disjunctive, it is not taken notice of, because on the making an entail, there could be no question of the remainder. And another case of one *Oclie*, 9 *Eliz.* is there cited, where a man devised lands to his grandchild and his heirs, with a proviso, that if he died before payment of such a sum, or before he came to the age of thirty years, that then another should have the lands; and adjudged, that upon the happening of the contingency, the other should have the land.

“ One having issue two sons, *B.* and *C.*, by divers venters, devises *Blackacre* to *B.* and his heirs, and *Whiteacre* to *C.* and his heirs, provided that if either of his said sons die before marriage, or twenty-one, and without issue, then he gives his said lands, so given, to such son who shall so die before marriage, or before twenty-one, and without issue, to such of his said two sons as shall survive the other, and dies; *B.* marries, and hath issue a daughter, and dies; and after *C.* attains his full age, and dies, without issue, before marriage. In this case it was adjudged, that *B.* and *C.* had no estate-tail, but a fee determinable upon the contingency of death before marriage at any time, or after marriage, and before twenty-one, and without issue; so that if they were married under age, or attained full age, though not married, or had issue upon marriage at any time, the limitation over was not to take place, and then to the survivor for life only.

" One makes a feoffment in fee to the use of himself and his heirs, and when *J. S.* pays such a sum of money, then to the use of him and his heirs; or, when he marries such a woman, or, when he comes to full age, then to the use of him in fee. This was adjudged a good remainder in fee upon the happening of the contingency, though in the mean time the feoffor had the whole fee simple in him; or rather, this takes effect by way of springing use, as appears in the case of *Lloyd and Carew* hereafter mentioned.

" One devised lands to his eldest son in tail, remainder to his youngest son in tail, remainder to his daughter in tail, and if they all died without issue, that the land should be sold by his executors. The eldest died without issue; then the youngest entered, and suffered a common recovery, and died without issue; and the daughter likewise died without issue. It was held clearly, that the executors were barred, and could not make sale according to the will; for this was only a plain limitation or power to them to sell after the former estates tail spent, and no contingency or executory devise; and therefore was subject to be barred as other remainders expectant upon estates tail are.

" One devised lands to *A.* for life, and if he died without issue, then *B.* should have the lands. In this case, *A.* hath but an estate for life by express words, and therefore shall have no greater estate by implication against the express words; but those words, *if he die without issue*, are only a condition, upon the happening or not happening whereof the remainder to *B.* is to vest or not vest; and, being used only for that purpose, seem to be confined to his having no issue at the time of his death; and then in the mean time the fee descends to the heir at law.

" So, where one devised lands to his brother *B.*, and if he died, having no son, that the land should remain to *C.* for life; and if he died without issue, having no son, that it should remain to the right heirs of the devisor: by this will, *B.* hath an estate-tail, and *C.* only for life, or at most but to him and the heirs female of his body. And the words, *having no son*, are a kind of condition precedent, upon the fulfilling or failing whereof the remainder limited to his own right heirs is to take effect by the will; for, if he had a son, he cannot die without issue; and therefore it must be intended such issue as he may die without, though he hath a son, *viz.* issue female; and if the words, *having no son*, make the contingency, the other words, *if he die without issue*, may well create an entail female; since there is no devise expressly for life, as in the other case, but only by construction of law. And if the words, *die without issue*, be not so construed, they are useless and idle. But one book says, that the son hath an estate tail to the heirs male of his body. But *querre* of this.

" Copyhold land is surrendered to the use of *A.* and *B.*, and of the longer liver of them, and for want of issue of *B.* of his body lawfully begotten, to remain to *C.*: adjudged, that *B.* had but an estate for life by the words of the surrender, and then

1 Roll. Rep.
137.
2 Bulst. 273.
Lady Ruffell's case.

Mo. pl. 201.

9 H. 6. 74.
20 Roll.
Rep. 217.
Paim. 134.

Mo. pl. 939.
Miltinder v.
Robinson,
Swinh. 112,
113.
1 Roll. Abr.
837. (12).
4 Mod. 258.

1 Roll. Abr.
837. pl. 12.
The same
is also said
in Moore's
Report.

Cro. Car.
366.
1 Roll. Abr.
839. (7).
Vaugh. 261.

Seagood v.
Hone. *Vide*
Allen v.
Nash.
1 Brownl.
127.
1 Mod. 52.

Cro. Jac.
695.
Chadock v.
Cowley.
[Fearne,
370. 4th
edit. S.C.]

Cro. Jac.
415.
1 Roll. Rep.
398. 436.
3 Bull. 192.
Webb v.
Herring.
Cro. Car. 58.
Swinb. 122.
accord. *per*
Cro. and
Yelverton v.
Richardson,
who held it
a fee; but
Vaugh. 270.
holds with
the other
opinion.
2 Roll. Rep.
423.
Swinb. 121.
120.

3 Bull. 195.
1 Roll. Rep.
436.

Cro. Elis.
376.
Baldwin v.
Wiseman.
[Owen, 112.
S. C.
Gouldb.]

" he shall not have a greater estate by implication in a surrender
" or conveyance, though in a will it would, perhaps, be other-
" wise; therefore the words, *for want of issue*, are the condition
" upon which the remainder to *C.* is to arise or not arise. And so
" it is, if a lease be made to *A.* for life, and if he die without
" issue, that it shall remain to *B.* &c.

" One devises lands to his son *A.* and his heirs, and devises
" other lands to his son *B.* and his heirs, and that the survivor
" of them shall be heir to the other, if either of them die with-
" out issue. This makes an estate tail, and not a fee determina-
" ble upon their respective deaths without issue; because such
" dying without issue is not confined to any time. And though
" it was objected that these words are useless, because if one died
" without issue, the other would be his heir of course, and then
" the fee given by the first words should stand, yet it was ad-
" judged *ut supra*, because *non constat*, but that he might have
" other children who might be heirs to them. Note; the book
" says the other children by other venters. But *quere* of that,
" for they could not be heirs to them.

" One having a wife, a son, and three daughters, devises lands
" to the son after the death of the wife, and if the three daugh-
" ters survive the wife, and the son, and his heirs, then to them
" for their lives. This is a good remainder to the daughters,
" and the son hath but an estate tail; for if he should have a
" fee, then the remainder would be void and idle, for they can-
" not survive him and his heirs, unless it be meant heirs of his
" body, for they themselves would be his heirs, and consequently
" cannot survive themselves; therefore it must be, such heirs as
" they may survive, that is, heirs of his body, which in a will
" gives him an estate tail by implication. So, if a man hath issue
" two sons, and devises to the youngest and his heirs, and if he
" die without heirs, to the eldest in fee; this makes an estate tail
" in the youngest, because otherwise the remainder would be
" void, the eldest being heir to him. And the diversity is, when
" such remainder is limited to him who will be heir, there, by
" a necessary implication, by the word *heirs* in the first part of
" the devise must be meant *heirs of his body*, and where such devise
" is over to a stranger, which carries no such necessary implica-
" tion in the first part of the devise, it makes the remainder void
" and against law.

" If an alien be made denizen, and lands be given to him and
" his heirs, remainder over to another; or to a bastard and his
" heirs, with such remainder over; these are good remainders,
" and the denizen or bastard have only an estate tail to them and
" the heirs of their body, because they can have no other heirs
" inheritable.

" One having issue two sons *B.* and *C.*, and two daughters,
" devises lands to *C.* in tail, if he should live to his age of twenty-
" four years, upon condition that he should pay 100*l.* to his two
" daughters; and if *C.* died without heirs, then if *B.* did not pay
" the said 100*l.* that it should remain to his daughters and their
" heirs.

heirs. And whether this was a condition for breach whereof the heirs should enter, or a limitation, that for non-payment would carry the lands to the daughters, was the question? And it was adjudged a condition, and that for breach thereof *B.* the heir should enter. But this judgment being in *C.*, *B.* was after reversed in error in *B. R.*, as appears in *Rolle*, where the case is put somewhat different; for there, after the devise to *C.* &c. it goes on, and if *C.* dies before twenty-four, (not saying without heirs, which, in this case, would give him an entail, the limitation over being to *B.* his brother, who would be his heir for want of issue,) then I will that *B.* my son and heir shall have the said lands to him and his heirs, he paying as *C.* should have done; and if *C.* and *B.* do not pay, then to the daughters, &c. it was held, that for non-payment by *C.*, *B.* should be in by limitation, and not by the condition, for then it would defeat the portions to the daughters, and the future devise to them too, and therefore the judgment which was given was reversed.

152. pl. 90,
S. C.]

1 Roll. Abr;
411. pl. 5.

Copyholder surrenders to the use of *A.* and his heirs, upon condition to pay 100*l.* to *B.*, and if he fails, that it shall be to the use of *B.*: if this was a good limitation to *B.* so as there should be a fee upon a fee, was the question? And *Beaumont* thought, that it was good enough, and should be as a use limited upon a feoffment; so these executory uses arise out of the first surrender, and executory uses may carry a fee after a fee as well as executory devises.

Cro. Eliz;
361.
Paulters vs
Cornhill.
Vide *supra*;

A. seised of lands in *London*, where by custom they may devise in mortmain, erects an alms-house, &c., and then devises the said lands to six persons and their heirs and assigns, upon condition and to the intent to pay out of the issues and profits thereof certain annual sums to the poor there, &c.; and if any part of the said purposes remain unperformed, then he devises the said lands to *B.* and the heirs male of his body, upon condition and to the intent to perform all the said trusts; and if he fails for two months, then he devises the said lands to the mayor and commonalty of *London* upon the same conditions; and if they fail, that then his heir should enter and perform the same; and dies. The devisees enter, and for breach of the condition, the heir enters, and then one *C.* enters, and gets a bargain and sale from the first devisees of their parts, and levies a fine with proclamations, and long after, the mayor and commonalty having notice of the will, entered, upon whom *C.* re-entered, &c.; and the court held clearly that, admitting these limitations good, they were barred by the fine and proclamations; but they inclined, the mayor, &c. could take nothing by the will, the devise to *B.* being but a possibility; and if the devise over to the mayor, &c. should be good, it would be a possibility upon a possibility, which the law will not allow. But *quere*, if there were twenty possibilities one after another, yet, if they were limited to take effect within the compass of lives then in being, or a reasonable time after, if they might not be allowed,

Cro. Car.
575.
1 Jo. 452.
Mayor and
Common-
alty of Lon-
don v.
Alfred.
[Vide
Fearne's
C. R. 377.
4th edit.]

3 Mod. 29;

"ed, since then there could be no inconvenience urged there-
 "from, which is the great argument upon which they have been
 "condemned.

Hutton, 60.
 Howell v.
 Anger.

"One having issue two sons, *A.* and *B.*, by his will devises
 "*Blackacre* to *C.* his wife for life, and after her death to *B.* and
 "his heirs in fee, under the conditions after declared, and de-
 "vises *Whiteacre* likewise to his said wife for life, and after her
 "death to *A.* and his heirs under the condition after limited ;
 "and if *C.* his wife died before the legacies paid, then he willed
 "that they should be paid by *A.* and *B.* out of the lands given
 "them, and if either of my sons die before they enter, or before the
 "legacies paid, then I will that the longer liver shall enjoy both parts
 "to him and his heirs ; and if both die before they enter, then my
 "executors, or one of them, to take the profits till they be paid. *A.*
 "year after the testator dies, *C.* enters. *A.* by deed releases to
 "*B.* all his right, &c. with warranty ; *B.* devises *Blackacre* to *D.*
 "his wife, and dies in the life of *C.*, and before the legacies
 "paid ; then *C.* dies, and *A.* enters into *Blackacre* ; and if this
 "entry was lawful, was the question ? One point was, if this
 "limitation of a fee after a fee were good ; and *Pell* and *Brown's*
 "case was cited to shew that it was, and that it should operate
 "as a future executory devise ; as, when one devises. that if
 "his son and heir die before marriage, or twenty-one, that then
 "J. S. shall have the land, this is good as an executory devise.
 "But this point was not adjudged ; because they all agreed, that
 "be it a condition or not, the release of *A.* has discharged it, as
 "in *Lampett's* case, and that this was without question an interest
 "in *A.*, though not executed ; and this release with warranty
 "barrs *A.* And the devise of *Blackacre* to *B.* is upon condition,
 "and this descending upon *A.* is without question barred by his
 "release. Note ; these limitations seem to be all good for the
 "reasons mentioned in the preceding case : but *quære*.

Co. 1048.
 Lampett's
 case. Cro.
 Eliz. 863.
 Brome v.
 Car.

2 Leon. 68.
 3 Leon. 115.
 Brian and
 Cawfen.

"One having three sons, *A.*, *B.*, and *C.*, and being seised of
 "copyhold lands which he had surrendered to the use of his will,
 "devises *Blackacre* to *A.*, *Whiteacre* to *B.*, and *Greenacre* to *C.*,
 "and if the said *A.*, *B.*, or *C.* live till they be of lawful age, and have
 "issue of their bodies lawfully begotten, then I give the said premises
 "to them and their heirs in manner aforesaid, to give and sell at their
 "pleasure ; but, if it fortune one of them to die without issue of his
 "body lawfully begotten, then I will that the other brother or brothers
 "have all the said premises in manner aforesaid ; and if it fortune the
 "third to die without issue in the like manner, then I will that the said
 "premises be sold by my executors, and the money given to the poor.
 "The testator dies : *A.*, *B.*, and *C.* are admitted to their parts :
 "*A.* attains full age, and hath issue : *A.* surrenders his part of
 "the whole to the use of *B.* and his heirs, who is admitted accord-
 "ingly : *B.* attains full age : then *A.* dies, and *B.* dies without
 "issue. It was adjudged, that no estate tail was created by his
 "will, but the fee simple vested and settled in them when they
 "came to their lawful age and had issue ; and that the words,
 "if they live till, &c. are words of condition, and no implication

to make an estate tail, and then the disposition ever upon such condition, &c. viz. *if the third died without issue*, is void, being not confined to any time certain; and therefore as to C.'s part, he dying within age, and without issue, this came to A. and B.; then A. living to full age and having issue, his surrender of Blackacre and the moiety of Greenacre to B. was good; and when B. after died without issue, though of full age, yet, as to his own part, which was Whiteacre and the moiety of Greenacre, this belonged to the heir at law of the devisor (the executors who should sell being dead before). But, as to Blackacre and the other moiety of Greenacre, these belonged to the heirs of B., as being A.'s part, who lived to twenty-one, and had issue, and therefore had the fee, and by his surrender to the use of B. made B. a good title thereto, which belonged to his own heirs, and not to the heirs of the devisor.

“ One having three sons, A., B., and C., and also three daughters, and being seised of Blackacre, Whiteacre, and Greenacre, devises all to his wife for life, and after her death that Blackacre be to A., Whiteacre to B., and Greenacre to C.; and if one or two of his sons die, that then his or their parts should be to the survivors; and devises to his three daughters 10*l.* each; to be paid out of his lands by every of his sons, as soon as they should enter their parts, after the death of the mother, provided that if it fortune any of my said sons to marry and have issue before he enters his part, then I will, that his part shall remain to the heir of his body and not to remain to his other brothers as aforesaid. The testator dies; then the wife dies, and the sons enter, and after B. dies having issue the defendant; and then A. dies having issue the plaintiff. It was adjudged for the plaintiffs, for the first words gave them but an estate for life, and the last clause gives no estate tail, unless they had issue and died before entry, which is a condition precedent to the vesting of the tail; and though 10*l.* a piece be devised to be paid out of their parts; yet that shall not enlarge their estates by implication, against the express words.

Cro. Eliz.
497.
Mo. pl. 656.
Bacon v.
Hill.

“ A. seised of lands in fee, having a brother named B., who had issue C. and D. his sons, and E. his daughter, by will devises to B. his brother, if he were living at the time of his decease, and his heirs; and if C. were living at the time of his death, and B. then dead, then he devises to C. and his heirs; and after devises to D. in the same form; and if no issue male be left from B., and that E. daughter of B. survive, and outlive B., C., and D., and it should happen she only should be alive at the time of his death, then he gave to her and her heirs; and if B., C., D., and E. die, so as no issue remain to B., then I will that F. (a stranger) shall inherit as aforesaid, be it that it happen my said brother B. to die without issue, either before my death, or at any time after; and dies. B. survived him, then C. died, leaving issue two daughters, the plaintiffs, and after B. died, and if D. or the daughters of C. should have the land was the question?

Supra.

2 Keb. 189.
192. 261.
Wright v.
Hiccocks.

“ and the better opinion seems for the daughters; for when it
 “ was devised to *B.* and his heirs, if he were living at the time of
 “ the death of *A.* the devisor, and he was so living, though these
 “ words give him a fee upon the happening of the contingency,
 “ viz. his surviving *A.*, and so to the others; yet, by the words
 “ after, if *B.*, *C.*, *D.*, and *E.* die without issue, either before his
 “ death or after, generally, without confining such dying without
 “ issue to any time certain, these words, in a will, plainly shew
 “ what heirs of *B.*, and so of the rest, the testator meant, viz. the
 “ issue of their bodies generally, and so make an estate in tail
 “ general to *B.*; and, by consequence, it must go to the daugh-
 “ ters of *C.*, his son and heir, before it can go to *D.* or *E.*, the
 “ youngest son and daughter of *B.*, or to *F.* And the words, if
 “ *no issue male be left of B.*, do not give an estate in tail male so
 “ as to go to *D.* the youngest son, upon the death of *C.* with-
 “ out issue male of *B.*, and to be fulfilled in the life of *A.* the
 “ testator before the devise to any of them can take effect; and,
 “ by consequence, cannot operate to qualify any estate before
 “ given, because no estate is before given that can take place till
 “ after the death of *A.* the testator, though they operate to make
 “ the vesting of the remainder to *E.* contingent, and to take only
 “ upon failure of issue male of *B.* in the life of *A.* the testator;
 “ and then the first devise to *B.* and his heirs, if he be living at
 “ the time of the death of *A.* can be restrained and qualified
 “ only by the last clause, which gives it to *K.* in case *B.*, *C.*, *D.*,
 “ and *E.* die, so as no issue be left of *B.*, *be it that B. die without*
 “ *issue, either before or after*, which words give an estate in tail ge-
 “ neral to *B.* by implication, and, by consequence, the daughters
 “ of his eldest son are to be preferred, and *D.* and *E.* can only
 “ come in after either, by virtue of the limitation made to them
 “ immediately, or as the next branch of the issue of the body of
 “ *B.* And if it had not been for the last clause, which governs
 “ and goes through all the preceding limitations, then, by the first
 “ clause, which gives it to *B.* and his heirs, if he were living at
 “ the death of *A.*, the whole fee would have vested in *B.* upon
 “ the happening of that contingency, and, by consequence, all
 “ the limitations after which were to arise, but upon failure of
 “ the first, would have been prevented and destroyed: and it is,
 “ in effect, no more now than a devise to *B.* and his heirs, if
 “ he survive the testator; and if he die without issue, either in
 “ the life of the testator or after his death, then to *F.*, &c.,
 “ which is a plain entail, and the remainders are all good, for all
 “ the contingency that is in the case is precedent to the vesting of
 “ any estate at all; and had it not been for the last words, *be it*
 “ *that B. die without issue*, the limitation over to *F.* had been
 “ totally void, and which-soever of the devisees had been living
 “ on *A.*’s death had taken the whole fee. And if the words, if
 “ *no male issue be left of B.*, should create an estate in tail male to
 “ *B.*, then the words after, *be it that it happen B. to die with-*
 “ *out issue, either before or after my death*, would not enlarge the
 “ estate

“ estate in tail male before given, and make it an estate in
 “ tail general to give it by way of remainder to the issue female
 “ of *B.*, as has been adjudged; and so the issue female would be
 “ quite excluded, which would be against the intent of the will,
 “ which was, that *F.* should not take till the failure of issue
 “ of *B.*

Dyer, 171.
 Mo. 13.
 Frencham's
 case.

“ *A.*, seised in fee, makes a feoffment in fee to the use of him-
 “ self for life, remainder to the feoffees for 80 years, if *B.*, and
 “ *C.* his wife so long live, and if *C.* survive *B.*, then to the use
 “ of *C.* for life, and after her death to the use of the first son of
 “ *B.* and *C.* in tail; and for default of such issue, to the use of
 “ *D.* and *E.* and the heirs of their bodies, remainder to the right
 “ heirs of *A.*; then *A.* dies, and *C.* dies, leaving a son, who dies
 “ without issue, and thereupon *D.* and *E.* enter and make a lease
 “ to the plaintiff, upon whom the defendant, as son and heir of
 “ *A.*, enters: and if the remainder in tail to the first son of *B.*
 “ and *C.*, and the remainder to *D.* and *E.* were executed, or were
 “ contingent upon the estate for life to *C.* was the question? and
 “ adjudged, that they were executed and not contingent; for
 “ though the estate for life to *C.* was contingent, viz. if she sur-
 “ vived her husband; yet this shall not hinder the vesting of the
 “ remainders limited after, but they shall take place in the persons
 “ *in esse*; and when that contingency happens, they, being limited
 “ by way of use, shall open to let in the contingent remainder to
 “ the wife. And a case is there cited of the Earl of *Derby*, where
 “ a feoffment was made to the use of *A.* in tail, remainder to the
 “ feoffees for eighty years, if *B.* so long live; and after his de-
 “ cease, to the use of *C.* and the heirs male of his body, remain-
 “ der to the use of *D.*; and adjudged, that the remainders vested
 “ presently, and that the possibility of *B.*'s outliving the eighty
 “ years, and so there would be no particular estate to support
 “ the remainders, which are not to take effect till his death,
 “ that yet this possibility would not make the remainders con-
 “ tingent. *Quere* of these cases.

Hutt. 118.
 Napper v.
 Saunders.
 Earl of Der-
 by's case.
 [So, it was
 said by Hale,
 C. J. in the
 case of *Weale*
v. Lower.
 (Pollexf.
 67.) that if
 a feoffment
 be made to
 the use of
A. for 99
 years, if he
 shall so long
 live, and
 after his
 death to the
 use of *B.*
 in fee, this shall
 not be con-
 tingent, but
 it shall be
 presumed
 his life will
 not exceed
 99 years;
 but that it
 had been
 otherwise, if
 it had been
 made but for
 21 years.—
 In a case of
 this nature

in Chancery, (*Beverley v. Beverley*, 2 Vern. 131.) where *A.* devised lands to *B.* his eldest son, for the term of 60 years, if he should so long live, and from and after his decease to his grandson *D.* (son of the said *B.*) in tail. *B.* and *D.* suffered a recovery; an objection was taken to the recovery, for that the devise to *B.* being only for 60 years if he should so long live, and after his decease to *D.*, the freehold during the life of *B.* was in abeyance. It was argued that the limitation of the estate-tail was good, exceptant on the term of 60 years; and Lord Derby's case was cited, as in point, that the devise over, from and immediately after the decease of *B.*, ought to be intended of his dying within the term; which was highly presumable, *B.* being then upwards of 40 years of age. But the court said, it would be hard to make such construction on the words of the will, as to say, where land is limited to a man for 60 years, if he shall so long live, and from and after his decease to another, that it must be meant from and after his decease *within the term*; for suppose he out-lived the term, should the remainder-man take in the lifetime of the first devisee? That would be a construction contrary to the words and intention of the testator. *Vide Fearn's C. R.* 24. 4th edit.]

“ *A.*, seised in fee, having issue two sons, *B.* and *C.*, devises lands
 “ to *B.* for fifty years, if he should so long live, and after the
 “ determination thereof, then to the heirs male of the body of
 “ *B.*; and for want of such issue to *C.* in tail, remainder to his
 “ own right heirs, and dies: *B.* enters, and suffers a common
 “ recovery, to the use of himself for life, and to the heirs male

4 Mod. 255.
 Goodright
 v. Cornish.

4 Leon. 22.

" of his body, remainder to the defendant and his heirs, and then
 " dies without issue: C. enters, and if B. had an estate-tail
 " was the question? for then the recovery barred that, and the
 " remainder to C. It was argued for C., that B. had no estate-
 " tail; for, first, he having but an estate for years, this cannot so
 " close with the remainder to the heirs male of his body as to
 " make an estate-tail in himself. Secondly, he shall not have an
 " estate for life by implication to make out such an entail, be-
 " cause he hath an estate but for years by express limitation; and
 " without an apparent intent of the testator, no other estate shall
 " be raised by implication. Thirdly, this cannot be good by way
 " of remainder to the heirs male of his body, because this would
 " be a contingent remainder of the freehold and inheritance,
 " which an estate for years is not sufficient to support. There-
 " fore, Fourthly, this is an executory devise to the heirs male of
 " the body of B.; as if one covenant to stand seised for twenty
 " years, remainder to the heirs of the body of the covenantor,
 " this is an executory remainder, and not to be barred by a
 " common recovery. For the defendant it was urged, that
 " such construction ought to be made, that all the will may
 " take effect; and it is a known rule in law, that it shall never
 " be construed an executory devise, if it will admit of any other
 " construction; and therefore this shall be construed an estate-
 " tail in B. and an estate for life, raised by implication to him
 " by reason of the words, *for want of such issue*, which of them-
 " selves make an estate-tail in a will. And there is no dif-
 " ference, whether those words follow an estate for life or years,
 " if the limitation be to the heirs. And now B., being heir at
 " law, so much of the old inheritable estate shall arise to him by
 " implication as may make him tenant for life, and then he hath
 " an estate-tail executed in him; and to construe it an executory
 " devise would be to introduce a perpetuity above the power of
 " a common recovery to dock; and the court held—This could
 " not be good as an executory devise, for then the limitation
 " over would be void; (*quære* of this reason;) therefore it must be
 " a contingent remainder, and then it is void, because the estate
 " for years is not sufficient to support it. Note; then it follows,
 " that afterwards judgment was given for the plaintiff, *viz.* C.,
 " which proves, that they held it no estate-tail in B.; for then,
 " by the recovery, that and the remainder to C. would have been
 " barred, and, by consequence, it would have been adjudged for
 " the defendant who claimed under the recovery. Secondly, this
 " proves, that it was held an executory devise, if the reason
 " there given be good, that then the remainder over would be
 " void; which I should think is a *non sequitur*; for if it were an
 " executory devise to the heirs male of the body of B., yet it
 " would only give them an estate-tail, which will bear a remainder
 " over; but, being a contingent remainder, and B. having only
 " an estate for years, the recovery was a forfeiture of B.'s estate
 " for years, whereof C., who was next in remainder, for want of
 " issue male of B., may at any time take advantage by entry.

" The

" The last case I shall here mention, to shew how far a limitation after a fee has been carried, was, in short, but thus: *A.* and *B.*, two sisters, seized of lands in fee for 4000 *l.* paid *A.* by *C.*, and in consideration of a marriage intended, and afterwards had between *B.* and *C.* by lease and release, convey all their lands to the use of *B.* and *C.* for their lives, remainder to their first and other sons in tail male successively, remainder to the daughters of *B.* and *C.* in tail, remainder to the right heirs of *C.*, provided that, if there be no issue between *B.* and *C.* living at the death of the survivor of them, and that the heirs of *B.* should, within twelve months after the death of *B.* and *C.*, dying without issue as aforesaid, pay to the heirs or assigns of *C.* 4000 *l.*, then the remainder in fee so limited to *C.* and his heirs should cease, and that then the premises should remain to the right heirs of *B.* for ever. Afterwards *B.* and *C.*, for extinguishing any other right or title which *B.* or her heirs then had, or after might have, by any settlement, proviso, &c. on payment of 4000 *l.* or otherwise to the heirs of *C.* levy a fine of the said lands to the use of *C.* and his heirs, and direct the trustees of the first settlement to convey accordingly: then *C.* devises the said lands to *D.* his brother, subject to his debts, which were near 5000 *l.*, and after *B.* and *C.* die without issue, and *A.*, the sister and heir of *B.*, brings a bill in Chancery against *D.*, the brother and heir of *C.*, and against the trustees, to have the conveyance of the lands, on payment of 4000 *l.*, pursuant to the proviso. And this bill being dismissed, an appeal was brought in parliament, and for the defendant or respondent it was insisted, that the proviso was void, the fee being before limited to *C.* and his heirs, and so not capable of a further limitation, unless to happen in the life of one or more persons in being at the time of the settlement, which is the furthest the judges have ever gone in allowing contingent limitations upon a fee: and if they should be extended to contingencies to happen within twelve months after the death of one or more person or persons in being, they may as well be extended to contingencies to happen within 1000 years, and so all the inconveniencies of a perpetuity will be let in, and the owner of the fee simple, thus clogged, will be no more capable of providing for the necessities and accidents of his family, than a bare tenant for life. Secondly, if this limitation were good, then the estate limited to the heirs of *B.* were virtually in her, and her heirs must claim by descent from her and not as purchasers; and then that estate is barred by the fine, the design of limiting such power to the heirs not being to exclude the ancestor; but because the power could not, in its nature, be executed till after the death of the ancestor, it being to take effect upon a contingency that was not to happen till after that time, and that, by this means, *C.* would not only have no portion with *B.*, but *D.*, his brother, would lose all the money he paid for the debts of *C.*, which were charged on the said lands. For the appellants it was urged,

" that

Cases in
Parliament,
137.
Lloyd and
others v.
Carew.

3 Chan. Ca.
31, 32. 36.

“ that the proviso was not void, that it was within the reason of
 “ the contingent limitations allowed in the Duke of *Norfolk's*
 “ case, where it is said, that future interests, springing trusts, or
 “ trusts executory, and remainders that are to arise upon contin-
 “ gencies, are quite out of the rule and reasons of perpetui-
 “ ties, if they are not of remote consideration, but such as will
 “ speedily wear out: that though there can be no remainders li-
 “ mited after a fee simple, yet there may a contingent fee simple
 “ arise out of the first fee: that the *ultimum quod fit* of a fee upon
 “ a fee is not yet plainly determined; that there could not, in any
 “ reason, be any difference between a contingency to happen dur-
 “ ing a life or lives in being, and within one year after, the reason
 “ of allowing them to be good, if confined to lives in being, or
 “ upon their extinction, was because no inconvenience could fol-
 “ low; and the same rule will hold to a year after: and that the
 “ true rule to set bounds to them is when they prove inconve-
 “ nient, and not otherwise: that this settlement was made by
 “ good advice. Secondly, that the fine could not bar the benefit of
 “ this proviso, because the same never was nor could be in *B.*
 “ who levied it; and the decree of dismissal was reversed.
 “ Note; Mr. *Pooley*, who argued this case, added also this reason,
 “ that if the proviso had been, that if *B.* die without issue living
 “ at the death of the survivor of them, then if the heirs of *B.*
 “ do, upon the death of such survivor without issue, pay 1000 *l.* to
 “ the heirs of *C.*, then, &c.; this, you agree, had been good, but
 “ being extended to a year after, it is otherwise, and may as well
 “ be 4000 years after: to this he said, if the proviso had been
 “ so worded, it would have been impossible to have been per-
 “ formed; for then the heirs of *B.*, who could not be known till
 “ her death would have been obliged to have carried always
 “ 4000 *l.* about them ready to pay, and to have the heirs of *C.*,
 “ who likewise could not be known till his death, always ready
 “ to receive it upon the instant of the death of the survivor.
 “ And it might happen, that neither the one who was ready to
 “ pay it, nor the other who was ready to receive it, might be
 “ heirs of *B.* and *C.*, and surely when the heirs of neither could
 “ be known till their deaths, twelve months was but a reason-
 “ able time to procure and pay so great a sum as 4000 *l.* Which
 “ argument shews, that the limitation of a fee after a fee upon a
 “ contingency, to happen within one or more life or lives in being,
 “ or upon their deaths, being allowed to be good, may be ex-
 “ tended further, when, as the limitation may happen to be, it
 “ would be inconvenient, and impossible to be performed within
 “ such a time; and that inconvenience is to be the only bound to
 “ these limitations. But here it is so far from being inconvenient,
 “ that it would be inconvenient and impossible to be performed
 “ otherwise.

2 Lev. 135.
2 Sid. 153.
Raym. 162.
2 Keb. 567.
McC. Snow
v. Cutler.

“ Husband seized of lands to the use of himself and his wife,
 “ and the heirs of the husband, by will devises thus: *The lands*
 “ *which are A.'s for life, I devise them to the heirs of the body of my*
 “ *wife, if they shall be of the age of 14 years at her death.* The de-
 “ visor

“visor dies without issue: the wife hath issue by a second husband: then she and her husband suffer a common recovery; and then the wife dies, the issue being about 14 years of age. And two questions are made: 1st, If this devise to the heirs of the body of the wife was good? And in this case the court was divided; for by two justices this is void, being a present devise to the heirs of the body of the wife, who being alive could not have heirs: and so it is, as if a devise were to the heirs of J. S. who is living, which is clearly void: And though J. S. had an estate for life, as the wife had here, yet the devise would not be good, because it is not by way of a remainder, but is a distinct present devise. And it was said, that this was a contingency upon a contingency, viz. If the wife should have heirs of her body, and also if they should be 14 years of age at her death; and therefore not to be allowed. But it was held by two other justices, (and, as it seems, it is the better opinion,) that the devise was good as an executory devise. They agreed to the case of the devise to the heirs of J. S. though he had an estate for life, because intended a present devise without other words: but, when the intent appears, that it shall take effect *in futuro*, it is otherwise. And here the devisor recites, that the lands were his wife's for her life, and therefore he did not intend the devise to take effect till after her death; as, when lands are devised to A. after the death of B., or to the heir of J. S. which shall be born, these are good executory devises, and the land shall descend in the mean time to the heirs at law of the devisor. So, a devise to a person that shall marry his daughter, &c. And in case of executory devises, it is not necessary there should be a devisee *in esse* at the death of the testator; and the contingency is frequent and ordinary, and confined to one life, and so not within the danger of a perpetuity, as it would be, if it were after such a one's death without issue. And all the court held clearly, that if the devise were good at all, it must be as an executory devise, and not as a remainder; for though the wife hath an estate for life, yet this is a new original devise, to take effect after her death, and not as a remainder joined to her estate. Also, as to the second point all held, that if this was an executory devise, it was not barred by the common recovery, according to *Pell* and *Brown's* case; for it hath no existence at all till the contingency happens, and therefore there can be no recompence in value; for a valuation cannot be put upon that which is not.

“Husband seised of lands in fee, in right of his wife, he and his wife by indenture covenant to levy a fine to the use of the heirs of the husband upon the body of the wife to be gotten, remainder to the right heirs of the husband: the fine is levied accordingly, and after they have issue a son, who died without issue in the life of the baron and feme; and then the feme dies; and after the husband dies without issue: and if the heirs of the husband, or the heirs of the wife should have the land, was the question? And for the heirs of the husband it was argued

4 Mod. 253.
Cases in
Parliament,
104. Davis
v. Speed.
[Ferne's
C. R. 63.
428. S. C.]

1 Mod. 98.
 221. 159.
 226. 237.
 2 Mod. 207.
 1 Leon. 75.
 Reym. 228.
 318.
 3 Keb. 129.
 339.
 1 Ro. Rep.
 240.

“gued, that this settlement being by way of use, was like a will to
 “be construed according to the intent of the parties: and there
 “the husband would have an estate for life by implication, which
 “being united to the estate limited to the heirs of his body, it
 “would make an estate-tail in him: and for this was cited *Piles*
 “v. *Mistford*, where upon a covenant to stand seised to the use of
 “the heirs male of his body, on the body of his second wife, it was
 “adjudged, that this limitation carried an use to himself, in whom
 “all his heirs were included; and therefore, he having an estate
 “for life by implication, till the future use came in *esse*, made the
 “whole an estate-tail in himself: so here. And though the
 “estate here was the wife’s, yet such use to the husband might
 “well arise by implication, because both joined in the deed and
 “fine, though it could not result back to the husband, because
 “he had none before. Besides, it was urged, that he had an estate
 “for life as tenant by the curtesy. 2dly, If no estate arises to the
 “husband by implication, yet it should be good to the heirs of his
 “body by way of springing use, and the estate, in the mean time,
 “should remain in the feme and her husband, till the death of the
 “husband: and that it was no more, than if the deed had de-
 “clared the use after 20 years, or other future time, to the heirs
 “of the body of the husband. But on the other hand it was ar-
 “gued and adjudged, that here being no particular estate to sup-
 “port this last remainder, it was void, and then the fine was to
 “the use of the wife and her heirs, she being owner of the estate:
 “that here was no particular estate was plain, because the heirs
 “of the body of the husband were limited to take presently, and
 “that during his life they cannot do. 2dly, If it was intended the
 “heirs of the body of the husband should take *in futuro*, that there
 “must be an estate somewhere to support the limitation till it
 “could take effect: that here was no such estate to the husband
 “expressed; and implied it could not be, for if any estate should
 “arise by implication, it must be to the wife who was owner of
 “the whole; and then, she dying before her husband, there again
 “an estate was wanted to support the remainders during his life.
 “That this was a case of a deed executed in the life of the par-
 “ties, and not of a will where large allowances are made in fa-
 “vour of supposed intentions by reason of persons being surprised
 “by sickness and wanting counsel; but the rules of law always
 “govern in construction of deeds. That the notion of a spring-
 “ing contingent use is hardly intelligible in itself, and by no
 “means applicable in this case; because no words here have a
 “relation to a future time or contingency; and to allow such li-
 “mitations in deeds, would make them as uncertain as wills, cre-
 “ate intentions not expressed, raise uses by implications never in-
 “tended, and in short destroy all the difference between good and
 “bad conveyances; produce a confusion in property, and render
 “all purchases unsafe and precarious. And therefore the judg-
 “ment for the heirs of the wife was affirmed.

“One having issue a son who was heir apparent, and two
 “daughters, devises in these words, *If it happen my son B. and my*
 “two

here was no express estate given; nor was there any by implication; because then it must be either a joint estate for life, with several inheritances in tail, or several estates-tail in succession one after another. The last it cannot be, because uncertain which shall take first, which next. And the first it shall not be, because the heir at law shall not be disinherited without a necessary implication, which in this case there is not: for it is only a designation and appointment of the time when the land shall come to the nephew; as if he had devised thus: *I leave my land to descend, or I give my land to my son and his heirs, till he and my two daughters die without issue, or so long as any heirs of the body of him and my two daughters shall be living, and then, or for want of such heirs, I devise the same to my nephew*: this is good as a future and executory devise, and in the meantime the land shall descend to the heir at law, he having made no disposition thereof. So, a devise that *J. S.* shall have his lands after 20 years, &c. is good for the same reasons.

“One by will devises thus: *I give to my daughter A. my lands in B., if my son C. happen to have no issue male, after the death of my wife; and if my son C. have issue male, then the said A. to have 5 l. only, in lieu of the said lands*; and dies: *C.* hath issue male; the wife dies: and after that, the issue male dies without issue; and then *C.* dies: and one doubt was, if *A.* should have an estate for life by the devise, because at the time of the death of the wife *C.* had issue male, though that issue after failed, viz. If this was a remainder to *A.*, or a contingent, or conditional devise? And it was said, that if I devise lands to *J. S.* if my son die without issue, that this is a conditional devise, and *J. S.* hath nothing till the contingency happens. (But *quære* of that case, for that devise tends to a perpetuity, and therefore is not to be allowed?) And the court were of opinion, that the devise was conditional, and that *C.* having issue male at the time of the death of the wife, *A.* is only to have the 5 l. and not the land. Note also; *Keeling* was of opinion, that this was an estate-tail in *C.*; but *Twissden contra*, that nothing was given to *C.* more than to a mere stranger. And this seems most consonant to the cases before mentioned. And then it was no more than an executory devise to *A.*, if the son died without issue, which gives no more estate to the son, than if he were a stranger; nor alters any estate which the law gives him, if he were heir at law. But by reason of the words, *If he have no issue male after the death of the wife; and if he have, then A. to have 5 l. only*; these words make the executory devise to *A.* conditional; and in this case the son having issue after the death of the wife, whereby the 5 l. became due, *A.* cannot after have the land, though that issue fails; because a recompence was provided for each side of the contingency; and when one was

2 Saund.

111.

1 Sid. 445.

2 Keb. 600.

Allen v.

Rivington.

Supra 761.

“taken

2 Mod. 289.
Taylor v.
Bydall.

" taken place, the other is shut out, as if it had not been mentioned.

" *A.* hath issue *B.* her son by a first husband, and *C.* and *D.* her son and daughter by *E.* a second husband. *F.* the brother of *A.* being seised in fee of lands, devises them to *A.* his sister and heir for so long time, and until her son *C.* should attain his full age of 21 years, and after he shall have attained his said age, then to him and his heirs for ever; and if he die before his age of 21 years, then to the heirs of the body of *E.* and to their heirs for ever, as they should attain their respective ages of 21 years. *F.* dies, and *C.* dies, and the question was, if *B.* as heir to *A.*, or *D.* either as heir to *C.* her brother, or as heir of the body of *E.* should have the land? And for *B.* it was argued, that nothing vested in *C.* till he attained 21, but the freehold and inheritance in the mean time descended to the heir at law of *F.*, for *A.* had but an estate for years, viz. till *C.* attained 21: then *A.* having but an estate for years, and *C.* nothing till 21, the fee must in the mean time descend to the heir at law of *F.*, and there it shall continue, because the contingency never happened, *C.* dying before 21. Also, the devise to *C.* being but contingent, viz. if he attained 21, the estate for years of *A.* was not sufficient to support it; and for that reason it was void. And *D.* cannot take as heir of *C.*, and then the land descends to the heir at law of *F.* 2dly, *D.* cannot take by the devise to the heirs of the body of *E.*, for admitting it to be an executory devise, yet *E.* her father being alive when it was to vest, there is no person within the description to take it, for *non est heres viventis*; and there also it descends to the heir of *F.*, which is *B.* the plaintiff. But for *D.* the defendant it was argued, that the fee vested presently in *C.*, there being only an estate for years in *A.*; and they relied upon *Boraston's* case, where there was a like devise: and there, from *C.* it descended to *D.* as his sister and heir. 2dly, If not as heir to him, yet as heir of the body of *E.* by way of executory devise, which needs no particular estate to support it; for though *E.* her father was living at the death of *C.*, yet he was dead before *D.* attained 21, when only she was to take; and the estate in the mean time descends to the heir at law of the deviser; and without making it an executory devise it would be void, being limited after the fee to *C.*, and therefore it cannot be good as a remainder, but the estate of *C.* which was vested being now divested by virtue of the original condition, he dying before 21, it returns to the heir at law of the deviser till the full age of the heir of *E.*, and until *E.*'s death, though it be after their full age, and then it is carried over to the heir of *C.* by virtue of the executory devise.

3 Co. 19.
Boraston's
case.

Cro. Eliz.
668. *Smith*
v. *Warren*.

" *A.* tenant for life levies a fine *come ceo*, &c. to the reversioner, to the use of the conusee and his heirs, upon condition to pay to *A.* 4*l.* annually, and that for default of payment it should be to the use of *A.* for life: the conusee makes a feoffment over, and then there is a default in payment of the 4*l.* And if by this feoffment the future use was destroyed, was the question?

" And

arise to the conuſee himſelf who levied the fine ; but if it had been to have ariſen to a ſtranger upon condition, the non-performace thereof would have created a ſpringing uſe to him, for it is merely a tie and charge upon the land which is not deſtroyed by the feoffment."

E) Of Remainders that ariſe on Conditions precedent or ſubſequent.

[T is a maxim frequently urged in our books, That a remainder cannot be limited to begin upon a condition annexed to the firſt eſtate, but that for breach of the condition the feoffor or leſſor muſt enter, and by that entry, the firſt eſtate being determined, the remainder is deſtroyed, becauſe it cannot take effect at the inſtant of the determination of the particular eſtate. For the remainder paſſing out of the feoffor or leſſor at the ſame time that the particular eſtate is created, and being to take effect in virtue of the firſt livery, when the feoffor or leſſor re-enters for the condition broken, that deſtroys the force of the firſt livery, being an act of equal notoriety therewith, and then the remainder which was to take effect thereby can never ariſe, becauſe there wants the ſolemnity required by law for that purpoſe.]

[1 Br. 155. a.
pl. 83.
253. a.
pl. 18.
Perk. ſect.
831.
Litt. ſect.
721. Co.
Litt. 378.
Co. 86. 88.
Plow. 25.
29. 33. a.
35. 10 Co.
86. b. Dr.
and Student.
Lib. 2. c. 20.
23. fol. 192.
206.

Roll. Abr. 474.]

" But, becauſe the reaſoning holds only where livery of ſeiſin is requiſite, and yet the law ſeems to be the ſame in other caſes where no livery is requiſite, as upon a leaſe for years, grant of an advowſon, common, rent *in uſu*, &c. therefore it will be neceſſary to conſider the following diſtinctiſons, for the better explanation and underſtanding hereof :

" 1ſt, The firſt diſtinction to be obſerved, is between a condition and a limitation : and in caſe of the condition, when it preceſſes the veſting of the remainder as the cauſe thereof, and is annexed to the firſt eſtate ; and where it is annexed to the firſt eſtate abſolutely without any regard to the remainder.

" 2d, Between a deed and a will, where in both the ſame words of condition are made uſe of for the veſting of the remainder.

" 3d, Between a limitation over in ſuch caſe of a will, and where no limitation is made over.

" 4th, Between remainders that are to ariſe upon conditions agreeable to the rules of law, and ſuch as are to ariſe upon conditions repugnant and againſt the rules of the law.

" 5th, Between ſuch words as actually make a condition, and ſuch as are only deſcriptive of the time and manner when and how the remainders are to ariſe and take place.

" 1. Between

1. Between a Condition and a Limitation, and in case of the Condition when it precedes the vesting of the Remainder and the Cause thereof, and is annexed to the first Estate; and when it is annexed absolutely without any Regard to the Remainder.'

Co. Litt.
201. 214.
10 Co. 42.
Plow. 27.
(a) Moor,
292. Co.
Litt. 214.
Poph. 99.
Plow. 413.
Cro. Elis.
424.
10 Co. 42.

"As to the first distinction between a condition and a limitation," "a condition is properly such, as goes in abridgment and restraint of the estate first given, upon something to be done or not done by the person who takes the estate, or by him who makes the estate, or to happen during the continuance of the estate. (a) A limitation is such as limits and circumscribes the estate to continue so long only, and no longer, than till such a thing happens, or till such a thing done or not done by the person who takes the estate, or any other; so that upon the happening, performance, or non-performance thereof, the estate *ipso facto* determines and expires as certainly as if it had been made for life or years; and upon such an estate a remainder may be limited, as well as after an estate for life or years," "as has appeared already in part, and will so more fully hereafter.

"But in case of the condition when a remainder limited there- after shall be good, and when not, depends upon the difference first mentioned: in the one instance, the remainder can never take effect by reason of the condition, but in the other, the remainder takes effect presently, and thereby destroys the condition."

Perk. 662.
330.
Co. Litt.
214.

"Therefore, if a man makes a lease for life or years of lands, or grants an advowson, common, rent *in esse*, &c. to one for life or years, upon condition, that if the lessee or grantee do not pay such a sum of money, that then his estate shall cease, and that it shall remain to B. for life, years, or in fee; this remainder is void for these reasons. First, Because it does not vest as a remainder presently, but is to arise upon breach of the condition only. Secondly, Upon breach of the condition it cannot vest, because none can take advantage of the breach thereof, but only the party from whom the condition moves, and his heirs. Thirdly, When they have taken advantage thereof by entry or claim, the particular estate is thereby determined, and the lessor or grantor in of his first estate, as it were *ab initio*, by title paramount the estate given or granted; and then if the remainder cannot vest at the instant of the determination of the particular estate, it can never after take effect, and by consequence is defeated and gone."

Cro. Elis.
360.
Cogan v.
Cogan.
[Vide
Fearn's
C. R. 395.
&c.]

"This case, though I do not find it *in terminis* in the books, seems to be well warranted by the case following," "where A. seised of lands in fee, let them to B. for life, remainder to C. for life, provided that if A. hath issue a son during his life, who should live to the age of five years, that then the estate limited to C. should cease, and that it should remain to such son in tail: A. hath issue a son, who lived to the said age, and if the

"remainder

remainder limited to C. should cease, and the remainder to the son be good, was the question. And *per totam curiam* it was *adjudged*, that the remainder to the son was void: wherein it appears *first*, That this was properly a condition, because upon the happening thereof it was to shorten and abridge the estate before given. *Secondly*, This case proves the law to be the same in case of things which lie in grant, as of those which lie in livery; for here it was not the particular estate that was to cease upon the condition, but the remainder, and that lies in grant. *Thirdly*, Though the condition here was not annexed to the first estate, yet it was annexed to the estate immediately preceding the remainder to the son; and so to this purpose is the same as if it had been for life, upon such condition to cease and remain over. *Fourthly*, It appears that the remainder was not to begin but upon the condition performed, and so the condition preceded the vesting of the remainder. *Fifthly*, This case proves, that none shall take advantage of a condition but the lessor and his heirs, and therefore the remainder to the son who was a stranger could not arise thereby. *Sixthly*, That this remainder being limited to begin upon a condition precedent, whereof none can take advantage but the lessor and his heirs, is for ever defeated and destroyed, because it cannot take effect according to the terms limited for vesting thereof.

But now, if one makes a lease for life or years, upon condition to pay so much at a day certain, or reserving rent, and for default of payment a re-entry, remainder after the death of the lessee, or after the years, to B. for life or in fee; or, if one makes a lease to A. for life, remainder to B. in fee, rendering rent, with clause of re-entry for default of payment by the tenant for life, and to retain during his life; in these cases the remainder vests presently in B., and has no dependance on the condition for its taking effect. But, if the condition should be broken, or the rent arrear, B. cannot enter, being a stranger; and if the lessor should enter, he would be in of his first estate by title paramount the remainder, and then the particular estate being determined before the remainder could take effect, the remainder would thereby be destroyed. But this would be unreasonable that he should destroy the remainder which was well vested by his own grant; and since every man's grant shall be construed strongest against himself, and this must be to support and make good the estate he has parted with; therefore by such remainder over the condition is destroyed, and the power of re-entry gone, and then the first estate is absolute, with the remainder over; and the lessor has no remedy for the money or the rent, but in a court of equity.

Perk. sect.
831.
Co. Litt.
214. 338.
Co. 40.
Roll. Abr.
472.
Cro. Eliz.
727. 792.
Dyer, 127.
Doct. &
Stud. l. 2.
c. 21.
[*Fearne's*
C. R. 405.
&c.]

2. Distinction between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.

Here we must observe, that though in case of a deed, either the condition destroys the remainder, or the re-

‘ remainder the condition, as appears before, yet in a will it is otherwise.

29 Aff.
pl. 17.
Perk. fecit.
863.
Plow. 412.
Dyer, 127.
20 Co. 40.
Roll. Abr.
407. 474.

‘ Thus, one seised of lands in fee, devisable by custom, by will devised them to *J. S.* a clerk, upon condition that he should be a chaplain, and sing for the soul of the devisor all his life, and that after his death the land should remain to *J. D.* mayor of *S.* and his successors, to find a chaplain perpetually to sing for the soul of the devisor, and dies. *J. S.* being of the age of twenty-four years enters, and holds the land for six years, and is not a chaplain; the heir of the devisor ousts him; then *J. S.* brings an assise, and upon the pleading thereto by the heir, and all this matter found, the assise went for the plaintiff; whence my Lord *Coke* infers, *that this was no limitation*, because then the estate of *J. S.* would have been *ipso facto* determined, and the estate cast upon *J. D.* and then *J. S.* could not have recovered; *secondly*, That this being a condition, *J. D.* in remainder could not enter for breach thereof; and, *thirdly*, Since it was adjudged likewise against the heir that he could not enter for the condition broken, therefore the condition by the limitation of the remainder over must be destroyed. But *Perkins* in citing this case holds, that for breach of the condition the heir might enter, and yet that the remainder should not be defeated thereby, but that after the death of *J. S.* it should well take effect; and with him agrees *Dyer* in a like case, and takes the diversity between a remainder by deed with livery, and a remainder by will; for in case of the deed, the entry for the condition broken *defeats the livery*, and, by consequence, *the remainder which depends thereon*; but in case of a will the remainder is good, though the particular estate never was good, or be defeated before the remainder can take effect, which must be as an *executory devise*, not as a remainder; for then it ought to vest when the particular estate ends; and without question, as an *executory devise*, such limitation over is good; and therefore, where *Plowden* in citing this case holds it to be a limitation, and not a condition, because then by the entry of the heir the remainder over would be defeated, this reason holds not, when by construing it an *executory devise* it may be made good, and yet the condition be preserved.

20 Co. 43.
Dyer, 127.
Roll. Abr.
478.

‘ So, where *A.*, seised of lands in fee, having issue three sons, *B.*, *C.*, and *D.*, devises the lands to his wife for life, *sub conditione quod ipsa educabit pueros testatoris in eruditione et bonis moribus*, the remainder to *D.* his son in tail, and dies; the wife enters and breaks the condition: and if *B.*, as heir, should enter for the condition broken, or if *D.* should enter as by limitation, or if the condition was destroyed by the limitation over, were the questions; *et per totam curiam*, as my Lord *Coke* cites it, it was held to be no limitation, because there are express words of condition; and if it be a condition, then the heir, by his entry for breach thereof, would defeat the remainder likewise, which is not reasonable; therefore it was held, that by the limitation over the condition was destroyed. But in *Dyer*, which seems to be the same case, it was held *the condition was not destroyed*, but that,

‘ for

for breach thereof, the heir should enter, and hold during the life of the wife, and yet that after her death *D.* should have the land, which must be by way of *executory devise*.

But, however the law might have stood when devises of lands were not very frequent, it is now settled, that, in case of a will, the devisee in remainder shall enter for breach of the condition annexed to the first estate, be it devised to a stranger, or to the heir himself. This construction was introduced to support the intent of the testator, which otherwise, in many cases, would be totally frustrated, and his will set aside: and, to make way for such construction, they held, that, by nonpayment of the sum, or nonperformance of the thing directed to be done, the estate of the first devisee determined immediately without entry or claim, and then the remainder succeeded as if there had been no condition at all; and so they changed the condition into a limitation, which determines the estate to the first, and casts the possession on the second by way of immediate remainder. Another reason of this construction might be, that seeing, by the limitation over, the land was given from the heir at law, and a new heir made, it was now more reasonable, that this *heir factus* should take advantage of the condition, who was to have the benefit of the land, than the *heir natus*, who, by such limitation over, was excluded and shut out from inheriting the land; and since none can enter for breach of the condition but the heir, and now, by giving him the land, the devisee is become heir thereof, therefore they construed such *heir factus* to be the *heir who should enter for breach of the condition*. And this was still more reasonable, when the first devisee was himself heir at law, and was to perform the condition; for, otherwise, whether he performed it or not, the remainder could never take place; since none could take advantage of the breach thereof but he himself who was to perform it; and, by consequence, the remainder, which was to arise upon the breach of such condition, would be prevented and destroyed, and the intent of the testator eluded*.

Vide title Conditions, Letter (H). 2 Mod. 26.
* In other words, it is now agreed, that where-ever in a devise a condition is annexed to a preceding estate, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate; and that upon the breach or performance of it (as the case may be) the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall there-upon actually commence in

possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate. Thus indeed is the testator's intention effectuated, by substantiating the remainder, though limited to a stranger; and enforcing the performance of the condition by the determination of the particular estate upon the breach of it, notwithstanding that particular estate be limited to the heir himself. *Fearne, 409. 4th edit. Vide Plow. 408. Scholastica's case, & infra, 811.*

Therefore, where a copyholder in fee of lands, descendible in Borough English, having three sons and a daughter, surrendered his land to the use of his will; and after by will devised his land to his eldest son in fee, (for so it was construed,) paying to each of his brothers and his sister 40*l.* within two years after his death, and died; the eldest son was admitted, and did not pay the money within the two years; the youngest son entered; it was adjudged, that his entry was lawful; for though in a will the word *paying* amounts to a condition, yet, if it should be construed a condition, in this case it would descend on the eldest son himself, who was to perform it, and also take advantage of the breach thereof; and then whether he performed it or not would

Welcock v. Hamond, 3 Co. 20. Cro. Elis. 204. 2 Leon, 214. cited Cro. Jac. 592. Roll. Rep. 219. and in several modern books.

be

be all one, since either way he was to have the land; and so the youngest children would be not only without remedy for their portions, but there would likewise be no penalty upon the eldest to enforce the payment thereof; which would frustrate the intent of the testator; therefore they construed the devise to the eldest son paying, &c., to be a limitation to him till he made default of payment only, and no longer; and then by such default, his estate ceasing, the nature of the land revives and lets in the youngest son, who was heir by the custom, since there was no limitation over.

Hainsworth
v. Pretty,
Cro. Eliz.
319. 333.
Moore,
pl. 891.
Roll. Abr.
411.
Vaugh. 271.
2 Mod. 26.

So, where one, seised of lands in fee, having issue two sons and a daughter, devised to his youngest son and daughter 20 l. 2-pieces, to be paid by his eldest son; and devised his lands to his eldest son and his heirs, upon condition, that if he did not pay the said sums, that then the land should remain to his youngest son and daughter, and their heirs, and died; the eldest son entered, and did not pay the money; it was adjudged that the youngest son and daughter should have the land; for, *first*, this devise to the eldest son and heir, being no more than what the law gave him, without such devise, was void. *Secondly*, if this should be a condition, it would be defeated by the descent on the eldest son, who was to perform it. Therefore, *thirdly*, it was held to be a devise to the eldest son only, or no longer than till he failed to pay the said sums; and then to the youngest son and daughter, which gives them the land by way of *limitation*, upon his failing to pay the said sums. But *Vaughan*, in citing this case, holds, the devise to the eldest son being void, that then it was no more than if he had devised, that if his eldest son did not pay such sums, that then the land should be to the legatees; which makes a *good future executory devise*, and the land in the mean time descends to the heir at law, as if no devise had been made thereof. This construction is well warranted by the case, and answers the purpose for which it was cited by *Vaughan*, but the other construction, in making it an *actual limitation*, is more natural and agreeable to the words and intent of the will.

Leon. 283.
Jennor v.
Hardie.

One devises lands to *A.* his wife, upon condition that she do not marry; and if she marry or die, that then the land shall remain to *B.* in tail; and if *B.* die without issue in the life of *A.* that then the land shall remain to *A.* to dispose thereof at her pleasure; and if *B.* survive *A.*, and after die without issue, that then the land shall be divided betwixt the sisters of the devisor, and dies: *B.* dies without issue, in the life of *A.*; it was adjudged, that *A.* had a fee by the words *to dispose thereof at her pleasure*; and that the remainder to the sisters was upon a contingent, which never happened, *viz.* *B.*'s surviving *A.*, but *B.* dying before *A.* the devise of the fee to *A.* was absolute. And though it was doubted if a remainder might be limited to begin upon a condition precedent, annexed to the first estate, as in this case it was, yet, being in a will, it was held to be a new executory devise of the reversion, if the estate had been defeated by the precedent condition, and not as a remainder; or at least

the

the condition should be construed to amount to a limitation till she married; and so the remainder would be made good thereby upon such determinable particular estate.

One devises lands, deviseable to *A.* for life, upon condition that if his heir, to whom the reversion descends, disturb *A.* or the executors of the devisor of their administration, that then the land shall remain to the daughter of the devisor and her heirs, and dies; *A.* dies; the daughter brings a formedon in remainder against the son and heir of the devisor, and alleges, that he disturbed *A.* and the executors also; and issue was joined upon it; which proves that the limitation to the daughter was good as an executory devise, to take effect upon such disturbance; and the fee, in the mean time, descended to the heir; and the book adds, that this could not be a condition, because then, by the descent to the eldest son, who was to perform it, it would be destroyed.

"This is true; but this in strictness was no manner of condition, but only a designation of the time when, and the manner how, the future executory devise to the daughters was to take effect, as will appear hereafter.

"*Cestui que use* in fee before 27 *H. 8.* devises his lands to his wife for life, *ita quod non faceret aut permetteret aliquod vastum*, the remainder after her death to his second son in tail, and dies; and after the statute, the wife commits waste. *A. querit* is made, Whether the feoffees, or heir of the devisor, or he in remainder should enter for the condition broken? And if, by entry of the heir or feoffees, the remainder be destroyed? No resolution is given in it; but, by the laws beforementioned, it seems clear, that if the heir does enter for the condition broken, and hold during the life of the wife, yet after her death the remainder to the second son will be good, by way of executory devise; for the remainder, not being to take effect by express words till after her death, he in remainder cannot enter upon breach of the condition by making it a limitation, till she does waste, and to vest presently upon such waste committed."

"*A.* having issue three sons and two daughters, and the eldest daughter having issue *B.*, and the youngest issue *C.*; *A.* by his will devises lands to his wife for life; and after her death to his grandchild *B.* and the heirs of her body; provided always, and upon condition, that she marry with the consent of *D.*, *E.*, and *F.*, or the major part of them; and in case she marries without such consent, or dies without issue, then he bequeathed the said premises to *C.*, and died; *B.* married *G.* without consent of any of the persons named for that purpose, and thereupon *C.* entered upon her. It was held clearly to be a limitation to her till she married without such consent, and not a condition; for then it would descend to the heir at law, and he, for breach thereof, might enter and defeat the limitation over; therefore it was construed to be a limitation, and that the marriage, without such consent, determined her estate-tail, and cast the possession upon

Flow. 27.
414

Dyer, 117.
b. Hubby's
case.

Fry v.
Porter, or
Williams
v. Fry.
Vent. 199.
2 Lev. 21
Mod. 86.
300.
3 Keb. 756.
787.

3. Distinction between a Limitation over in case of a Will, and where no Limitation is made over.

"The third distinction I observed, was between a limitation over in case of a conditional devise in a will, and where no limitation was made over upon breach of the condition; and both parts of this distinction sufficiently appear from the laws already mentioned under the 1st and 2d head; I shall therefore only add the two following cases for further illustration thereof. The first whereof was this:—"

Cro. Elis.
146.
Crickmere
v. Paterfon.
Swinb. 115.

"A. seised of lands, and having issue two daughters only, devised lands to the eldest and her heirs, and that she pay to her youngest sister yearly 30 l. And *per cur.*—This was a condition, for otherwise the youngest sister would have no remedy for the rent; and being a condition, it descended upon both the daughters as heirs, and for breach thereof the youngest might enter into a moiety of the land with her sister; for there being no limitation over to the youngest for default of payment, if she had not been equally heir with her sister, she would have been without remedy.

Cro. Jac. 56.
Curtis v.
Wolverston.
Poph. 11.

"So, where a copyholder in fee of lands in *Borough English*, having issue three sons, A., B., and C., surrendered his land to the use of his will, and after devised them to B. in fee, upon condition that he should pay to his four sisters 20 l. a-piece at their full age, and died; A. the eldest son had issue two daughters, and died; B. was admitted, and did not pay the 20 l. a-piece; C. the youngest son entered: it was objected, that this was a limitation to B. till he failed to pay, &c. and so should go to the youngest son, who was inheritable by the custom. But it was adjudged to be a condition, and that for breach thereof the daughters of A. the eldest son should enter; but it seems that after such entry the heir by custom shall enter upon them. But *quere*, if the devise had been to the eldest son upon such condition, this had been a limitation, which, upon non-payment, would have carried the land to the youngest son, who was heir by custom; for otherwise, if it should be a condition, by the descent to the eldest son, it would be merged and defeated. But *quere*, if the land had been descendible to the eldest son as other inheritances at common law are, and such conditional devise had been made thereof to the eldest son without any limitation over for default of payment, *quere* if in such case the legatees had any other remedy than by bill in equity for their legacies, for the land not being given to them, it will be hard to maintain, that for breach of the condition the land should go over to them; therefore in such case it should seem they have no remedy but in Chancery, where the eldest son will be looked upon as a trustee for the payment of so much money to them."

4. Distinction between Remainders that are to arise upon Conditions agreeable to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of Law.

“As to the first part hereof, how far remainders upon such conditions, and so far as they may be called conditions, which do not go in restraint and abridgment of the first estate, are good, will appear under the 5th and last distinction. But as to the remainders that are to arise upon conditions repugnant, and against the rules of law, this has been already cleared in part under the first distinction, and will now fully appear by the cases following:”

“Therefore, if one by his will, by covenant to stand seised, feoffment to uses, or other conveyance whatsoever, gives or conveys lands to, or to the use of *A.* his eldest son, and the heirs male of his body, remainder to, or to the use of *B.* his second son, and the heirs male of his body, and so to the third and other sons in like manner; and after adds a proviso, that if *A.* or his issue, or any other of his sons in remainder, shall attempt to alien, &c. or shall alien, &c. by which any estate shall be barred, &c. that then immediately after such attempt, and before any act executed, or immediately after such alienation, the use and estate of him so attempting or aliening, &c. shall cease as if he were naturally dead, and that then it shall remain immediately to such persons to whom it ought to come by the intent of the indenture or will, or to him in the next remainder, &c. In this case the remainders are actually vested as remainders in all the sons; but, as to their taking effect in possession upon breach of the condition, or sooner, or otherwise than they would have done if there had been no condition at all, the proviso or condition is totally repugnant and against law; for be it either a condition or a limitation, it cannot carry over the estate to him in remainder upon breach thereof. For if it be a condition, then the donor and his heirs only can take advantage of the breach thereof, not those in remainder who are strangers; and if the donor or his heirs enter for breach of the condition, they thereby defeat not only the present estate, but all remainders dependant thereupon. If it be a limitation till they alien only, yet it is repugnant, that when by the alienation the estate is actually settled and vested in the alienee, the same alienation should at the same time vest and settle the estate in another; and for the words *attempting, endeavouring, or going about to alien*, they are of too uncertain a signification to receive any countenance, and what shall be said a sufficient attempt, and what not, is hard to determine; besides that, all such clauses tend to perpetuities, to fix estates in families unalienable, that they can upon no exigencies or emergencies whatsoever dispose thereof, to provide for payment of their debts, their wives, or younger children; and also they destroy and enervate the force of fines and common recoveries, the great and common assurances, whereby men hold their

1 Co. 89.
Mo. pl. 332.
869.
6 Co. 40.
9 Co. 127.
Cro. Eliz.
378.
Cro. Jac.
698.
10 Co. 36.
Mo. pl. 496.
Swinh. 112.

Cro. Jac. 61.
10 Co. 86.
Moor, 772.
Lovett v.
Goddard.

their estates, and therefore with just reason all such clauses are exploded and disallowed.

'One devises lands to his son *A.* and the heirs male of his body, provided that if *A.* or any issue male of his body, alien, give, or grant the premises to any person for above twenty years, &c. that then the said premises, for default of such issue male of the body of *A.*, immediately upon every such alienation, gift, or grant, shall remain and come to his (the testator's) son *B.*, and the heirs male of his body, &c. and dies; *A.* enters and makes a lease for a thousand years, and dies without issue male, leaving *C.* his daughter and heir; *B.* enters upon her, *C.* re-enters. It was held *first*, That the remainder to *B.* was not to take effect but upon alienation and death without issue male, and not upon the death of *A.* without issue male only. *Secondly*, That the remainder being limited to take effect upon such alienation should never arise, because by the alienation the land is given to another, and then it is repugnant to make the alienation to one sufficient to carry the land to another.' "Note; This case appears in *Croke* to be adjudged in *C. B.* and *B. R.* for the daughter of *A.*, but in *Moore* it is said, that in error afterwards brought in *B. R.* the judgment was reversed, but no reasons for the reversal are there mentioned. This case agrees with the case of *Alston v. Hart* above mentioned, where it was holden, that without an attempt to alien, the remainder was not to arise; and upon that point only judgment was there given, without entering into the nature or validity of the limitation, which by the foregoing case appears to be clearly against the law."

Roll. Abr.
472.
Skirn v.
Lady Bond.

'One devises lands to *A.* in tail, upon condition that he shall not alien, and that if he dies without issue it shall remain to *B.* in fee; after *A.* aliens, yet *B.* cannot enter for the condition broken, but the heir at common law, because this is not a limitation, but a condition, by *Coke* and *Warburton*. But *quære* if *A.* after dies without issue, if *B.* may not enter; for though the heir enter for the condition broken, and hold till the estate tail determined, yet the remainder to *B.* seems good by way of executory devise, to arise out of the reversion vested in the heir by his entry for breach of the condition, and not as an immediate remainder, because it is not to take effect till the death of *A.* without issue, and yet the estate tail of *A.* by breach of the condition may determine long before.

Vent. 321.
3 Keb. 787.
Piers v.
Wynn.
& vide
Plow. 408.
Moor, 543.

'One devises lands to *A.* and the heirs male of his body, provided if he does attempt to alien, that then immediately his estate shall cease, and *B.* shall enter: after *A.* makes a feoffment in fee, and thereupon *B.* enters; and it was adjudged in the grand sessions against *B.*, whereupon he brought a writ of error. And *first* it was agreed, That tenant in tail could not be restrained from alienation by fine or recovery. *Secondly*, That a bare attempt would be no breach; but then it was argued, that he might be restrained from aliening by feoffment, or other act which would amount to a tort, and make a discontinuance, and

that

that this proviso imports as much; and therefore the feoffment as a breach, for that was an attempt, and more; and that therefore it should determine the estate-tail *quasi* by limitation, which would give an immediate title of entry to *B.* by executory devise, and that the current of authorities, since 10 Co. 40. are, that a condition in a will shall be taken as a limitation. But the whole court held the condition void, because *non constat* what shall be adjudged an attempt, and how it should be tried; and so the judgment was affirmed.

But where one, having two sons, devised *Blackacre* to his eldest son in tail, and *Whiteacre* to his youngest son in tail, *proviso* *impero* that if any of his children alien or demise any of his lands to them devised before they come to the age of thirty years, then the next brother shall enter; the eldest enters, and lets *Blackacre* before his age of thirty years: this was held a good limitation till they aliened, and that upon alienation it should go to the other. But this case differs from the preceding cases, for here was no total restraint of alienation, but only till they arrived to such an age as they might be presumed to have full discretion, and to know well what they did, which was but a reasonable restraint; but in that case where the younger brother entered into *Blackacre* by virtue of the limitation, and aliened it before his age of thirty, it was held, that the eldest brother could not enter into it again, because by the entry of the younger brother that part was discharged of the limitation forever.

2 Leon. 22.
Mo. 271.
Spittle v.
Davis.

“These cases being so adjudged, though none of them do in express terms deny *Scholastica's* case to be law, yet the resolution of that case can hardly stand, as it tends as directly to a perpetuity as any of them. The case was this:—A man devised lands to his eldest son in tail, remainder to his youngest son in tail, remainder over in tail, remainder to his own right heirs; and if any of the entails do wrong, vex, or molest any other of them for the said lands, or mortgage, bargain, and sell the said lands, or otherwise incumber them, &c. that then every such person, and his and their heirs, shall forthwith be excluded and discharged touching the said entail; and that the conveyance of the entail of the said lands against him or them shall be of no force, but that it shall descend and come to the party next in tail to him, as if such disorderous person had never been mentioned in the will. The eldest son enters and avoids a fine, and suffers a common recovery, and the youngest son enters upon him. It was adjudged that his entry was lawful, and that the estate of every one in remainder was subject to the limitation to cease by alienation. And that the next in remainder might enter; for that it was not a condition, because then it would descend to the eldest son himself, and by his alienation would pass extinguished in the land; but being a limitation, it is as if it were devised to every of them till they aliened, and so by alienation their estate *ipso facto* determines, and is cast upon him in the remainder before entry. And for construction of the condition

Plow. 401.
Newis v.
Lark, or
Scholastica's
case.
Mo. 543.
pl. 721.

“by

10 Co. 42.
[*Fide Bate-*
man v. Allen,
Cro. Eliz.
437. and
Ferne's
C. R. 386.
4th edit.]

1 P. Wms.
304.
2 Vern. 635.
Collins v.
Plummer.

“ by a limitation in a will, this case seems to have led the way
“ to all the cases that have followed upon it. But for the nature
“ of the condition, all the cases before mentioned seem to condemn
“ it. And my Lord *Coke* says, that a contrary judgment was given
“ in the same case afterwards by *Popham* and two justices, though
“ *Moor* in reporting the same case mentions it to have been ad-
“ judged by *Popham* and two justices, according to the resolution
“ in the Commentaries. But the case at this day by good opinion
“ is held to be no law, as being introductive of a perpetuity which
“ the law condemns.”

Upon a marriage settlement *A.* is made tenant for life, remain-
der to the heirs of his body by his wife *Jane*; and in the same
deed *A.* covenants not to suffer a recovery, but that the lands shall
be enjoyed according to these limitations; *A.* notwithstanding his
covenant suffers a recovery, and devises the lands. It was held
in Chancery, that *A.* being tenant in tail, and as such having
power to suffer a recovery, the lands devised should not be affected,
but that the covenant was good, and should therefore bind his
assigns.

- ‘ 5. Distinction between such Words as actually make a Condition,
‘ and such as are only descriptive of the Time and Manner when
‘ and how the Remainders are to arise.

“ The fifth and last distinction I shall mention is, between such
“ words as actually make a condition, and such as are only de-
“ scriptive of the time when, and manner how, the remainders are
“ to arise and take place. And this is the more necessary, because
“ in several of the foregoing and other cases great disputes have
“ arisen, when the word condition has been in the deed or will,
“ though in reality there has been no manner of condition at all; for
“ a condition, as appears before, properly and strictly taken must
“ go in restraint and abridgment of the estate first given, other-
“ wise it is no condition, but only a modus or particular qualifi-
“ cation whereby such a person is to entitle himself to the estate
“ in remainder, and has no manner of relation to the first estate
“ either to shorten or abridge it.”

Flow. 23 to
29.
Co. Litt.
378.

‘ Therefore, where one made a lease to *A.* for life, remainder
‘ to *B.* for life; and if it happen *B.* dies before *A.*, then the lands
‘ to remain to *C.* for life; *B.* dies in the life of *A.*, and then *A.*
‘ dies, and if the remainder to *C.* was good, was the question? It
‘ was argued that it was not, because it was appointed to begin
‘ during the particular estate, where it ought to be limited to take
‘ effect after the particular estate ended; and therefore a lease for
‘ life to *A.*, remainder to *B.* for life, and if *A.* dies, that then it
‘ shall remain to *C.* in fee, this remainder is void, because then it
‘ would subvert the remainder to *B.*, and therefore is repugnant
‘ to the estate first limited to *B.* So, a lease to two for their lives,
‘ remainder after the death of the first of them to *C.* in fee, is
‘ void, because it would defeat the survivorship given by the first
‘ words. So here, secondly, it was argued, That this remainder

‘ was

is void, being to begin upon a condition, whereof none should take advantage but the lessor and his heirs. Thirdly, That this remainder, being to begin upon a condition precedent, did not pass out of the lessor at the time of the livery, as all remainders ought, and therefore also was void. But on the other side it was argued and adjudged, that *first*, Here was no repugnancy, as it was not intended that if *B.* died, living *A.*, that then *C.* should have the land immediately, but that then it should remain to *C.* as a remainder, viz. after the death of *A.*, and as *B.* would have had it, if he had lived. *Secondly*, That this was not a condition, but a limitation when the remainder should begin; for if it were a condition, it would go in restraint of the thing given upon something to be done or not done by the particular tenant, which here it does not: therefore if one makes a lease to *A.* for life, upon condition that if *B.* marries the daughter of the lessor during the estate for life, that then it shall remain to *B.*, this is no condition to defeat or abridge the estate of *A.*, but is only a limitation when and how the remainder to *B.* is to take effect. So, if a lease were made to *A.* for life, upon condition that if *B.* pay to the lessor 20*l.*, that then after the death of *A.* the land should remain to *B.*, this is good, because it does not go in abridgment of the first estate; but if it was, that then immediately upon such payment the land should remain to *B.*, this would be void, because this would go in destruction of the first estate, without any thing to be done or not done by him, and of such condition the lessor and his heirs only can take advantage, not a stranger, and therefore the remainder to arise thereby is void. So, if a lease be made to two for their lives, upon condition that if one of them died within seven years, that then after the death of the other the land should remain to a stranger in fee, this is a good remainder, being not to begin upon a condition, but upon a limitation or *modus* appointed by the lessor. And they all agreed, that a remainder to begin upon an impossible or illegal limitation or condition would be void; as, upon a condition that if *A.* the first lessee, or if *B.* kill a man, that then it should remain to him, these remainders shall never arise. So the case of *Plesington*, who made a lease for years upon condition that if he aliened the reversion, that then the lessee should have it to him and his heirs; this limitation was void, because repugnant, that when he aliened the reversion to one, the same alienation should carry the land to another. Also, the better opinion seems, that the remainder passed out of the lessor presently, and is carried into abeyance, to be executed when the contingency happens.

"But, though these words make no condition with regard to the precedent estate, yet as to the vesting of the estate in remainder to which they are annexed, they may properly enough be called conditions precedent. Therefore where" "*A.* by his will devised lands to *B.* his second son, and if he depart this world not having issue, then he willed that his land should remain over to another, and died; *B.* had issue *C.*, and died; then

Plowd. 29. a.
34. a. b.
Perk. sect.
725. 729.
Co. Litt.
378.

Leon. 285.
3 Leon. 106.
Cro. Elis.
26. Lec. v.
Vincent.

* C. died without issue; it was urged, that the remainder could not take effect, because it was limited to take place on a condition precedent, which in this case had not happened; for B. died without issue, and so did not depart the world not having issue, as the words of the will are; yet, *per cur.* it was adjudged, That though literally he could not be said to depart the world not having issue, yet, since that issue died without issue, by the intent of the testator, and the construction of law, he was dead without issue when the issue failed; as in a formodon in remainder or reversion, though the donee hath issue, yet, if after the estate-tail determines for want of issue, the writ supposes that the donee died without issue; a *fortiori* in case of a will such construction should be made to support the intent of the testator.

Lev. 35.
Vent. 229.
Sid. 302.
2 Keb. 73.
78. 169.
246. 462.
MSS.
Goodyer v.
Clerk.

* So, where A. upon marriage conveyed lands to the use of himself for life, remainder to his first and other sons in tail male successively; and if he dies without issue male, then to the daughters for one hundred years, for raising 1500*l.* for their portions; A. had issue a son and a daughter, and died; and after the son died without issue; and if the daughter should have the term was the question? And it was argued, that she should not: because A. did not die without issue male, for he left a son, though such a son after died without issue; and it could not be intended that whenever the issue male failed, the daughters should have their portions, for that might be 100 years after when all the daughters were dead; and such intention would make it ill in its creation. But it was answered and adjudged, that *quandocunque* the issue male failed, the husband in this case may be said to be dead without issue male; and the expectation of such a term in remainder is for their advantage in marriage; and such a term may be as well created to arise upon failure of issue male, as a power to sell upon failure of issue male, which hath been adjudged to be good. "Note; A case was cited 13 Car. 1. between Brett and Pildredge, where a father upon marriage of his daughter made a provision, that if his daughter died without issue within two years, that then her husband should repay 500*l.* of her portion: the daughter had issue; and after, she and the issue died within the two years. It was adjudged, that the husband should not repay the 500*l.* because by the having of issue the condition was fulfilled. *Note;* My Lord Chief Justice Holt, in the case next after mentioned, said, that the principal case of Goodyer v. Clerk was not put right in any of the books but Keble, for the true case was, that the husband before marriage, by a separate deed, made a lease for 100 years, to begin after his death without issue male on the body of his intended wife, in trust, for raising portions for daughters; and after made a settlement by lease and release, to the use of himself and his wife, and first and other sons, in the usual form, &c. And he said, this term being not subsequent to nor depending upon the estates limited by the settlement, but precedent in its creation, could not be barred by any fine or common recovery under the settlement. And though he did

not deny but such lease was good, yet he thought it a very dangerous practice; and if such leases were countenanced, no purchaser under such settlement would be safe. But note; though such lease cannot be barred by a common recovery, because being precedent to the estate-tail, the recompence in value cannot extend to it, nor can he who recovers against the tenant in tail be supposed to have any right against the termor, who comes in paramount the estate-tail; yet it appears by the books, that *Manwood*, *Barnsley*, and *Twisden* held, that if a common recovery be against the tenant in tail, such lessee for years *in future*, or upon a contingency, shall not be admitted to falsify within 21 H. 8. c. 15. to defeat the recovery; and then it remains at common law, and his term is subject to the power of the tenant in tail, as it was before that statute; which sufficiently takes off the objection from the danger of introducing perpetuities by the allowing of such leases. And in another book it is held, That if there be *A.* tenant in tail, remainder to *B.* in tail, and *B.* make a lease for years, or grant a rent-charge, such lessee or grantee cannot falsify a common recovery had against the first tenant in tail; because he who suffered the recovery was not chargeable with the lease or rent. And though on the other hand it may be objected, that by this construction all provisions for daughters or younger children made by such precedent lease for years may be defeated; to this it is answered, that the Court of Chancery will no doubt support such leases according to the trust thereof declared for daughters or younger children, but no further; and when that is satisfied, the term will then fall of course for want of power to falsify by the common law, and a further support in equity.

1 Keb. 247.
248. 463.
1 Sid. 108.
Cro. Jac.
592. Sir T.
Raym. 29.
1 Co. 62. b.

" One makes a settlement upon marriage to the use of himself for life, remainder to trustees to support the contingent remainders during his life, remainder to his wife for life for her jointure, remainder to his first and other sons in tail male successively; and then follows this clause—And in default of such issue, and in case he (the husband) shall die or be dead without issue male of his body on the body of his wife born, or *in ventre sa mere*, at the time of his death, having one or more daughter or daughters, then to trustees for 500 years, in trust to raise portions for such daughter or daughters, also yearly maintenance to be paid half-yearly from the death of the wife. The husband has issue male by his wife, and also daughters, and dies; then the issue male dies without issue; and if the term should arise, was the question? It was argued by Serjeant *Parker*, that it should not, because it was to arise upon a condition precedent; for the having no issue male was restrained to a particular time, *viz.* the time of his death, which here did not happen. He agreed, if it had been, that if he die without issue male generally, there, issue is *nomen collectivum*; and though he has issue, yet if such issue male after die without issue, either in his life time or at any time after, yet the term should arise, but not in this case, and cited the laws beforemen-

Trin. 1706.
in B. R.
Stroud v.
Andrews.
[S. C. Rep.
temp. Holt,
625. and
11 Mod. 88.
But the re-
port here is
apparently
from a dis-
ferent hand,
and is in
some re-
spects more
full.]

" tioned.

Remainder and Reversion.

" *issue.* *Raymond* argued, that here was no contingency, but
 " a plain limitation of the term after failure of issue male, when-
 " ever that happened; for when he says *and in default of such issue*,
 " it is plain, if he had gone no further, it had been so then,
 " when by those words the term would have been well raised, the
 " subsequent words, which are but tautology and a repetition of
 " the same thing, shall not hinder it from rising: for that would
 " be to make one part of the deed destroy and subvert the other,
 " and the words following, *and in case he shall die or be dead with-*
 " *out issue male of his body on the body of his wife born*, if it had
 " gone no farther, are but a repetition of the former words, and
 " *in default of such issue.* But then, if the words, *or in ventre sa*
 " *mere at the time of his death*, shall be joined to all the foregoing
 " words and be taken as part of them, then it destroys and con-
 " tracts them; for then all that is before spoken of issue
 " male is to be confined to his death, as the operative words
 " which govern and go through the whole sentence; therefore,
 " he argued, that the words, *at the time of his death*, should be re-
 " strained and confined only to the words next immediately be-
 " fore, *and in ventre sa mere*, for otherwise it is not to be
 " known what he meant by *ventre sa mere*, nor at what time such
 " issue male was to be *in ventre sa mere*, for all issues are *in ventre*
 " *sa mere* at one time or other; therefore to make sense of the
 " words, those words must be restrained, and then the whole is
 " consistent and easy, and runs thus—*and in default of such issue*,
 " *and in case he shall die or be dead without issue male generally, or*
 " *shall die or be dead without issue male in ventre sa mere at the time*
 " *of his death*. and then whether the issue male die at his death,
 " or being *in ventre sa mere* at his death, and born after, die with-
 " out issue male, the term shall arise, and no condition in it, but a
 " plain limitation of a term in remainder. But my Lord Ch. J.
 " said that by such construction you destroy the last words,
 " which are restrictive and explanatory of the foregoing, and tied
 " down to the time of his death. Also, the maintenances being
 " appointed to be paid half-yearly from the death of the mother,
 " how, that such maintenances and term were only to arise in
 " case of no issue male at the time of his death; for otherwise,
 " the interest being to be paid from the death of the mother,
 " it was there should be a failure of issue male 40 or 50 years
 " after, the interest or maintenance would be more than the prin-
 " cipal, interest, or portion; and he was so strongly of this opi-
 " nion, that this term was to arise upon a condition precedent,
 " which here was not performed, that he said they might argue
 " all the days of their lives, they should never make him change
 " it. And accordingly, judgment was there given, that the term
 " should not arise. But afterwards, upon a writ of error brought
 " in parliament, that judgment was reversed.
 " And makes a settlement upon the marriage of his son with one
 " A. of the use of the son for life, remainder to trustees to
 " support, &c. remainder to the first and other sons in the usual
 " way, and adds this proviso, viz. *Provided that, if the said B.*
" shall

shall happen to survive her husband, not having issue of their two bodies lawfully begotten, then she, the said B., should have power to sell and dispose of such part of the lands as she should think fit. The husband dies, leaving issue; some years after that issue dies without issue; and then the wife sells the lands in question to the defendants, against whom the heir at law of the husband brought this bill to have a discovery of the deeds and writings; and insisted that the wife had no power to sell these lands, because the condition was not performed; for the husband left issue, and so she did not survive him, not having issue. But my Lord Chancellor said, that when an estate is made to one and the heirs of his body, and in case he die without issue, to go over to another, that limitation over is good, though he dies leaving issue, which issue afterwards dies without issue. And that is a stronger case than this; for if he leaves issue, he cannot be properly said to die without issue, though that issue after fails; because death is a single act, and to be performed but once; but here, surviving is a continuing act, and she survives her husband as much a year after, as she did the first moment; and therefore, if the issue fails during her life, she actually survives without issue, or not having issue, because the issue fails during her survivorship, which continues after the failure of issue. And this, he said, was the plain natural meaning of the parties, as well as agreeable to the words, which were to give the wife a power to dispose of so much of the lands, in case the issue to be provided for by that settlement failed during her life; and accordingly dismissed the bill.

[Pr. Ch. 293. S. C. 2 Vern. 651. S. C.]

One Fletcher, being possessed of a term for years, by his will devises it to his wife for life, and after her death to Rebecca Fletcher for life, and after her death to Thomas Fletcher and his children; and if it shall happen the said Thomas Fletcher to die before the expiration of the said term, not having issue of his body then living, then to go over to the now plaintiff for the residue of the term. The defendant's title was by an assignment from Rebecca Fletcher, and a release from Thomas Fletcher, of all their estate, title, and interest respectively in and to the premises: the two life-estates were at an end: and Thomas Fletcher was dead without issue; and now the plaintiff brought this bill to have an assignment of the residue of the term, pursuant to the will. All that was insisted on for the defendant to difference this case from the Duke of Norfolk's case of a term, and from Pell and Brown's case of a fee, was, that this contingency of his dying without issue then living was not confined to his death, but that the word then living should relate to the words before the expiration of the term; and so this went further than any of the cases had ever yet been carried, for he might have issue for several generations, and yet, if that issue failed at any time before the expiration of the term, then it was to go over; and this in a long term plainly tended to a perpetuity, and therefore ought not to be allowed; but that, by the devise to Thomas and his children, and the words

Fletcher's case. Trin. 11th July 1709, in Ch. [1 Eq. Ca. Abr. 193. S. C. Fearn's Ex. Dev. 184. S. C.]

“ if he die without issue, the whole term and interest was vested
 “ in him, and he might dispose thereof as he thought fit. And
 “ that it could not be restrained by the words *then living*, for they
 “ related only to the expiration of the term, &c.; so the re-
 “ mainder over to the plaintiff was void. But it was decreed to
 “ be a good remainder to the plaintiff, by way of executory do-
 “ vise; and that the words *then living* must relate to the time of
 “ his death, for otherwise there would be no difference between
 “ this case and the common limitation of a term to one and the
 “ heirs of his body, and if he die without issue, to remain to an-
 “ other, which is void; for there it must likewise be intended if
 “ he die without issue before the expiration of the term, because
 “ when the term is expired, nothing remains to limit over: but,
 “ here, being limited over upon this contingency, viz. *If he die*
 “ *without issue then living*, viz. *at the time of his death*, it is good,
 “ because the contingency must happen within the compass of
 “ one life, or not at all, and will be certainly known at his death.
 “ And this case differs in nothing material from the Duke of
 “ Norfolk's case.

Corbett v.
 Maidwell,
 Trin. 1710.
 1a Chancery.
 12 Eq. Ca.
 Abr. 337.
 S. C. 1 Salk.
 259. S. C.
 2 Vern. 640.
 655. S. C.
 3 Ch. Caf.
 190. S. C.
 Although
 this case,
 and the cases
 on which it
 was founded,
 have been
 constantly
 received as
 the law of
 the court,
 yet judges in
 later times
 have ex-
 pressed their
 opinion of
 the incon-
 venience at-
 tending these
 determina-
 tions, and
 have anx-
 iously sought
 for circum-
 stances to
 distinguish
 the modern
 cases from
 them.
 Butler v.
 Duncombe,
 1 P. Wms.

“ In this case it was said by my Lord Chancellour to have been
 “ decreed in this court, and several cases cited for it, that where
 “ an estate is limited to a man for life, remainder to his wife for
 “ life, remainder to trustees for a term of years, upon trust out
 “ of the rents and profits, or by mortgage or sale to raise portions
 “ for daughters of that marriage, to be paid at their age of
 “ 18 years, or day of marriage, which should first happen, that
 “ these portions were absolutely due and vested at eighteen or
 “ marriage, though in the life of the father and mother; and
 “ that the term for raising them should be sold in the lifetime of
 “ the father and mother, and this court would warrant the title.
 “ So, if the trust of the term were limited upon a condition pre-
 “ cedent, as if it was declared, that in case he should die without
 “ issue male on the body of his said wife, leaving daughters, that
 “ then the trustees should, out of the rents, &c. raise and pay
 “ portions to such daughters at eighteen or marriage, &c. that in
 “ case the mother died without issue male, leaving daughters, who
 “ attained eighteen or were married in the father's lifetime, that
 “ such term in remainder should be sold presently, and the por-
 “ tions raised. So, where even the term itself was to arise upon
 “ such condition precedent, or, after a limitation to the first and
 “ other sons or before, it were limited, that in case he should die
 “ without issue male on the body of his wife, leaving daughters,
 “ then to trustees for a term of years, in trust to raise portions for
 “ daughters, payable at eighteen or marriage, yet after the death
 “ of the wife without issue male, such term shall be sold to raise
 “ the portions in the father's lifetime. The reasons of which
 “ resolutions, he said, were, because the death of the wife, which
 “ was all that was contingent in that case, had happened; that it
 “ was now become impossible he should die leaving issue male by
 “ her, and then it was no more than if it had been limited when
 “ he shall die, or after his death. And the reason of the court's
 “ coming

“ coming into this at first was, to promote suitable matches, and
 “ that women might have their portions when they were likely to
 “ do them most service; though he said, if it had been *res inte-*
 “ *gra*, he should not have decreed it so.
 2 P. Wms. 93. *Ravenshill v. Dansey*, *Id.* 179. *Brome v. Berkley*, *Id.* 484. *Evelyn v. Evelyn*,
Id. 679. *Hebblethwaite v. Cartwright*, *Ca. temp. Talb.* 31. *Stanley v. Stanley*, 1 Atk. 549. *Hall*
v. Carter, 2 Ark. 354. *Sevens v. Derhick*, 3 Ark. 39. *Lyon v. Duke of Chandois*, *Id.* 416.
Goodall v. Rivers, *Mos.* 395. *Churchman v. Harvey*, *Ambl.* 335. *Smith v. Evans*, *Id.* 633.
Conway v. Conway, 3 Br. Ch. Rep. 267.]

(F) Of Cross Remainders, or those arising by Im-
 plication and Construction of Law.

“ THE last thing to be treated of under this head is, concerning
 “ remainders arising by implication or construction of law,
 “ and therein of cross remainders. But these being already
 “ settled under the head of *Devises*, as being allowable only in
 “ last wills and testaments, I shall pass them by.”

A. having issue five sons, his wife being *ensient*, devised two-
 thirds of his lands to his four younger sons; and the child in
ventre sa mere if he were a son, and their heirs; and (a) if they
 all died without issue male of their bodies, or any of them, that the
 lands should revert to the right heirs of the devisor. By this devise
 the younger sons are tenants in tail in possession, with cross re-
 mainders in tail to each other, and no part shall revert to the heirs
 of the devisor till all the younger sons be dead without issue male
 of their bodies.

Dyer, 303.
 (a) That
 each shall be
 heir to the
 other, makes
 cross re-
 mainders.
HoB. 33. &
vide Cro.
Jac. 266.
 656. 695.
Bulk. 62.
Vent. 224.

Owen, 25. *And.* 38. *Savil*, 92. *Moor*, 637. *Raym.* 455.

But, where one having issue three sons, *A.*, *B.*, and *C.*, devises
 one house to *A.* and his heirs, another house to *B.* and his heirs,
 and a third house to *C.* and his heirs, provided that if all his said
 children should die without issue, that then all the said messuages
 should remain and be to his wife and her heirs; it was held by
 three judges, that upon the death of one of the sons without issue,
 the wife might enter, and that here there were no cross remainders
 from one son to another, because being devised to them severally
 by express limitation, there shall be no greater estate to them by
 implication. But *Lee*, Ch. J. doubted; and *Doddridge*, J. said, that
 though perhaps cross remainders may be by implication where there
 is a devise to (b) two several persons, yet not so if to more; for
 when one dies there cannot be several estates by moieties to several
 persons, and when another dies, remainder again to another, be-
 cause of the uncertainty and inconvenience; and that it was never
 seen in any book, where an estate is limited to divers, that there
 could be cross remainders.

Cro. Jac.
 655.
 2 Roll. Rep.
 281. *Gil-*
bart v. Wit-
ty. *Cart.*
 173. *S. C.*
 cited and
 admitted to
 be law.

(b) As in
 4 Leon. 14.
 [Vide *infra*.]

One seized of lands in fee, by his will in writing devises *Black-*
acre to *A.* his daughter and her heirs, and *Whiteacre* to his daugh-
 ter *B.* and her heirs: and if she die before the age of sixteen years,
 living *A.*, then *A.* shall have *Whiteacre* to her and her heirs; and
 if *A.* die, having no issue, living *B.*, then *B.* shall have the part of

Dyer, 310.
Benl. 212.
Roll. Abr.
 830.
Vaugh. 267.
Clasche's
case.

A. to her and her heirs; and if both die, having no issue, then to *J. S.* and his heirs, and dies; *B.* attains her age of sixteen years, and then dies without issue in the life of *A.* And first it was held by three justices against *Dyer*, That the daughters had an estate-tail upon the whole will, and not a fee determinable upon a contingent subsequent. Secondly, That by the words, *if both die without issue*, no cross remainders in tail were created by implication, but that upon *B.*'s death without issue, after sixteen, *J. S.* should have her part presently without staying till the death of *A.* without issue.

Raym. 452. *A.* seised of lands in fee, by his will devises all his lands in the Skin. 17. county of ——— to his two daughters *B.* and *C.* and their pl. 19. heirs, equally to be divided betwixt them; and in case they hap- 2 Jon. 172. pen to die without issue, then he devises the said lands to his 3 Show. 136. nephew *J. S.*, and the heirs male of his body, and dies. It was pl. 115. Pollex. 434. S. C. adjudged, that upon the death of *B.* one of the daughters, the Holmes v. other sister took her moiety as a cross remainder. Meynell, 6 vide 2 Vern. 545. 3 Mod. 107.

Cro. Jac. It hath been said in a great variety of cases, that cross remain- 655. ders can never arise between more than two, from the great con- Vent. 224. fusion it would otherwise create.

Raym. 455. *Fitg.* 97. *Shaw v. Weigh*, 2 Jon. 82. [This doctrine, that there cannot be cross remainders cre- ated between more than two persons, seems exploded. The rule now settled is, that where they are to be raised between two, the presumption shall be in favour of them; but where between more than two, it shall be against them. But it being only a presumption, it may in either case be rebutted by circum- stances of plain, manifest intention. The words "in default of issue," and a devise over of all the tes- tator's estates, have been holden to raise cross remainders. *Phipard v. Mansfield*, Cowp. 800. *Comber v. Hill*, *infra*. *Atherton v. Pye*, 4 Term Rep. 710. *Wright v. Holford*, Cowp. 31. S. C. by the name of *Wright v. Englefield*, Amb. 468. and by the name of *Wright v. Lord Cadogan*, 6 Br. P. C. 156. *Holmes v. Meynell*, *supra*. *Marryatt v. Townly*, 1 Vez. 102. The disposition of the courts to presume against cross remainders, arose from their dislike to the splitting of tenures. 1 Vez. 164-5.]

Co. Lit. 25. It is clearly agreed, that cross remainders can only arise in Roll. Abr. last wills, and are not to be allowed of in any deed or convey- 837. ance (a).

3 Show. 136. pl. 115. [(a) This doctrine is not correctly stated, nor is it supported by the authorities to which it appeals. Cross remainders, it is true, cannot arise in a deed by implication, *Cole v. Levingdon*, 5 Ventr. 224. *Doe v. Dorvell*, 5 Term Rep. 521. but they may be raised in a deed, where they are limited in express, though perhaps rather informal, terms. *Doe v. Wainwright*, 5 Term Rep. 427. Indeed, in executory articles, Lord Camden went further; for in the case of articles upon a marriage to lay out the wife's fortune, to the use of all the children of the marriage as tenants in common and of their respective heirs, and for default of such children and their issue, to the use of the survivor of the husband and wife; his Lordship held, that there were cross remainders. *Twisden v. Birt*, Nolan's edit. of *Strange*, vol. 2. 970. note (3), S. C. Amb. 663, by the name of *Twisden v. Locke*.]

2 Str. 969. *Richard Holden* seised in fee, and having issue a son and three Ca. temp. grandchildren, by his will devised part of his estate to his wife for Wardw. 21. her life, and the reversion of such part expectant on her death, and 3 Barnard. all other his freehold tenements, &c. he gave to his son *Richard B. R.* 367. *Holden* for life, and after his death to his first and other sons suc- 441. cessively in tail male; and for default of such issue, and after the 3 Kol. 188. determination of the said estates, he gave the premises to his Comber v. grandson *Richard Holden*, and his grand-daughter *Elizabeth Holden*, Hill. to be equally divided between them, and to the heirs of their re- Pasch. 7 G. 2. spective bodies issuing; and for default of such issue he gave the in B. R. and M. 8 G. 2. s like cases premises

premises to his grand-daughter *Anne* in fee: the testator died seised, *Richard* the son died without issue male, whereupon *Elizabeth* and the grandson entered, and *Elizabeth* died without issue generally: *Anne Holden* married *John Jervis*; and the question was, Whether there were cross remainders between *Elizabeth* and *Richard* the grandson, or whether the moiety of *Elizabeth* should go to *Anne* or *Richard*? And it was resolved, That there were no cross remainders between them, because here are no express words, nor is there a necessary implication, without either of which cross remainders cannot be raised; that the words, *and for default of such issue*, being relative to what goes before, mean only, and for default of heirs of their respective bodies, and then it is no more than as if it had been a devise of the moiety to *Richard* and the heirs of his body, and of the other moiety to *Elizabeth* and the heirs of her body, and for default of heirs of their respective bodies, remainder over; in which case there could be no doubt. And it was held, that this case differed from the case *supra* of *Holmes* and *Meynell*, the word *respective* being wanting in that case, and the first devisees were the testator's daughters, and the remainder-man only a nephew, whereas in the present case *Anne* was as near to the testator as *Richard*.

B. R. between *Brown v. Williams*. 2 Str. 996.

[*Davenport v. Oldys*, 1 Atk. 579. *Cowp.* 799. *Marryatt v. Townly*, 1 Ves. 102.]

[*R. H.* devised to his six nieces to be equally divided between them, share and share alike, as tenants in common, &c. and of the several and respective heirs of the body and bodies of all such and every his said nieces; and in case one or more of his said six nieces should happen to die without issue of her or their bodies, then he gave, &c. the share or shares of her or them so dying without issue to the survivor or survivors of them his said six nieces, share and share alike, as tenants in common, &c. and to the several and respective heirs of the body and bodies of such survivor or survivors of them; and if all his said nieces should die without issue, then he gave, &c. all the same manors, &c. unto his own right heirs for ever. It was admitted, that the original share went to the survivors by way of cross remainders, but it was insisted that the shares which the two last dying nieces took by way of accruer did not survive.]

Lesch v. Jackson, *ex parte* Lord *Apsley*, Tr., 11 G. 3. in *Chancery*. *Nolan's* edit. of *Strange's Reports*, vol. 2. 970. note (3).

- (G) "Of vested Remainders, and of the particular
 "Estate to support them in their Creation; how
 "long it must continue; and when by Determin-
 "ation, Grant, or Refusal thereof, the Remainder
 "is discontinued, barred, or destroyed, and when
 "not.

"AS to a vested remainder, we are to consider, 1st, The nature
 "of a remainder vested, that there must be a particular
 "estate to support it in its creation; wherein to consider, 1st,
 "What estate is sufficient for that purpose, when it must begin,
 "and how long it must continue. 2^{dly}, When by determination,

“ grant, or refusal thereof, the remainder is discontinued, barred,
 “ or destroyed, and when not; and therein of the remedies for
 “ him in the remainder or reversion by entry, action, or rescuit.
 “ 3dly, Where the remainder or reversion shall be subject to the
 “ acts or charges of the particular tenant, and where and how
 “ the charges of him in the remainder or reversion shall take
 “ place.

“ It has already appeared what estate is sufficient to support
 “ contingent remainders, and what not. As to remainders which
 “ vest presently, though there must be a particular estate to
 “ distinguish them to be remainders, yet, as to supporting them,
 “ there needs none; because they vest presently and certainly as
 “ remainders in the person to whom they are limited. And I
 “ find only one estate whereon it is held no remainder can de-
 “ pend; and that is an estate at will; for if such estate be made
 “ with remainder over. the remainder is void. The reason seems,
 “ because by the limitation over the will is instantly determined,
 “ and then the remainder cannot be good for want of a particu-
 “ lar estate whereon to depend; and in possession it cannot be
 “ good, because it was limited as a remainder.

8 Co. 75.

Cp. Litt.
 21. b.
 Godb. 19,
 20.

“ A remainder may be limited upon a gift in frank-marriage
 “ either to the donees themselves, or to a stranger. But the di-
 “ versity taken in the books is, that if the remainder be limited
 “ over in fee, then is the frank-marriage destroyed, and the donees
 “ have no estate-tail but only for life; because by the limitation over
 “ of the fee, the tenure of the donor, which is inseparable to
 “ frank-marriage, is destroyed, and then the words of the gift
 “ carry but an estate for life. But, if the remainder were limited
 “ over in tail only, or for any less estate, yet the frank-marriage
 “ continues; because the tenure by reason of the reversion left in
 “ the donor continues.

Co. Lit.
 54. b.
 Dyer, 310. a.
 Cro. Elis.
 491.
 3 Leon. 22.

“ If one make a lease to *A.* for life, remainder to him for years;
 “ or to *A.* for his own life, remainder to him for the life of *B.*;
 “ these are good remainders, and both estates are vested in *A.*;
 “ for though he can have no benefit of the remainder in his own
 “ person, yet he may give, grant, devise, or assign either estate,
 “ and a greater estate may support a less, as in those cases, but
 “ not *à converſo*; therefore, if one makes a lease to *A.* for years,
 “ remainder to him for life, the lease for years is drowned.

Doct. & Stu-
 dent, lib. 2.
 c. 20.
 1 Bro. 253.
 pl. 45.
 Plow. 25. b.
 2 Roll. Abr.
 415. pl. 8.

“ Another rule is, that the remainder must be limited and
 “ given out at the same time that the particular estate is created;
 “ for otherwise the reversion settles immediately in the lessor or
 “ feoffor, and draws to it the rents and services, and then the re-
 “ mainder limited after comes too late. Therefore, if one makes
 “ a lease for life, and after confirms his estate for life, remainder
 “ after his death to another, this remainder is void; because the
 “ confirmation gave no new estate to the first lessee, or any ways
 “ enlarged his old estate, but he continued tenant only for his
 “ own life, as he was before, and then the remainder cannot be
 “ good, because it was limited after the particular estate had
 “ taken effect, whereby a reversion was vested and settled in the
 “ lessor;

lessor: and as a grant of the reversion it is not good, because not so intended. And some of the books add another reason that it cannot be good as a grant of the reversion, because he was not party to the deed, and unless it be by way of remainder, none can take, but those who are parties to the deed. But *Littleton* seems to reject this reason, where he holds, that in such case, if the tenant for life accepts the deed of confirmation, the remainder is thereby in him, to whom it is limited; because such acceptance is an agreement and attornment in law of the tenant for life; though without the deed he in remainder cannot maintain an action of waste, or have any other benefit against the tenant for life. But this reason seems rather to prove, that the deed operates as a grant of the reversion to which attornment is requisite; for to a remainder there needs none, because it takes effect by the same deed, and at the same time with the particular estate; and therefore his advice is for him that is to have the remainder, to get another part of the indenture to himself.

Lit. Sect.
573. Co.
Lit. 317.
Plow. 160. b.
Dyer, 126. b.

If the lessor disfeise his tenant for life, and after make a new lease to him for life, remainder over, this remainder is void; because the tenant for life is remitted to his first estate for life, which was long before the remainder was appointed, and then, as a remainder, it cannot be good, because there was no particular estate created at the same time with it. So, if the heir endow his mother, remainder over, the remainder is void, though livery be made; because the dower hath relation to the death of the husband which was before the appointment of the remainder. But, if the lessor disfeise his lessee for life, and make a lease to a stranger for the life of the first lessee, remainder over, and then the first lessee enter and be remitted; yet the remainder continues good; because it was well vested before the entry and remitter.

Plow. 25. b.
Godb. 355.

If a lease be made to *A.* for life of *B.*, and after the lessor confirm the land to *A.* for his own life, remainder over, this is a good remainder; because, by the confirmation, the estate of *A.* was enlarged and made absolute for his own life, which before was determinable upon the death of *B.*; and by such confirmation a new estate being created, a remainder may be limited upon it, as it might at making the lease. So, if confirmation be to the tenant for life in tail, with remainder over, this is good for the same reason; because the estate for life is enlarged to an estate in tail, upon which a remainder may be limited, as it might upon the first making of such estate.

Doct. &
Stud. lib. 2.
c. 20. 1 Bro.
253. pl. 45.
2 Roll. Abn.
425. pl. 8.

So, if a woman be tenant for life, and the lessor confirm the estate of the husband and wife for their two lives; this confirmation enures to the husband by way of remainder for life, or, at least, by way of increase and enlargement of the estate of the husband, and the estate for life of the wife continues distinct. But some call this a reversion in the husband, and not a remainder, because the estate of the wife is not enlarged there-

Cro. C. r.
478.
Dyer, 126.
Lit. 66.
525.
Co. Lit. 249.
1 Lev. 58.
Plow. 11. b.
1 Sid. 83.
363.

by;

by; and this remainder did not pass till after the reversion
vested and settled in the lessor.

A. copyholder for life, remainder to *B.* in fee: *B.* surrenders
this copyhold to the use of *A.* for life, remainder after his de-
cease to the use of *B.* and *C.* his wife for their lives, and the life
of the longer liver of them, remainder to the use of the right heirs
of *B.* It was argued, that this surrender to the use of *A.* for life
was void; because he had an estate for life before, and then the
remainders limited thereon are void also; and then the sur-
render enures to the use of *B.* and his heirs, as it was before,
and *C.* took nothing by it. And though a lease to *A.* for life,
remainder to *B.* for the life of *A.* of lands at common law be
good, because *A.* may forfeit his estate for life, whereof *B.* shall
take advantage and hold during the life of *A.*; yet it is other-
wise in case of copyholds; for there the lord of the manor
shall take advantage of the forfeiture, and hold during the life
of the particular tenant, and not he in reversion or remainder.
And so here, the first estate being void, to give *A.* any benefit,
the remainder must be void too. On the other side it was ar-
gued, that if the estate limited to *A.* was void, yet the limita-
tion to *B.* and his wife was good by way of present estate and
surrender of the remainder, as a grant of the reversion *cum*
post mortem of the tenant for life *acciderit* hath been construed
a good grant in *presenti* of the reversion; and the words *cum*
post mortem refer to the having the land in possession. So, here,
B. and *C.* shall have the land for their lives in possession after
the death of *A.*, as by a mediate settlement, and not by way of
remainder. And so was the opinion of the whole court, as
Summers reports it; and that it was not good by way of re-
mainder. But *Siderfin* reports it to be held by three justices
good by way of remainder: and the reason there given for it
is, because, say they, the continuance of the particular estate
in *eye* is not always necessary, as, if a rent be granted to the
tenant of the land for life, remainder over, this is good. So,
an estate limited to an infant, remainder over, and the infant at
full age disagrees to the estate for life. So, they thought, if a
copyholder in fee surrenders to the use of the lord for life, re-
mainder over, this is good. So, if tenant for life, and he in
the reversion grant their estate to the tenant himself for life,
remainder over, this is good. But *quære*, if these cases war-
rant such construction; for in the case of the rent, though be-
tween the parties it merges presently in the land as soon as
granted, yet, as to all strangers, it hath continuance, and the
grantee himself hath a continuing benefit by way of exonera-
tion of his estate therefrom. As to the case of the infant,
though he refuses at full age, yet that shall not divert the re-
mainder, which was once well vested by good title, but he in
remainder shall enter presently, as in his remainder upon such
revesting, because there was a good estate to support it in its
creation. As to the case of the surrender to the lord, he hath
benefit

benefit by actual possession of the land during the estate thereby surrendered, and may grant it out again for his own life, though, whilst it is in his own possession, he cannot properly be called a copyholder thereof, because he cannot be said to be out of himself. And as to the last case, if it were barely by way of grant, it cannot be good, because the freehold cannot pass without livery; and if livery were made by parol, it then amounts to a surrender of his estate for life; and a new estate for life is created by the same livery, upon which a remainder may be limited, as it might have been at first. But, if it were by deed and livery, it should seem it cannot be good; because then every one passing only his own estate, the tenant for life cannot give an estate to himself; but by his joining in the deed and acceptance thereof, this may, as appears before, amount to an attornment, and then the grant, as to the other, will pass the reversion. But in the principal case, the surrender by him in remainder cannot pass the reversion, because he has it not as a reversion, but as a remainder. And for the same reason the acceptance of the particular tenant cannot amount to an attornment, (if it were necessary, which, in case of a copyhold being an estate at will only seems not requisite,) because no reversion is granted or surrendered; and then his estate continuing in all respects the same as it was before the remainder, as a remainder it cannot be good, though by way of present grant, to take effect in possession after the death of *A.*, it may.

But Co. Lit. 298. a. *contra*; that it is good, and vests in an instant, and the suspension in judgment of law grows after. So, these books hold the remainder of a seigniori granted in such manner void for the same reason; and because *no formacion in remainder* lies without alleging the eclipse in the particular tenant. *Ideo quare.*

"*A.* tenant in tail, remainder to *B.* in tail: *B.* by indenture enrolled for 20*l.* bargains and sells the lands, and all his estate, right, title, &c. to *C.* during the life of *A.*, remainder to the queen, her heirs and successors. This remainder was held void; 1*st*, because there was no particular estate; for the grant to *C.* was absolutely void, because it can never take effect in possession, nor can *C.* have any benefit by it, *A.* having an estate in tail therein, which is subject to no forfeiture to let in the remainder, and his entry into religion, which is a foreign possibility; and against law likewise, shall never be presumed. 2*dlly*, *B.* having granted *totum statum suum* to *C.*, left nothing in him to limit over, and therefore the remainder is void, either because *C.* took nothing, and then a remainder cannot be without a particular estate, or, if *C.* took any thing, he took the whole, and nothing remained to limit over to the queen; and, by consequence, such remainder is void. And as a grant of the reversion it cannot operate, because *B.* had no reversion, but a remainder only.

2 Co. 505 Mo. 342. Sir Hugh Cholmley's case.

"Husband makes a feoffment in fee to the use of himself for life, remainder after the death of his wife to *B.*, and dies; then the wife dies; and if this remainder to *B.* was good, was the question. The court seemed to be of opinion that it was not; because, during the life of the wife, it did not vest: and admitting that the wife had an estate for life by a former conveyance, as the case in fact was, yet that could not support a remainder which was created at the same time with it. On the other side it was argued,

Sir T. Jo, 124. Key v. Gamble.

Remainder and Reversion.

THE CASE WAS THE CONTINGENCY but a remainder vested. There was a remainder was taken between a remainder at common law and the future of uses. This is the case *verbatim* as it is. There was no payment was given. But it seems the remainder was contingent, and upon the wife's surviving her husband. Because by his death the particular estate was determined, and yet the remainder could not then be determined and the estate of the wife by a former conveyance shall be of no regard, if it had had continuance, as it is in this case, by the contingent, divested and put to a right.

THE CASE WAS LAY DOWN for a rule, that when the particular estate and remainder depend both upon one title, there, the determination of the particular estate is a defeating of the remainder. But when the particular estate is defeatable only, and the remainder is upon title, there, though the particular estate be determined, yet the remainder continues good: as, if *A.* be lessor to *B.* for life, and the tenant demise him, and make a lease to *B.* for years, and the remainder to *C.* in fee; though *A.* enter, and determine the estate for life, yet the remainder to *C.* being once vested shall not be defeated; for it would be unreasonable that the lessor should have the land again, and contrary to his will. And in this case the remainder depends upon the particular estate at first, though that estate for life be in another person. And there put also the case of the infant before the court, agreeing at full age.

THE CASE WAS A rent to *A.* for the life of *B.*, remainder to the heirs of the body of *B.*, this is a good remainder; because it is determined at the instant of the determination of the particular estate, and remainders ought, or during the particular estate. And if one makes a lease to *A.* for the life of *B.*, remainder to *C.* in fee; now till an occupant enters there is no particular estate, and yet the remainder to *C.* continues good, because it is vested in *C.* presently by the first limitation; and the estate of the tenant to the first estate shall not vitiate the estate to the remainder, which was well vested.

THE CASE WAS A rent to *A.* for life of *B.*, remainder over; if *A.* dies, the remainder shall have the rent presently; because the rent is determined by the death of *A.*, and there is no occupant of a rent. But *Yelverton* holds, that if there be covenants they shall have the lands during the life of the tenant of the rent, and this is sufficient to support the remainder.

THE CASE WAS A rent to the right heirs of *J. S.*, who is then dead, remainder over, this whole grant is void; for *J. S.* cannot have heirs during his life, and so there is no person to take the particular estate, and without that there can be no remainder; and therefore that is likewise void. So, if a lease be made to *J. S.* for life, where there is no such person, remainder over, the whole is void for the same reason. So, if a lease be made to a monk, or other person, who has no capacity by law to take for life or years, remainder over, both are void. But in

all these cases, if such estate were devised by will, he in remainder should take presently. So, if the first devisee refuse, or die in the lifetime of the devisor, the remainder shall vest in possession presently. The reason of which difference is, because in a will the intent of the devisor is principally to be regarded; and if the particular estate fails, the devise over shall be construed as a new original devise to support the intent of the testator, and let in the *hares factus* according to the estate thereby given him. But if one by his will devise, that his feoffees shall make an estate to *A.* for life, remainder to *B.* in fee, if *A.* refuse, the feoffees ought to make an estate to another for the life of *A.* with remainder to *B.* in fee. And so, if one devise, that his executors shall make such estate, and *A.* refuse, yet *B.* shall not have the remainder presently, because here he hath referred the estates to be made by the rules of the common law, and therefore they ought to be pursued. But *quere* in these cases if the estates ought not to be made to *A.* pursuant to the will, which, though he refuse, will, *nolens volens*, carry the estate to him with remainders over, and then, if he after refuse to take such estate, the remainder will vest in possession presently. But it is likewise held, that if a devise be to *A.* for five years, remainder to *B.* in fee, and *A.* die in the lifetime of the devisor, that this shall descend to the heirs of the devisor in the mean time, till the five years are past, and then *B.* shall have it, as by a new original devise. But *quere* in all cases of wills, since the intent of the party is to be the principal guide, if it appears that the remainder is not to take effect till such a determinate future time, why should it not in the mean time descend to the heir at law, and so of the use, and when the time is expired take effect in the devisee in remainder as a new original executory devise?

" If one give lands to *A.* in tail, remainder to himself for life, or years, remainder to *B.* in fee; this remainder to himself is void; because none can give lands to himself; and yet the remainder to *B.* is good, because there is a particular estate to support it. So, if the first remainder were to a monk or other incapable person, remainder over, this last remainder is good, and shall take effect in possession, upon the determination of the particular estate, without any regard to the mesne remainder, which was void. But *quere*, if there be not a diversity between such remainder limited to himself by fine; for some of the books seem to hold it good by estoppel in such case; but how that can be I do not know; for estoppels are generally to conclude the party to his prejudice, when he does a thing, or grants an estate he had no right to; yet, having so granted it, he shall not afterwards be admitted to invalidate and make it void, by saying he had no power to make it.

" Another diversity is between a feoffment to uses, and a covenant to stand seised to uses; for if one makes a feoffment in fee to the use of *A.* for life, remainder to the right heirs of

Rep. 138.
Swinb. 129.
Mo. 319.
1 Leon. 195.
196. 198.
2 Bulk. 292.
Raym. 162.
Dyer, 122.
pl. 20. 127.
310. pl. 79.
Flow. 244.
414. a.
Godolph.
356.
(6). 357.
(13). 358.
(19). (25).
462. Cro.
Eliz. 423.
Fuller v.
Fuller.

2 Bro. 253.
pl. 35.
Perk. sect.
566. 705.
Godolph.
359. (20).
1 Leon. 197.
198.
2 Bro. tit.
Estates. pl.
23. 66.
Dyer, 309.
(69). pl.
32. pl. 14.
2 Mod.
210. 1 Leon.
395. 196.
199. 200.

1 Co. 101. a.
154. b.
Mo. 195.
520.

" J. S.

Plovd. 307,
2 Sid. 66.
257.
2 Lev. 77.
2 Mod. 209.
Ld. Raym.'s
case.

" J. S., who is living, here, the remainder passes out of the feoffor presently, and is carried into abeyance, till the death of J. S.; because by the feoffment he departed with the whole estate, and left nothing in him. But, in case of a covenant to stand seised to such uses, nothing passes out of the covenantor, but what can then vest in the covenantees.

" So, if a feoffment be to the use of A. for life, remainder to B. for life, remainder to C. in fee; if A. refuse, B. shall take his remainder in possession presently: but upon a covenant to stand seised, if A. refuse, B. shall not take presently, but the covenantor or himself shall retain it during the life of A. So, if the first estate were void, as a covenant in consideration of long acquaintance to stand seised to the use of A. for life, and after his death, in consideration of consanguinity, to the use of B. in tail, or fee; here the first estate is void for want of a sufficient consideration to raise the use to A. Yet B. shall have no use till the death of A.; but the covenantor shall retain the land during the life of A. The reason of which diversity is, that in case of the feoffment he divested himself of the whole estate, and therefore against his own solemn livery can have nothing further therein; and the feoffees being only instruments, through whom the estates were to pass over to others, were to have nothing to their own use. And since A. refused, B. must take in possession presently, because no other can have it. But, in case of the covenant to stand seised, the uses being executory and to arise out of the possession of the covenantor, if one refuse, or the use limited to him be void, yet this cannot carry the possession to the other sooner than was intended; because it is the consideration that draws out the use, and that by the terms of the covenantor himself begins not to operate as a consideration till after the death of A.; and the consideration for each estate was several and independent. So, in the principal case; there, A. covenanted by indenture with B. and C. that in consideration they with the rents and profits should pay his debts, and such other sums of money as he by his will should appoint, he and his heirs should stand seised to the use of B. and C. for 24 years; and after the end or expiration of said term, then to the use of D. his son in tail, &c. Then A. is attainted of treason, and it was adjudged, 1st, that the limitation to B. and C. was void for want of consideration; because they were strangers to the payment of his debts, and were to pay them out of the rents and profits of the land limited to them, which was no consideration on their part, and therefore could raise no use to them, as it would, if they had been made executors, or were to have paid the debts out of their own estates. 2^{dly}, It was adjudged, that the limitation over, being after the end or expiration of the term of 24 years, and this term (which excludes the interest in the land) being void, the use shall arise to D. in remainder presently. But, if it had been limited after the end or expiration of the 24 years, there, though the term had been void, yet the remainder should not have

Ld. Raym.'s
case, *sub. seq.*

Mo. 195.
contra; but
quere—If
the difference
upon the word
term was not
in the book
unobserved.

have taken place till the 24 years run out by effluxion of time; because each estate was executory, and to arise out of the estate of the covenantor upon distinct considerations.

" If copyhold land be surrendered to the use of *A.* for life, remainder to the use of *B.* for life; if *A.* commit a forfeiture, or refuse, *B.* shall not enter till his death, but the lord shall enter, and hold during the life of *A.* So, in such case, of a surrender to the lord, *B.* shall not enter till *A.*'s death, because his estate is by the custom, and is not to begin till after the death of *A.*, and no incident of the common law which vests it sooner belongs to such estates without special custom; and then the lord, from whom all these copyholds originally moved, shall take advantage of such forfeiture, refusal, or surrender, as a benefit not originally departed with, when he gave out the lands. So, where *A.*, *B.*, and *C.*, copyholders for life successively; *A.* takes a conveyance from the lord of the freehold and inheritance; this does not divest the remainders to *B.* and *C.* And yet they cannot enter till the death of *A.*; because the custom was so, though the estate for life of *A.*, as copyhold, was enfranchised and gone.

" If *A.* limits an estate to the use of himself for life, remainder to his executors for twenty years, remainder to *B.* in tail; *A.* is attainted of treason, so that he can make no executors by which the remainder to them is become void; the remainder to *B.* shall take effect in possession presently, without staying until the years run out by effluxion of time. So, if the remainder had been to the administrators of *A.*, which had been merely void for the time intervening after the death of *A.* till administration granted; in such case, the remainder to *B.* should vest in possession presently upon the attainder of *A.*; because the intermediate remainder being void, the last remainder did then depend immediately upon the particular estate, and upon determination thereof takes effect in possession.

" Husband, seised of lands in right of his wife, makes a feoffment in fee to the use of himself and his wife for their lives, remainder to the use of *C.* in tail, or in fee, and dies: the wife refuses the estate limited to her by the feoffment, and brings a *cui in vita*, not against the heir of her husband, but against *C.* in the remainder; which proves, that upon such refusal the remainders being by way of estate executed by feoffment vested presently in *C.*

" We come next to consider by what means remainders or reversions may be discontinued, barred, and destroyed, and by what not; and therein of the remedies for him in the reversion or remainder by entry, action, or receipt. And here it will be necessary to distinguish between the acts of the tenant in possession solely, and the acts of the tenant in possession jointly, or with the concurrence of him in the remainder, or the reversion; the acts of the tenant in possession solely, or such as are done or suffered either by the tenant for life or years, or by the tenant in tail. And of these, some only divest or displace the

9 Co. 107.
Margaret
Podger's
case.
1 Saund.
151.
2 Brownl.
154.

1 Leon:
196-7.
2 Leon. 5.
3 Leon. 20.
Moor, 100.
Dyer, 309.
Cranmer's
case.

Plowd. 114.
Amy
Townsend's
case.
1 Leon. 199.

" remainder

" remainder or reversion, but make no bar or discontinuance;
 " some both divest and displace the remainder or reversion, and
 " also cause a bar or discontinuance: and some neither divest nor
 " displace the remainder or reversion, and by consequence make
 " no bar or discontinuance.

" As to the first—if tenant for life or years of lands, houses
 " or other things which lie in livery, make a lease for life, a gift
 " in tail, or a feoffment in fee, levy a fine, or suffer a common
 " recovery thereof; these acts divest and displace the remainder
 " or reversion, but make no bar or discontinuance; for if
 " he in the remainder or reversion may enter presently for the
 " forfeiture. But in case of the fine, if it be with proclamation,
 " he in the remainder or reversion must enter within five years
 " after the fine levied, else he is barred during the life of the
 " tenant for life; but after his death, he has other five years to
 " make his entry, within which if he does not enter or claim, he
 " is then barred for ever; because his remainder or reversion be-
 " ing displaced and turned to a right, the operation of the statute
 " 4 Hen. 7. upon the fine bars such right, if no entry or claim be
 " made within five years; and here being two several rights, one
 " to enter presently for the forfeiture committed in levying the
 " fine, and the other after the death of the tenant for life, when
 " the title of him in remainder or reversion falls into possession,
 " the words of the statute have been expounded to give five years
 " for the respective recovery of these several rights. But, in case
 " of the feoffment or common recovery, if there be no fine, he in
 " remainder or reversion may enter at any time either during
 " the life of the tenant for life by reason of the forfeiture, or at
 " any time after his death in right of his remainder or reversion.

" Lessee, for years of some lands, and of others at will, and
 " of others by copy of court roll, having also lands of inheritance
 " in the same town, leases all to A. for life; and then levies a
 " fine to A. of so many acres as included all the lands. Five
 " years passed, he himself all the while continuing in possession,
 " and paying the rent to the lessor. A. dies; the lease for years
 " expires: it was held by all the judges of England, except two,
 " that the original lessor was not barred: 1st, Because without
 " making such lease for life, the lessee for years, at will, or by
 " copy of court roll, could not have levied such fine to bar his
 " lessor by the intent of the stat. of 4 Hen. 7. 2^{dly}, Though such
 " lease was a disseisin and turned the reversion of the lessor to a
 " right, yet being made by fraud and covin, that statute never
 " intended to establish such fines. And it has now been ad-
 " judged, that if lessee for years makes a feoffment, and levies a
 " fine, and five years pass, the lessor shall have the other five
 " years after the term expired to enter or make his claim, as
 " well as when lessee for life makes a feoffment, and levies a fine;
 " for in that case he may have a writ of entry *in consimili casu*
 " presently, as here he may have assize, and therefore this differs
 " from the case put in *Margaret Podger's case*, that if lessee for
 " years be ousted, and he in reversion disseised, and the disseisor
 " levy

Co. Lit.
 252. a.
 Lit. sect.
 611. Co. Lit.
 327. b.
 Cro. Cit.
 257. 368.
 Plowd. 373.
 b. Cro. Eliz.
 220.
 1 Leon. 23.
 214. 2 Inst.
 529. Cro.
 Eliz. 254.
 Saunders v.
 Tucker.
 7 Eliz.
 Jones's case.
 Mo. pl.
 192. 3.
 Co. 98.
 2 Brownl.
 157. MS.
 and 1 Keb.
 249. 543.
 Fryer v.
 Kenn.
 1 Chan.
 Cases, 279.
 1 Leon. 40.

3 Co. 77.
 Farmer's
 case.

Sir T.
 Raym. 219.
 1 Vent. 241.
 2 Vent. 334.
 2 Lev. 52.
 3 Keb. 37.
 110.
 Whalley v.
 Tauced.

levy a fine with proclamations, and five years pass, the lessor is for ever barred, because his right first began upon the disseisin, and disseisor comes in without the consent of the lessee for years; and therefore if he can defend his possession five years, he shall hold out the lessor for ever, who by not pursuing his right within that time hath let in the fine which works the bar by force of the statute: but in this case all is transacted by the means and with the privity of the lessee, who is trusted with the possession. And though in *Farmer's* case there were many notorious circumstances of fraud, yet it does not follow, but that the law is the same where no such evidence of fraud appears. And it would be of dangerous consequence to men's inheritances if it should be otherwise. But, where tenant for life is disseised, and the disseisor levies a fine, there, the right of him in the remainder or reversion does not begin till the death of the lessee, as it does, where the lessee for life himself levies a fine, or the lessee for years makes a feoffment and levies a fine; in which cases, if he in the reversion or remainder should be compellable to enter within the first five years, then, if the lessee for life or years should have charged or incumbered the land, they would hold it charged during the continuance of the particular estate in right. And the reason of the forfeiture in these cases being the breach of trust committed by the tenants in possession, it is reasonable he in reversion or remainder should have the same benefit where it is committed by a tenant for years, or where by a tenant for life in possession. *Quare*, if the law be the same on fine levied by copyholder for life or years; for if one ousts the copyholder, this is a disseisin to the lord, and both he and the copyholder on fine with proclamations, and five years, shall be barred for their several interests.

Leon. 99.

" If tenant for life and a stranger levy a fine *come ceo*, &c. to him in the remainder for life, who accepts it; this is a forfeiture of both their estates; the one by giving, and the other by accepting, such fine, which passed a greater estate than both of them had; and therefore the remainder-man in fee may enter; because both are estopped by the fine. It was urged, indeed, that this was only the surrender of the first tenant for life, and could be no estoppel, because an interest passed; but the fine purports the contrary, in giving a fee, and therefore estops the parties to say against it.

2 Lev. 209.
Sir T. Jo. 65.
3 Keb. 687.
733. Smith
v. Abell.

" If there be *A.* lessee for life, remainder to *B.* in tail, remainder to *A.* in fee; *B.* and *A.* make a feoffment in fee to *C.*, this divests the remainder to *B.* and his own remainder likewise; but *B.* may enter for the forfeiture, because his remainder hinders the closing of *A.*'s two estates, and then his estate for life, which was distinct, is, by the feoffment, forfeited and gone. But in this case, if *A.* had made a lease to *C.*, who afterwards makes a feoffment in fee to *D.*, and then *A.* had released all his right to *B.*, this had been no forfeiture to entitle *B.* to an entry; because *A.* did nothing to take out the re-

1 Roll. Abr.
854. pl. 4.
6. Hiblyn
Slack, 857.
pl. 3.

" remainder

"mainder from *B.*, but the wrong and disseisin was done immediately to *A.* himself, and his release passed only his own right without affecting *B.*'s remainder.

1 Roll. Abr.
858. pl. 5
26 12. 15.
9 Co. 106.
2 Inst. 118.

"If lessee for life makes a feoffment in fee, he in the remainder or reversion, be it for life, in tail, or in fee, may enter for the forfeiture; and if he in the first remainder does not enter, he in the second or third remainder may enter to the use of the others, and by reason of his own interest; and so may the issue or heirs of any of those in remainder after their deaths; for the feoffment divests their several remainders, and gives them title of entry in their turns.

9 Co. 104.
Margaret
Podger's
case.
2 Brownl.—
134. 153.
Mesne case,
per nosse
Bagnall v.
Tucker.

"*A.* copyholder for life, remainder to *B.* for life, *A.* accepts a bargain and sale of the freehold from the lord to him and his heirs, and then levies a fine with proclamations with five years; then *A.* dies. It was adjudged, that *B.* may lawfully enter, for the acceptance only of the freehold from the lord did not divest the remainder to *B.*, for *A.* was only passive in it, and accepted that which was lawful for him to take, and for the lord to grant; and then the remainder of *B.* not being turned to a right, the fine could not attach upon it. And though, as between the lord and *A.*, the copyhold was determined and enfranchised by the accession of the freehold; yet, as to *B.*, it still continued copyhold, and then the fine levied of the freehold by *A.* could not bind the copyhold of *B.*, unless it had been turned to a right, any more than a fine levied of land shall be a bar to the rent issuing out of it; and *B.*'s remainder by the custom not being to take effect till after the death of *A.*, he cannot enter sooner, nor take advantage of the forfeiture. But, if such fine had been levied after the death of *A.* and then five years had passed, this had barred the remainder of *B.* because then his title came in possession.

1 Leon. 40.
Braybrook's
case.

"*A.* tenant for life, remainder to *B.*, remainder to *C.* in fee: *B.* being in possession levies a fine *come reo*, &c. to a stranger; *A.* dies. It was agreed by the whole court, that by that fine the remainder in fee is not touched, or discontinued: but because *B.* had done as much as in him lay for the disposing of the fee-simple by the fine, and had taken that upon him, the same amounts to a forfeiture. *Quere* of this case, how *B.* could be in possession unless by disseisin of *A.*, and then that displaces all the remainders, and turns them to a right, which right, as to his remainder, being but for life, is forfeited by the fine, as it would be by a feoffment in such case, though the fine or feoffment cannot touch or displace the remainder in fee, that being divested and displaced before. But, if the fine were levied by *B.* being in possession of a remainder, as a remainder only, then indeed it does not divest or displace the remainder in fee, and yet amounts to a forfeiture; as a fine levied by tenant for life of rent, common, &c. or other things which lie in grant, would be. Wherein the fine differs from a grant by deed, though it be enrolled; for such deed of things which lie in grant neither displaces the remainder, nor amounts

Co. Litt.
251. b.

to a forfeiture of the particular estate. *Quere* the reason of the diversity.

Co. Litt.
251. b.

" A right of a particular estate may be forfeited; and he who hath but a right of a remainder or reversion may take advantage thereof: as, if lessee for years be ousted, or lessee for life be disseised, and levy a fine to a disseisor, or a stranger; or, if the lessee for years bring an assize, or the lessee for life a writ of right, accept a fine *come ceo*, &c. of a stranger; these are forfeitures of their several rights, for which he who hath but a right of remainder or reversion may enter presently upon the disseisor.

Co. Litt.
252. a.
Co. 2. 55.
1 Leon 264.

" At the common law, if lands were given to one for life, remainder to another in fee, and a stranger brought a feigned action or *præcipe* against the tenant for life, who suffered judgment to go against him by default or confession, without praying in aid of him in the remainder, this divested the remainder, and turned it to a right. And yet he in the remainder had no remedy to recover it, unless he were once seised, as by entry upon the tenant for life before such recovery; in which case, after his death, he might maintain a writ of right against the recoveror upon such seisin. And whether any formedon in remainder lay in such case, the books are not agreed. But if such feigned *præcipe* were brought against tenant for life, and he let judgment go by default, or confession, without praying in aid of him in the reversion, this was a forfeiture of his estate for life. And yet he in the reversion had no other remedy but by a writ of right. The reason seems to be, the credit which the law gave to such recoveries being had in courts of record; and because, for ought appeared to the contrary, the demandants might have good title to the land; and therefore the law would not suffer such recoveries to be impeached, but in an action of a higher nature, as the writ of right was. There were likewise other acts of record by the tenant for life or years, which amounted to a forfeiture of their estates: as, if tenant for life in a feigned *præcipe* brought against him pleaded in chief, vouched, or prayed in aid of a stranger, or in a writ of right. So, if in a writ of entry *in casu proviso* by a stranger, supposing the reversion to be in him, the tenant for life confesses the action; or in waste against him by a stranger plead *non waste*; so, if lessee for years being ousted bring assize or lease in a *præcipe*, and bring error for error in the process; these and such like are agreed to be forfeitures of their estates. But, whether he in the reversion or remainder might enter, or were driven to his writ of right, or what other remedy he had, does not seem clear from the books: but the cases where the tenant for life lost in a feigned *præcipe* by default or reddition, that is, confession, being the most frequent, and the prosecuting the writ of right by those in remainder or reversion being both tedious and expensive, the first statute that provided remedy in those cases was the statute of *W. 2. c. 3.*, which gives power to him in the reversion to come in before judgment, and pray to be received

Co. Litt.
280, 281.
2. 362.
2 Inst. 345.
Co. 88.
10 Co. 44.
45.
2 Leon. 64.
4 Leon. 129.
Booth, 151.
60. 70.
Brook, tit.
Forfeit, 8.
1 Co. 15.
39.
Ed. 3. 16.
24. Ed. 3.
68. 5.
Aff. 2. 22.
Aff. 31.
Co. Litt.
252, 252. a.

" to defend his right; or, if he did not come in, and judgment
 " was given by default or reddition, then the statute gave him the
 " writ of entry *ad communem legem* against such recoveror after
 " the death of the tenant for life, wherein he might set forth his
 " title; and if the tenant could shew no better title than only the
 " recovery, that should not avail him. So, where the recovery
 " against the tenant for life was by *nihil dicit*, this being an equal
 " mischief was taken to be within the same statute. And so was
 " he in the remainder as well as he in the reversion. But where
 " the recovery was upon feint or feigned pleading of the tenant
 " for life, this, not being within the statute, was remedied by
 " 13 R. 2. c. 17. which gives rescuit likewise in that case. But,
 " to elude the force of this statute, the tenant for life would con-
 " trive to have the *præcipe* and recovery against him carried on so
 " secretly, that he in the reversion or remainder should have no
 " notice of it time enough to pray to be received, and then, if
 " the recovery were against him upon feint or false pleading, this
 " not being within the former statute of W. 2. or remedied by
 " this of R. 2. otherwise than by giving rescuit, which by such
 " secret recovery was prevented, he in the reversion or remainder
 " had no other remedy than what he had at common law be-
 " fore either of the statutes; therefore, to obviate this mischief,
 " another statute was made, 32 H. 8. c. 31., which makes void
 " all recoveries had by assent of the parties against tenant for
 " term of life, unless it were by good title, or the assent of him
 " in the remainder or reversion. But the tenants for life found a
 " way to get out of this statute likewise, by making a feoffment
 " in fee with warranty, and before he in the remainder or re-
 " version could have notice to enter for the forfeiture, would
 " cause a *præcipe* to be brought against the feoffee, and come in
 " themselves by way of voucher; and so the recovery, not being
 " against the tenant for life, as the statute speaks, was out of the
 " statute, and remained at common law. So, if such tenant for
 " life was not disseised, and a *præcipe* brought against the disseisor
 " by covin, and he vouched the tenant for life, and so a recovery
 " was had; this likewise was out of the statute; for which rea-
 " sons this statute, being defective, was repealed, and another sta-
 " tute made, 14 Eliz. c. 8., which makes void all recoveries by
 " agreement and covin had either against the tenant for life him-
 " self, or where he comes in by way of voucher only, unless he in
 " the reversion or remainder assent of record, viz. upon vouch-
 " er, aid prier, or rescuit. But if recovery be had against tenant
 " for life without consent or covin, though without title, this di-
 " vests the remainder or reversion, so that they cannot enter
 " within any of the statutes, but remain yet at common law.
 " And all these statutes extend to all sorts of tenants for life.
 " A. tenant for life, remainder to B. in tail, remainder to C.
 " in fee; A. by indenture inrolled in Chancery bargains and sells
 " the lands to D. and his heirs, and then D. suffers a common
 " recovery with voucher of A. before the statute 14 Eliz., and
 " execution was had thereupon. Yet it was adjudged a for-
 " feiture,

1 Bend. 132.
 pl. 194.
 Co. 15.

Co. Litt.
 361. a.
 1 Co. 15.

1 Co. 14.
 Mo. pl. 423.
 2 Leon. 60.
 4 Leon. 123.
 Co. Litt.
 362. a.

feiture, for which he in the remainder might enter presently without aid of any of the statutes; for a common recovery is but a common assurance or conveyance, and, if no use be declared, shall be to the use of tenant for life. And by the proceedings in it *constit curia*, that the recoveror hath no title. And the suing of execution, which is but in pursuance and contemplation of the first act, cannot be any bar to the entry of him in the remainder or reversion. Note; where tenant for life bargains and sells lands to *A.* and his heirs, and after levies a fine *come ceo*, &c. to *A.*; this was held a forfeiture of the bargainee, not of the bargainor, who at the time of the fine, which alone made the forfeiture, had nothing to forfeit.

10 Co. 44,
45.
2 Co. 74.
5 Co. 40
Sir William
Pelham's
case.

1 Leon. 264.

"*A.* tenant for life, remainder to *B.* for life, *B.* reciting, that he had an estate in fee, levies a fine *come ceo*, &c. to a stranger, who brings *quid juris clamat* against *A.*, and *A.* makes default, and thereupon judgment was, that he should attorn, which he accordingly did. And the court held, that his estate for life was not forfeited, because the attornment was by compulsion of the court upon his default of appearance, and not voluntarily. And there two justices held, that the estate of *B.* was not forfeited by the fine, because this made no discontinuance, and nothing passed by it, but what he might lawfully grant. But two other justices held the contrary, and that it is not the discontinuance only that makes the forfeiture, but where he doth any thing in a court of record whereby his will appears to disinherit him in the remainder or reversion; as, praying in aid of a stranger, &c. And this seems the better opinion. For attornment *in pais* to the grant of a stranger works no forfeiture; but attornment of record does, where *in quid juris clamat* the tenant for life comes in, and submits in court to attorn. But the attornment in the principal case being by judgment of the court upon the default makes the difference.

Cro. Eliz.
757. Hold
v. Lister.

Co. Litt.
252. a.
2 Leon. 64.
66. 4 Leon.
129. 132.

Mo. pl. 108.

"In *quid juris clamat* the tenant says, that he holds in tail of the gift of one *A.*; the plaintiff says, that *A. ne dona pas*; and upon issue it was found for the plaintiff. And *Brown* held, that the plaintiff might enter presently, because by such claim the tenant for life had forfeited his estate; but whether the plaintiff should upon the verdict have judgment to recover the land, was the doubt.

"In an assize of fresh force by *A.* against *B.* and *C.*, it was found, that one *D.* was seised of the lands in question, and by indenture made a lease for three years to *B.* at such a rent; and after by indenture inrolled, bargained, and sold the reversion to the plaintiff *A.* and his heirs, who after, for rent arrear, brought debt in *C.* *B.* against *B.*, and he pleaded, that after the said lease, and before the grant to *A.*, *A.* by deed inrolled according to the custom, bargained and sold to him, upon which they were at issue. And if this was a forfeiture of *B.*'s lease was the question, on which the jury doubted, and referred it to the court: and it was adjudged to be a forfeiture.

Waldon
Dixie's case.
Moor, 211.
pl. 352.

" It would be too large a field here to enter into all the cases and diversities wherein the particular tenant ought to pray in aid of or vouch him in the reversion or remainder, and where he in the reversion or remainder may pray to be received, and where not; and what acts of the particular tenant shall amount to a forfeiture, whereof and when he in the remainder or reversion shall take advantage, and in what manner, &c. these being large enough to make distinct heads of themselves.

" I shall proceed therefore to the second diversity, to shew what acts of the tenant in possession make a discontinuance or bar of the remainder or reversion, and what not.

Co. Litt.
327. a.
3 Co. 85.

" If tenant in tail in possession of lands, houses, or other things, which lie in livery, make a feoffment in fee, a gift in tail, or a lease for another man's life, or levy a fine thereof; these acts divest and displace the remainder or reversion, and amount to a discontinuance; for avoiding whereof, after the death of the tenant in tail without issue, those in reversion or remainder are put to their formedon, and cannot enter; because then the alienee might lose the benefit of the warranty annexed to such alienation.

Co. Litt.
326.
2 Inst. 343,
343. 681.
3 Co. 71.

" So, if a man seised of lands in tail, in fee, or for life, in right of his wife, made a feoffment in fee, a gift in tail, or a lease for another man's life; this divested the wife's estate, so that after her husband's death she could not enter, but was driven to her *cui in vita*; for the safeguard of the warranty that might be annexed to such alienation of the husband made a discontinuance of the wife's estate-tail, and of the reversion or remainders depending thereon, for avoiding whereof after her husband's death she was driven to her *cui in vita*, and after her death without issue, those in remainder or reversion to their several formedons.

" So, if in a *præcipe* brought against the husband and wife of the wife's lands, the husband lost by default, reddition, or *nihil dicit*, if he were seised for life, or in tail, in her right, she was driven to her *cui in vita* after his death; but, if in fee, then she had no other remedy, but a writ of right after his death. Which last case was remedied by the statute of *W. 2. c. 3.* which gives her a power to come in and pray to be received before judgment, or to bring her *cui in vita* after his death. But for an effectual remedy both for the wife and those in remainder or reversion against all alienations of the husband solely or jointly with his wife, except it were by fine or common recovery, wherein both joined, and as well of lands given to them jointly during the coverture, as of lands whereof the wife was solely seised; and also for remedy against all recoveries by default, reddition, *nihil dicit*, or feint pleader of the husband, the statute of *32 H. 8. c. 28.* gives the wife, and those in remainder or reversion, power to enter in their several turns; and so it does to their several issues or heirs, notwithstanding any fine, feoffment, or other act, made, done, or suffered by the husband only. And yet, if the husband and wife join in a feoffment of the

" wife's

wife's lands, this being in effect the feoffment of the husband
 only is within the relief of the statute, so, if the lands were
 given to the husband and wife and their heirs during the co-
 verture, all acts of the husband to defeat this estate are equally
 provided against by the equity of this act, as if the wife had
 the sole seisure thereof. But, if the husband levies a fine with
 proclamations of his wife's lands, and dies, the wife or her
 issue must enter within five years after his death, and those in
 remainder or reversion within five years after the death of the
 wife without issue, else they will be barred by another statute,
 viz. 4 H. 7. for such fine makes a discontinuance of the wife's
 estate, and of those in remainder or reversion at common law.
 And though 32 H. 8. aids the discontinuance by giving them
 an entry, yet it does not take away the bar which is wrought by
 their laches upon the other statute. Also the issue cannot enter
 during the husband's life, either by the common law or this
 statute.

If tenant in tail in possession suffers a common recovery, this
 not only divests and displaces the estate-tail, and all remainders
 and reversions depending thereon, but also, by reason of the
 supposed recompence, bars them for ever; as is confirmed by
 every day's practice. But then he who suffers such recovery
 ought to be perfect tenant in tail, and also seised by force of the
 tail.

For, where husband and wife were seised of lands to them
 and the heirs of their two bodies, or to them and the heirs of
 the body of the husband with remainder over, and a stranger
 brought a *præcipe* against the husband only, who vouched over,
 and thereupon a common recovery was had; the wife died;
 and then the husband died without issue; it was adjudged, that
 this recovery should not bind the remainder; for between the
 husband and wife are no moieties, nor has the husband power
 to sever the jointure, or to dispose of any part of the land with-
 out his wife, so that the *præcipe*, being brought against him
 only, the recompence cannot enure; because the wife had a
 joint estate with him at the time of the recovery, and did not
 join; and to a moiety it cannot enure, because here are no
 moieties between the husband and wife; and therefore the re-
 compence, recovered by the husband only, cannot enure to the
 remainder, which depends upon a joint and undivided estate
 made to the husband and wife. And then the recovery, which
 binds only in regard of the recompence in value, cannot in this
 case bind either the issue, if there were any, or the remainder,
 since neither of them can take advantage, or sue execution of
 the recompence in value. And though the husband survived,
 this will not mend the case; because the law is to judge of it
 as it was at the time of the recovery, and not as it falls out by
 an after accident. But, if the estate had been to the husband
 and wife, and the heirs of the body of the husband, and he
 had levied a fine, or made a feoffment in fee, and then come in
 as vouchee in a common recovery, this had barred both the issue

3 Co. 6.
 Moor, 210.
 Owen v.
 Morgan.
 3 Co. 6.
 Capple-
 dake's case.

“ in tail and him in the remainder; because, by the feoffment
 “ or fine, the whole estate was discontinued, and the feoffee
 “ or conusee sole and perfect tenant to the *præcipe*; and then,
 “ when the husband came in only as vouchee, he came in in
 “ privy and representation of all the estates he ever had, and
 “ was to make his defence by them, which if he does not, but
 “ calls upon another to defend him, and that other undertakes it
 “ accordingly, and by his misbehaviour suffers the demandant to
 “ get judgment, he is bound to make a recompence equal to
 “ what the other lost; and such recompence, being to be in lieu
 “ thereof, is to go in the same manner as the estate he was bound
 “ to defend should have done, and, by consequence, to the issue,
 “ and those in remainder or reversion; and then they having, in
 “ supposition of law, a recompence equivalent to what they lost,
 “ have the effect of the first supposed warranty, and cannot im-
 “ peach the recovery, or complain of any hardship done them.
 “ But, if the husband and wife had been jointly seised to them
 “ and the heirs of their two bodies, with remainder over, and
 “ the husband had made such feoffment, or levied such fine, and
 “ then come in as a vouchee; it seems doubtful, if the issue in
 “ tail, or the remainder, should be barred; because the wife, hav-
 “ ing a joint estate of inheritance with the husband, was no
 “ party to the voucher, and therefore the recompence could not
 “ enure to the inheritance of the whole. And to a moiety it
 “ could not, because there are no moieties between them. *Quære*
 “ *ergo*.

Plow. 8.
 Mawdli's
 case.
 Co. 3. 5. b.
 58.
 Mo. 256.
 8 Co. 77, 8.

“ The tenant in tail at the time of the recovery, if the *præcipe*
 “ be brought against himself, ought to be then seised by force of
 “ the estate-tail in possession, otherwise the recovery will be no bar
 “ either to his issue or those in remainder or reversion; because
 “ the recompence in value, which causes the bar, will go in lieu
 “ of the estate he then had, which was recovered, and not in lieu
 “ of the estate-tail which then he had not, nor, by consequence,
 “ could lose. Therefore, if tenant in tail be disseised, and the
 “ disseisor die seised, and his heir be in by descent, and then the
 “ tenant in tail enter upon the heir and disseise him, and, upon a
 “ *præcipe* brought against him, suffer a common recovery; or, if
 “ the tenant in tail take back an estate in tail, or in fee, from the
 “ disseisor himself; or discontinue the estate-tail, and enter upon
 “ the discontinuee, and then suffer such common recovery on a
 “ *præcipe* against himself; these recoveries bar neither the issue in
 “ tail nor remainders; because the recompence in value goes to
 “ the estate which he had at the time of suffering such recovery,
 “ which not being the estate-tail, cannot be a bar to the estate-
 “ tail, or the remainders or reversion depending thereon. But, if
 “ the *præcipe* had been brought against the discontinuee, dis-
 “ seisor, &c. and the tenant in tail had come in by way of vouch-
 “ er, and vouched over the common vouchee, and so a recovery
 “ had been had, this would bar the estate-tail and remainders or
 “ reversions depending thereon: because he, coming in only as
 “ vouchee, comes in in privy and representation of the estate-
 “ tail,

“ tail, and for defence thereof, and cannot come in for any other respect; and therefore the recompence in value which he recovers against the common vouchee goes to that estate-tail, and the remainders or reversions depending thereon, and so makes good the recovery against the tenant, none having any loss but the last vouchee, and that occasioned by his own default or contempt.

“ Tenant in tail covenants to stand seised to the use of himself for life, and after, to other uses, which were totally void; because by such covenant only he could dispose of no more than for his own life: and after a *præcipe* being brought against him, and a common recovery had with single voucher; it was held, this recovery did not bar the remainder or reversion, because by such covenants *quoad* himself, the tenant in tail, was not seised by force of the tail, and then the recompence could not enure to the estate-tail and remainders. *Sed quære*, for Moore reports the same case otherwise, because, he says, he was tenant in tail as he was before notwithstanding such covenant.

Yelv. 51.
Moor,
pl. 940.
Freshwater
v. Rofs.
Moor,
pl. 105.
2 Co. 52.
Cro. Eliz.
279. 471.
895.

Mo. pl. 226.

“ Tenant in tail makes a lease for twenty-one years, and after makes a feoffment in fee with letter of attorney to enter and make livery; the attorney enters and ousts the lessee, and makes livery accordingly: and this was held a discontinuance of the estate-tail and remainders; for the lease being but for years, he was seised by force of the tail; and though livery by him or his attorney was a wrong to the termor by putting him out of possession, yet such livery gave away nothing from the termor, who may re-enter when he will, but passed only the freehold which the tenant in tail had or may give away by livery. But, if tenant for life be with remainders in tail, and he in the remainder in tail enter upon the lessee for life, and disseise him, and then make a feoffment in fee; or, if tenant in tail make a lease for life, and after disseise the lessee for life, and make a feoffment in fee, and the lessee die, and then the tenant in tail die without issue; he in the reversion or remainder may well enter, because the tenant in tail at the time of the feoffment was not seised of the freehold and inheritance of the estate-tail, but of another estate gained by disseisin. But, in the first case, if the tenant in tail after such lease for years had only granted the reversion in fee, and the lease had expired; though the grantee had entered in the life of the tenant in tail; yet this had made no discontinuance, because neither the lease for years, nor the grant of the reversion, divested any estate, but passed only what the grantor might lawfully grant, *viz.* an estate for his own life.

Co. Litt.
347. a. b.
333. Sir T.
Raym. 37.

Co. Litt.
332. b.
sect. 619.

Co. Litt.
333.
sect. 620.
621, 622.
339.
sect. 638.

“ If tenant in tail make a lease for the life of the lessee, and after grant the reversion in fee, and the tenant for life attorn; or, if he by indenture enrolled bargain and sell the reversion, and then the tenant for life die, and the grantee enter in the life of the tenant in tail; this is a discontinuance equivalent to a feoffment, and puts the issue and those in remainder or reversion to their several formedons. And so it would be, if the

“ tenant

“ tenant for life surrendered to the grantee, or the grantee recovered in waste, or entered for a forfeiture in the life of the tenant in tail; the grantor by the attornment and entry comes in in continuance of the new reversion, which was gained on making the lease for life. But, if the tenant in tail had died in the lifetime of the lessee, and then the lessee had died, and the grantee entered; yet the issue or those in remainder or reversion might well enter upon him; because there was no discontinuance executed in the life of the lessee longer than for the life of the lessee, and by his death, that being determined, the grantee, who *prima facie* took only during the continuance thereof, has no right after the death of the tenant in tail to enter to enlarge the discontinuance. And though such grant of the reversion were with warranty, yet it would be all one; for the estate itself to which the warranty was annexed being determined, the warranty cannot have continuance or enlarge the estate. So, if after the death of the tenant in tail his issue had granted the reversion, though with warranty, and the tenant for life had attorned, and died, and then the grantees entered; yet the issue of that issue, or those in remainder or reversion, might well enter upon him; because the discontinuance was in effect but for life; and the issue who granted the reversion not seised by force of the estate-tail.

Co. Litt.
333. b.

“ If tenant in tail make a lease for life, remainder over in fee, and die in the life of the lessee for life; yet this is an absolute discontinuance, and takes away the entry of the issue or those in remainder or reversion: because the estate for life and remainders make but one estate, and all pass by the same livery. So, if tenant in tail make a lease for life, and after release to the lessee and his heirs; this is an absolute discontinuance, because the whole fee is executed in the life of the tenant in tail.

Co. Litt.
265. a. b.
333. b.
333. a. b.
sect. 637.
631. 640,
641.

“ It is a rule in our books, that the estate-tail cannot be discontinued but where he who makes the alienation was once seised by force of the tail, unless it be by reason of a warranty: as, if the grandfather tenant in tail be disseised by the father, who makes a feoffment in fee, and dies, and then the grandfather dies, the son may enter upon the feoffee, and by consequence so may they in remainder or reversion in their turns. For here can be no discontinuance of the estate-tail or remainders; because the father who made the feoffment was not seised by force of the tail, but of the estate gained by the disseisin. But, if the feoffment had been with warranty, this had wrought the effect of a discontinuance, and taken away the son's entry for preservation of the warranty, and to prevent circuity of action. So, if tenant in tail be disseised, and he or his issue after his death release to the disseisor with warranty; this in effect amounts to a discontinuance, and takes away the entry of those who have right; which, without the warranty, it would not have done; and the issue, being never seised by force of the tail without such warranty, could not by any means have discontinued the tail.

† Another

" Another rule is, that to make a discontinuance, the alienance must be in by force of the alienation of the tenant in tail himself, and not of any other. Therefore, if tenant in tail makes a lease for life, and after grants the reversion to *A.*, and the lessee attorns, and then *A.* grants this reversion to *B.*, and the lessee attorns, and dies in the life of the tenant in tail; though *B.* enters, yet this is no discontinuance, because *B.* is not in of the grant of the tenant in tail, but of *A.* his grantee. *Quere rationem.*

" *A.* tenant in tail, remainder to *B.* in tail, reversion to *A.* in fee. *A.* by indenture enrolled bargains and sells the lands to *C.* and his heirs, and after levies a fine thereof to *C.* and his heirs. *C.* enfeoffs *D.*, and then *A.* dies without issue, and *B.* enters. It was adjudged, that by the bargain and sale to *C.* he had only an estate descendible to him and his heirs during the life of *A.*, and also the reversion in fee expectant upon the estate-tail of *B.* 2dly, That the fine levied after made no discontinuance, not so much as a divesting or displacing of the remainder to *B.*, but only enured to corroborate the estate of *C.*, and by force of the statutes 4 *H.* 7. and 32 *H.* 8. made it to have continuance so long as *A.* should have issue of his body: and that it operated only as a release or confirmation upon the estate, which passed before by the bargain and sale, and was guided by it. But, if the fine had been levied before the bargain and sale, or before the enrolment of it, this had made a discontinuance of the estate-tail and remainders. 3dly, It was adjudged, that the feoffment of the conusee made no discontinuance of the remainders to *B.*, so as to take away his entry; for none can discontinue the reversion or remainders, but he only who hath the estate-tail; and therefore if tenant in tail grant *totum statum suum* to one who makes a feoffment in fee, this will not take away the entry of him in the reversion or remainder: and here, the remainder to *B.* was not so much as divested or displaced, for the conusee had but a fee determinable upon the death of *A.* without issue, and also the reversion in fee: and therefore when he who had a fee, though it were determinable, gave a fee, this did no wrong to the heirs of *A.*, nor by consequence to *B.* in remainder; as a feoffment by tenant for life or in tail does, who, having no fee themselves, cannot give a fee to others without plucking it out of the reversion or remainders: and therefore in one case it is a forfeiture of the estate for life; and in the other a discontinuance of the estate-tail and remainders. But here it is no wrong or discontinuance to either, and therefore the entry of *B.* in remainder is lawful.

" *A.* tenant in tail, remainder to *B.* in tail: *A.* makes a lease for three lives, warranted by 32 *H.* 8., and dies without issue: the warranty descends upon *B.* who was his heir. It was held, that by the death of *A.* without issue, the lease for three lives was determined, and was no discontinuance, nor could bind him in the remainder; because the estate out of which it was derived was at an end, and then the lease to which the warranty was annexed

Co. Litt.
333. b.

10 Co. 93.
Edward v.
Seymour,
1 Bull. 62.
Mesne case,
per nescire
Heywood
v. Smith.

Cro. Eliz.
62. K. 100.
v. Cope.
8 Co. 34.
Co. Litt.
333. a.
Vaugh. 383.
accord. Cro.
Car. 156.

Salvin v. Clerk, Dyer, 48-9. *constr.*; but there, in the margin, is cited 1 Ed. 6. to be resolved by all the justices, that such lease shall not bind him in remainder. Hil. 40 Eliz. in C. B. Reeve v. Cox, adjudged accordingly, and 4 Mar. accord. *per cur.*

“ nexed being determined, the warranty was determined also, and cannot bar him in the remainders. And *Vaughan* says, that the case of *Salvin v. Clerk*, in which it is reported, that such lease is a discontinuance, and that therefore a subsequent fine with warranty by the tenant in tail, which on his death without issue descended to him in the remainder whose estate was discontinued, was a bar of the remainders; *Vaughan* says, that this case is all false and misreported; for the lease being warranted by 32 H. 8. was no discontinuance or tort; and then there was no new reversion gained to which the warranty could be annexed; but being annexed to the estate-tail, determined with it, as did the lease, and so could not touch him in the remainder.

Cro. Car. 156. *Salvin v. Clerk.*

“ Another point in *Salvin v. Clerk*'s case was this: *A.* tenant in tail, remainder to *B.* in fee: *A.* makes a lease for three lives, warranted by 32 H. 8. and after levies a fine with proclamations, and dies without issue. Five years after his death elapse, and then the lease for three lives expires. *B.* and his heirs are barred; because the right to have formedon in remainder, admitting such lease a discontinuance, or to enter, if it were not, accrued immediately on the death of *A.* without issue; and he had no other right after the determination of the lease for three lives, than he had before; for by the death of *A.* without issue, that lease, or the right of his continuance, was at an end. And this differs from the case of a fine levied by tenant for life; for there, he in the remainder or reversion hath two titles, one to enter presently for the forfeiture, the other to enter within five years after the death of the tenant for life, when the remainder or reversion falls into possession: but here, he hath but one title, *viz.* after the death of the tenant in tail without issue, and therefore ought to have pursued it by entry or action within five years after such death without issue.

Godb. 9. pl. 12.

“ *A.* tenant in tail, remainder to *B.* in fee. *A.* makes a lease for three lives, warranted by 32 H. 8., and dies without issue; and before any entry, *B.* grants his remainder by fine. And if the conusee might enter and avoid the lease, was the question. *Dyer* and *Mead* held he might; because by the death of tenant in tail without issue, the lease was not avoidable only, but absolutely void, the estate out of which it was derived being determined: and the lease being warranted by the statute made no discontinuance; for if it had, then such grant of the remainder before avoidance of the lease had established and made it unavoidable.

Co. Litt. 339. sect. 629.

“ Another rule is, that none can discontinue an estate-tail without he also discontinues the reversion or remainder, for the discontinuance working a wrong, and passing a larger estate than the person who makes it has by law power to pass, such estate must be made up out of the reversion or remainder. If therefore the reversion or remainder be in such person, that the

“ tenant

“ tenant in tail cannot draw it out; or, if he who takes the estate
 “ has already the reversion or remainder, so that there is no oc-
 “ cation to draw it out for making good the estate given him by
 “ the tenant, there, the alienation of the tenant in tail makes no
 “ discontinuance; because for want of the reversion or remainder
 “ he deals only with his own estate, and that being in tail, he can
 “ give no more thereof than for his own life only, and by con-
 “ sequence after his death his issue may well enter.

“ Therefore, if there be tenant in tail, remainder or reversion
 “ to the king, and the tenant in tail make a feoffment in fee, a
 “ gift in tail, or a lease for life, this is no discontinuance; but
 “ after his death his issue may enter; for the remainder or re-
 “ version being in the king, the subject cannot by any act of his
 “ without title draw it forth, and then whatever estate he departs
 “ with must be wholly derived out of his own possession, which
 “ being in tail only, he can dispose no more thereof than for his
 “ own life only; and by consequence after his death his issue
 “ may well enter. But, if such tenant in tail had suffered a com-
 “ mon recovery, this in respect of the supposed recompence had
 “ barred the estate-tail, and all remainders depending thereon, ex-
 “ cept the remainders or reversions to the king, which by such feign-
 “ ed recovery and recompence could not be touched. So, if such
 “ tenant in tail had levied a fine with proclamations after 4 H. 7.
 “ this had bound the issue by virtue of that statute, but made no
 “ discontinuance either of the estates-tail, or the reversion or re-
 “ mainder depending thereon; because the reversion or remainder
 “ in the king prevented such discontinuance for the reasons before
 “ given: and then those in the intermediate reversion or remain-
 “ der might enter after the death of the tenant in tail without
 “ issue, as if no such fine had been levied. But now by 34 H. 8.
 “ c. 20. it is provided, that where the king gives or otherwise
 “ provides lands to one in tail, no feigned recovery by assent of
 “ parties had against such tenant in tail of any lands, tenements,
 “ &c. whereof the reversion or remainder at the time of such re-
 “ covery is in the crown, shall bind or conclude the heirs in tail;
 “ but that after the death of such tenant in tail, the heirs in tail
 “ may enter, the said recovery or any other thing done or suffered
 “ by or against such tenant in tail to the contrary notwithstanding.
 “ Upon which last words this statute has been likewise ex-
 “ tended to take off the force and effect of the fine levied by such
 “ tenant in tail of the gift or provision of the king, so as that the
 “ same shall not bind the issue; though *Hobart* says, this was an
 “ oblique and indirect strain upon the statutes. For the statute
 “ 32 H. 8. c. 36. which says, that that statute shall not extend
 “ to fines levied by tenant in tail, the reversion being in the
 “ crown, but that they should be of like force as if the statute
 “ had not been made; this did not at all mend the case of the
 “ issue in tail, and therefore that slip was helped by the judges
 “ upon the words of the following statute of 34 H. 8.; upon con-
 “ struction of which statute it was also held, that all intermediate
 “ reversions or remainders to common persons depending on such
 “ estate-

Co. Litt.
 372. b. 335.
 Dyer, 32. a.
 Plow. 555. a.
 Poph. 63.
 Brook, tit.
 Assurance, 6.
 tit. Fines
 levy, 121.
 tit. Discon-
 tinuance of
 Possession, 2.
 tit. Reco-
 very, 31. b.
 tit. Tail, 41.
 Bendlow,
 223.
 Plow. 254.

Co. 878.
 Hob. 333.
 2 Co. 19.
 Mo. pl. 259.
 Jackson v.
 Darcy.
 3 Leon. 57.
 & 4 Leon.
 40. Mel-
 me case.
 Co. Litt.
 372, 373.

“ estate-tail of the gift or provision of the king, whereof the re-
 “ version or remainder was then in the king, were preserved like-
 “ wise against such feigned recovery by the tenant in tail in
 “ possession; for their remainder or reversion being barrable at
 “ common law, in regard the estate-tail whereon they depended
 “ was barred, now that statute having made provision against
 “ barring such estate-tail in possession, by consequence, preserves
 “ also the remainders or reversions depending thereon.

“ But this stat. 34 H. 8. extends only to estates-tail of the gift
 “ or provision of the king; therefore, if a common person by deed
 “ enrolled gives lands to A. in tail, remainder to B. in tail, re-
 “ mainder to the king in fee; or, if one who hath a remainder in
 “ fee, except upon an estate-tail of the gift of a common person
 “ by deed enrolled, grants such remainder or reversion to one for
 “ life, or in tail, remainder to the king in fee, and the tenant in
 “ tail in possession after suffers a common recovery; this bars all
 “ but the remainders to the king, as it did at common law. So,
 “ if he levies a fine with proclamations, this binds the issue as it
 “ did before; but, neither the king, nor those who have an in-
 “ termediate reversion or remainder; because it makes no dis-
 “ continuance, as has been shewn.

2 Co. 15.
 Mo. 195.
 Wiseman's
 case.
 2 Co. 52.
 Mo. 345. b.
 Sir Hugh
 Cholmley's
 case. Co.
 Litt. 373.
 Yelv. 149.
 Poole v.
 Needham,
 2 Co. 41.
 10 Co 39.
 1 Leon. 85.
 Cro. Car.
 430.
 Mo. pl. 665.
 Cro. Elis.
 595.
 Stratfield v.
 Dovez.

Co. Litt.
 373. contr.
 1 Sid. 166.
 1 Keb. 620.
 Loyd v.
 Pollard.

Co. Litt.
 372. b. and
 the books
 there cited.

Co. Litt.
 335. a.
 Sect. 629.
 9 Ed. 4. 24.
 Plow. 559.
 1 Co. 140.

“ The king gave lands to one in tail, saving the reversion to him-
 “ self: the donee is disseised, and the disseisor levies a fine with
 “ proclamations, and five years pass. *Walmesley* held, this bound
 “ only the issue, in whose time the fine and non-claim was, and
 “ that his issue were at liberty to enter after his death by the sta-
 “ tute 34 H. 8. And though my Lord *Coke* cites this case to be
 “ resolved contrary, yet this is held in other books not to be law;
 “ for that would open an easy way to get out of the statute; and
 “ therefore, where such donee in tail, the reversion being in the
 “ king, bargained and sold the lands to one and his heirs, and
 “ died, and the vendee levied a fine, and five years passed with-
 “ out claim by the issue; yet the court seemed to be of opinion,
 “ that such issue was not bound; and if it were, that yet clearly
 “ his issue would be at large, and not bound by the fine.

“ Other diversities there are upon the said statute, which, being
 “ not to the present purpose, I shall pass over, referring you to the
 “ books where they may be seen.

“ Another case wherein there can be no discontinuance of
 “ the estate-tail, unless the reversion or remainder be also dis-
 “ continued, is this: if tenant in tail enfeoffs him in the inter-
 “ mediate reversion or remainder, this is no discontinuance, but
 “ that after his death the issue in tail may well enter; because the
 “ livery being made to him who had the intermediate reversion
 “ or remainder, cannot be supposed to give him what he had al-
 “ ready, or to draw out an estate from him only to give it him
 “ again *eo instanti*; therefore, such livery being made of the pos-
 “ session can pass only so much thereof as the tenant in possession
 “ had power to depart with; and that being for his own life only
 “ leaves his issue at liberty to enter after his death. But, if A.

“ were tenant in tail, remainder to *B.* in tail, remainder or reversion to *C.* in fee, and *A.* make a feoffment, gift in tail, or lease for life to *C.*; this discontinues the estate-tail and the remainders depending thereon; because there is room for the tortious operation of the livery upon the first estates, before it comes to the last remainder or reversion in fee; and whether that be discontinued or not, yet the force of the livery, reaching beyond the estate-tail in possession, must be a discontinuance thereof, and of the next remainder depending thereon, since it can have no other effect.

“ If tenant in tail make a lease for his own life, remainder to the donor in fee, this is no discontinuance; because the lease for his own life being lawful, the limitation over to the donor, who had the fee before, could make no discontinuance. For that would be to make the limitation to him by way of remainder work stronger than an immediate feoffment to them: and then he having, in the lease for his own life, given away all that he had, the limitation over is void. But, if the lease had been for another man's life, with remainder to the donor in fee, this had been a discontinuance; because such lease, being more than he could lawfully make, plucked out of the reversion of the donor to serve and apply such lease; and then the limitation, which he afterwards makes to the donor, being derived out of such new fee gained by the first livery, carries on the discontinuance as against the issue in tail.

“ If tenant in tail enfeoff the donor and a stranger, this is a discontinuance of the whole land; because they take as joint-tenants, whereof each is seised *per my et per tout*.

“ Another way whereby those in reversion or remainder might at common law have remedy upon a recovery, with or without title had against tenant for life, in dower, or by the curtesy, if such tenant, being empleaded, would not vouch or pray in aid of those in remainder or reversion, or they had no notice time enough to come in to pray to be received, was by bringing a writ of error to reverse the judgment given against such tenant for life, if there were error in it, not otherwise. But this they could not have till after the death of such tenant for life, unless they came in by way of voucher, aid prier, or rescuit; for then being parties to the record might have had such writ of error presently. And when the statute of *W. 2.* divided the fee conditional into a fee-tail whereon a reversion or remainder might depend, the judges extended the remedy which the common law gave by writ of error to those in remainder or reversion expectant on such estate-tail after the death of the tenant in tail without issue; but the judgment against the tenant for life divesting the reversion or remainder, so that he could not after grant or transfer it over to any person; and it being doubtful whether he could punish waste after such recovery had; therefore the statute of *9 R. 2. c. 3.* gave him in the reversion or remainder expectant on such estate for life a writ of error or attain in the life of the tenant for life.

Dyer, 8.
pl. 15.

Co. Litt.
335. a.
Dyer, 12.

Co. 3. 3-4.
F. R. 21 E.
99. d.
Palm 226.
229, 230.
245. 253.
254.
3 Co. 61.
2 Inst. 345.
10 Co. 44. a.
1 Co. 84.
1 Roll. Rep.
301. &c.

" estate-tail of the gift or provision of the king, whereof the reversion or remainder was then in the king, were preserved likewise against such feigned recovery by the tenant in tail in possession; for their remainder or reversion being barrable at common law, in regard the estate-tail whereon they depended was barred, now that statute having made provision against barring such estate-tail in possession, by consequence, preserves also the remainders or reversions depending thereon.

" But this stat. 34 *H. 8.* extends only to estates-tail of the gift or provision of the king; therefore, if a common person by deed enrolled gives lands to *A.* in tail, remainder to *B.* in tail, remainder to the king in fee; or, if one who hath a remainder in fee, except upon an estate-tail of the gift of a common person by deed enrolled, grants such remainder or reversion to one for life, or in tail, remainder to the king in fee, and the tenant in tail in possession after suffers a common recovery; this bars all but the remainders to the king, as it did at common law. So, if he levies a fine with proclamations, this binds the issue as it did before; but, neither the king, nor those who have an intermediate reversion or remainder; because it makes no discontinuance, as has been shewn.

" The king gave lands to one in tail, saving the reversion to himself: the donee is disseised, and the disseisor levies a fine with proclamations, and five years pass. *Walmesley* held, this bound only the issue, in whose time the fine and non-claim was, and that his issue were at liberty to enter after his death by the statute 34 *H. 8.* And though my Lord *Coke* cites this case to be resolved contrary, yet this is held in other books not to be law; for that would open an easy way to get out of the statute; and therefore, where such donee in tail, the reversion being in the king, bargained and sold the lands to one and his heirs, and died, and the vendee levied a fine, and five years passed without claim by the issue; yet the court seemed to be of opinion, that such issue was not bound; and if it were, that yet clearly his issue would be at large, and not bound by the fine.

" Other diversities there are upon the said statute, which, being not to the present purpose, I shall pass over, referring you to the books where they may be seen.

" Another case wherein there can be no discontinuance of the estate-tail, unless the reversion or remainder be also discontinued, is this: if tenant in tail enfeoffs him in the intermediate reversion or remainder, this is no discontinuance, but that after his death the issue in tail may well enter; because the livery being made to him who had the intermediate reversion or remainder, cannot be supposed to give him what he had already, or to draw out an estate from him only to give it him again *eo instanti*; therefore, such livery being made of the possession can pass only so much thereof as the tenant in possession had power to depart with; and that being for his own life only leaves his issue at liberty to enter after his death. But, if *A.*

" were tenant in tail, remainder to *B.* in tail, remainder or reversion to *C.* in fee, and *A.* make a feoffment, gift in tail, or lease for life to *C.*; this discontinues the estate-tail and the remainders depending thereon; because there is room for the tortious operation of the livery upon the first estates, before it comes to the last remainder or reversion in fee; and whether that be discontinued or not, yet the force of the livery, reaching beyond the estate-tail in possession, must be a discontinuance thereof, and of the next remainder depending thereon, since it can have no other effect.

" If tenant in tail make a lease for his own life, remainder to the donor in fee, this is no discontinuance; because the lease for his own life being lawful, the limitation over to the donor, who had the fee before, could make no discontinuance. For that would be to make the limitation to him by way of remainder work stronger than an immediate feoffment to them: and then he having, in the lease for his own life, given away all that he had, the limitation over is void. But, if the lease had been for another man's life, with remainder to the donor in fee, this had been a discontinuance; because such lease, being more than he could lawfully make, plucked out of the reversion of the donor to serve and apply such lease; and then the limitation, which he afterwards makes to the donor, being derived out of such new fee gained by the first livery, carries on the discontinuance as against the issue in tail.

" If tenant in tail enfeoff the donor and a stranger, this is a discontinuance of the whole land; because they take as joint-tenants, whereof each is seised *per my et per tout*.

" Another way whereby those in reversion or remainder might at common law have remedy upon a recovery, with or without title had against tenant for life, in dower, or by the curtesy, if such tenant, being empleaded, would not vouch or pray in aid of those in remainder or reversion, or they had no notice time enough to come in to pray to be received, was by bringing a writ of error to reverse the judgment given against such tenant for life, if there were error in it, not otherwise. But this they could not have till after the death of such tenant for life, unless they came in by way of voucher, aid prier, or rescuit; for then being parties to the record might have had such writ of error presently. And when the statute of *W. 2.* divided the fee conditional into a fee-tail whereon a reversion or remainder might depend, the judges extended the remedy which the common law gave by writ of error to those in remainder or reversion expectant on such estate-tail after the death of the tenant in tail without issue; but the judgment against the tenant for life divesting the reversion or remainder, so that he could not after grant or transfer it over to any person; and it being doubtful whether he could punish waste after such recovery had; therefore the statute of *9 R. 2. c. 3.* gave him in the reversion or remainder expectant on such estate for life a writ of error or attain in the life of the tenant for life.

Dyer, 8.
Pl. 15.

Co. Litt.
335. a.
Dyer, 12.

Co. 3. 3-4-
F. R. 21 E.
99. d.
Palm 226.
229, 230.
245. 253.
254.
3 Co. 61.
2 Inst. 345.
20 Co. 44. a.
1 Co. 84.
1 Roll. Rep.
301. etc.

Reversion and Reversion.

In the case of the writ of error, the tenant for life is
 not entitled to the possession and mesne profits, unless the
 plaintiff can prove that he was of covin, and assent
 to the reversioner's recovery; for then restitution is to
 be made of the possession and mesne profits to the plaintiff in
 error. But this shows that the parliament held such covin or
 recovery a forfeiture of the estate for life, otherwise it would
 have been said to have given the possession and mesne profits
 to him to whom the reversion or reversion during the life of the
 tenant for life. But though it was a forfeiture, yet, as it ap-
 pears from the statute, it was not erroneous, no sufficient remedy
 was provided for him in the reversion or remainder to take ad-
 vantage thereof, till 22 H. 8. and 14 Eliz. And if it were ef-
 fective, yet all this time he could not reverse it, till after the
 death of the tenant for life. But this statute making no men-
 tion of reverses against tenants in tail, they remain still as they
 were before the making of the statute *de donis*; and those in re-
 version or reversion expectant thereon can have no writ of
 error, nor any common judgment given against the tenant in tail,
 nor can they be reversed without issue; nor can they be received upon
 the statute of V. c. 3. which gives the rescuit, because the
 statute is taken upon as an inheritance which by possibility
 may endure for ever; and therefore during the continuance
 of the estate in reversion or remainder are little regarded.

This case may be used to shew what is a sufficient error for
 a writ of error in reversion or reversion expectant upon an estate-tail to
 be reversed, or by writ of error, and how such writ of error
 may be taken or prevented by the tenant in tail.

A man having three daughters, B., C., and D., makes a feoff-
 ment to the use of himself for life, remainder to B. in tail, re-
 mainder to himself in tail general, remainder to himself in fee;
 and the B. enters, and takes husband, and they both levy a fine
 with warranty against B. and her heirs, B. being then within
 age; and after a common recovery is suffered with voucher of
 her husband, who appeared by attorney, and vouched
 the common vouchee; and so a common recovery is had,
 and she is declared to the husband and his heirs, B. being still
 under age; then B. dies without issue, and five years passed
 after her death; and now a writ of error was brought by C. and
 D. against one who claimed under the husband to reverse this
 recovery, and be let in by their formedon in remainder to avoid
 the continuance wrought by the fine for two parts of the
 estate; and after argument, it was held by all the court,

That the appearance of an infant by attorney was error,
 and that the attorney had appeared without warrant; for an
 attorney cannot give him authority *ad perdendum et lucrandum* for
 the warrant of attorney purports; but an infant might
 be appointed guardian assigned either by the court or by
 the court of Chancery; and such guardian hath his warrant from
 the court, and ought to be one of an
 age; and if he misbehaves himself, an action of deceit lies
 "against

5thly, It was held by all, that the fine with proclamations and five years non-claim after the death of B. without issue had been a bar of this writ of error, if it had been relied on; but there, defendant after he had pleaded the fine with proclamations concludes *unde petit*, &c. if against the fine containing such warranty plaintiff ought to have a writ of error, and so hath relied upon the warranty, not upon the fine with proclamations; and he having election to rely either upon the one or the other, by relying upon the one hath waived the other, and therefore it shall be intended only a fine at common law without proclamations, which only discontinues, but does not bar any right. *Nota*—In this case it was after held by *Doddridge*, J. and *Leigh*, Chief Justice, that for so much of the estate as was limited in use to the feme, the warranty was extinguished and gone, and so plaintiff had judgment for all the point of the warranty, being the only point wherein the court was against him. And if the warranty were out of the way he must have judgment for all. But *quere* here, for the use is to the husband and his heirs, and the warranty was against the feme and her heirs, and therefore this seems a mistake of putting the case.

As to such acts of the tenant in possession as work no divesting or displacing of the remainders or reversions, and, by consequence, no bar or discontinuance, this has already appeared in part, and I shall only put two or three cases more for further illustration thereof.

5th point.

227. 232.
235. 240.
243. 247.

If there be tenant for life, remainder to the king for life, remainder to another in fee, and the tenant for life make a feoffment in fee; this works no divesting or displacing of the remainder to the king, nor, by consequence, of the remainder depending thereon, but passeth only his own estate for life. And yet this amounts to a forfeiture whereof the king may take advantage; because by making livery thereof in fee he hath done as much as in him lay to defeat and disinheret the king of his remainders, which is always a sufficient cause for the forfeiture of a particular estate. So, if the king make a lease for years, and the lessee make a feoffment in fee, this is a forfeiture of the term; and yet the reversion is not drawn out of the king.

1 Co. 76. b.
Co. Litt.
251. a.
Poph. 30.

If tenant for life, the reversion or remainder to the king be pleaded in a *præcipe*, and a recovery be had against him by assent, without title, this does not divest the remainder or reversion of the king; because being by assent, and without title, it is but in the nature of a conveyance, which cannot take away the king's inheritance. But, if such recovery were upon good title and without covin, this would divest the king's remainders or reversion, because the judgment is matter of record, and no wrong is done to the king; as, if a disseisor recovers against the tenant for life, and enters, by this he defeats the king's remainder.

1 Co. 16.
2 Co. 53.

15 Ed. 4. 9.
Co. Litt.
851.
2 Leon. 61.
4 Leon. 126.
Ca. 385.
Co. Litt.
327. 332. a.
sect. 608.
615, 616,
617.
Pop. 63.

" If tenant for life of rent or services on a *precipe* brought
" against him pleads to the right, or confesses the action, &c.;
" or grants them in fee; this is no forfeiture to him in the
" remainder or reversion; because they cannot by any act of the
" particular tenant be drawn out of him in the remainder or re-
" version, or be conveyed for any longer time than such particu-
" lar tenant hath interest therein. Wherein there is a diversity
" between land, houses, and other things which lie in livery, as
" appears before, and rents, commons, advowsons, remainders,
" or other things, which lie in grant only. For if tenant in tail
" of such things as lie in grant, by deed or fine grant them to one
" and his heirs, yet this is no discontinuance; but the issue in
" tail, or those in remainder or reversion, may distrain for the
" rent, use the common, present to the church, or enter into the
" land; or they may, if they will, admit themselves out of pos-
" session, and bring their formedon. But then, a lineal war-
" ranty with assets, or a collateral warranty without assets, will
" be a bar to them, and therefore it is more dangerous to bring
" such action.

3 Co. 85.
Co. Litt.
377.

" Another diversity is, between such things as lie in grant and
" are *in esse*, and such things as lie in grant and are newly created:
" as, if tenant in tail of land grant thereout a rent, common, &c.
" to one and his heirs, yet this is absolutely determined by the
" death of the tenant in tail upon the construction of the statute
" *de donis*.

Co. Litt.
330.
sect. 609,
810.

" If one let lands to *A.* for life, and *A.* let the same lands
" to *B.* for years, and after grant the reversion; yet the grantee
" hath an estate but for term of life of the grantor; and there is
" no divesting of the first reversion, nor cause of forfeiture;
" because by such grant nothing passed but the estate which the
" grantor had. So, if *A.* had in this case released or confirmed
" the land to *B.* and his heirs, yet he would have only an estate
" for the life of *A.*, and no forfeiture or divesting of the first
" reversion.

" I come now to consider the acts of the tenant in possession
" jointly or with the concurrence of him in the remainders or
" reversion, whereof some divest and displace the remainder or
" reversion, and cause a forfeiture and discontinuance, and some
" not.

1 Co. 76.
Bredon's
case.
Hob. 227.
278.
6 Co. 15. a.
Trepont's
case.
Co. Litt.
302. b.
1 Roll. Abr.
355. pl. 7, 8.

" *A.* tenant for life, remainder to *B.* in tail, remainder to *C.*
" in tail, or in fee. *A.* and *B.* join in a fee *come ceo*, &c. to *D.* in
" fee, who grants and renders a rent-charge to *A.* for life: *B.*
" dies without issue: then *C.* enters; and *A.* distrains and avows
" for the rent. It was adjudged lawful; for this fine made no
" discontinuance either of the first or second remainder, but each
" of them give only what he might lawfully give, *viz.* *A.* his estate
" for life, and *B.* a fee determinable upon his death without
" issue; and the remainder to *C.* was not divested or discontinued
" by the fine; and by consequence no forfeiture of the estate for
" life

“ life was wrought, by reason he in the remainder in tail joined
 “ therein. And there it was held, that, if need were, to prevent
 “ a forfeiture, it should be construed first the grant of *B.* of his
 “ remainder, and then the grant of *A.* of his estate for life. It
 “ was likewise held in the same case, that if *A.* and *B.* had join-
 “ ed in a feoffment by deed, this would be no discontinuance or
 “ divesting of the remainders or reversion, but that each should
 “ be said to pass only what they might lawfully depart with : and
 “ that if *B.* died without issue, yet the feoffee should hold during
 “ the life of *A.* But some books hold this case of the feoffment
 “ to be different from the fine, and though the fine makes no
 “ discontinuance, yet the feoffment, they think, does. And it was
 “ held in the principal case, that if the feoffment were by parol, it
 “ would operate as the surrender of *A.*, and the feoffment only
 “ of *B.*, which would discontinue the estate-tail and remainder.
 “ For in such case it cannot enure otherwise ; because unless the
 “ remainder comes into possession by the accession of the estate
 “ for life, it would not pass at all ; for a remainder, as such, can-
 “ not pass by parol without deed ; and therefore to make *B.*’s
 “ joining of any effect, it must be taken to be the surrender of
 “ *A.*, and the feoffment of *B.* But a case was there cited, 41 *Ed.* 3.
 “ 21 & 41 *Aff.* pl. 2. where *A.* was tenant for life, remainder to
 “ *B.* in tail, and *A.* made a feoffment in fee to *B.* and his wife,
 “ who survived *B.*, this was held a forfeiture of *A.*’s estate for life,
 “ and that *D.* in remainder might enter : because between baron
 “ and feme there are no moieties, and the wife surviving is in of
 “ the whole by *A.* the feoffor, whose feoffment divested and dis-
 “ placed the remainder to *D.*, and, by consequence, made a for-
 “ feiture of *A.*’s estate for life. So, where tenant for life, and
 “ he in the remainder for life, join in a feoffment, though by
 “ deed, yet this is a forfeiture of both their estates, for which he
 “ in the next remainder may enter presently ; because both of
 “ them joined in the tortious act which divested the remainders.

Sid. 831
MS.

Co. Litt.
251. a. 302.
Hob. 277.
Dyer, 339. a.
1 Leon. 262.
1 Roll. Abr.
855. pl. 8.

“ If *A.* be tenant for life, remainder to *B.* in tail, remainder to
 “ *C.* in fee ; *A.* make a feoffment in fee to *C.* ; this divests and
 “ displaces the remainder of *B.*, and is a forfeiture for which he
 “ may enter. So, if *A.* were tenant for life, remainder to *B.* in
 “ tail, remainder to *C.* in tail, remainder to *D.* in fee, and *A.*
 “ make a feoffment in fee to *B.*, who dies without issue, *C.* may
 “ enter for the forfeiture ; for the livery divested his remainder,
 “ and *B.* could not dispense with the forfeiture as to his own
 “ estate. So, if *A.* be tenant for life, remainder to *B.* in tail,
 “ and *B.* release to *A.* in fee, and after *A.* make a feoffment in
 “ fee, and then *B.* die ; yet his issue may enter for the forfeiture :
 “ for the release did not mend at all the estate of *A.* ; and though
 “ it prevented *B.* himself from taking advantage of the forfeiture,
 “ yet it could not bind his issue, or those in remainder.

1 Co. 140.
Pop. 84.
1 Roll. Abr.
857. pl. 1, 2.

“ Husband tenant for life, remainder to his wife for life, re-
 “ mainder to the heirs male of their two bodies, remainder to *A.*
 “ in fee. The husband and wife levy a fine with warranty,

1 Leon. 36.
1 Sid. 83.
Raym. 36.
1 Keb. 76.
&c.

Stephens v.
Brittridge.

" and die without issue :—the warranty descends upon *A.* : yet it
 " was adjudged, that neither the fine nor the descent of the war-
 " ranty upon *A.* barred or discontinued his remainder, because
 " the estates of the husband and wife for their several lives con-
 " tinued distinct, and were not merged in the remainder to
 " them in tail; and then not being seised by force of the tail,
 " their fine could make no discontinuance of the estate-tail or the
 " remainder, and, by consequence, the warranty could not at-
 " tach upon *A.*, whose estate was not divested or turned to a
 " right. But in all these cases the fine with proclamations binds
 " the issue by force of the *stat. 4 H. 7. & 32 H. 8.*

" *A.* tenant for life, and *B.* in remainder in tail levy a fine;
 " *B.* dies without issue, and if the consuee should hold during the
 " life of *A.*, was the question. The court thought this case the
 " same with *Bredon's* case. But *Hale* said, the reasons given in
 " *Bredon's* case make against the resolution; for where it is said,
 " the remainder in tail passed first to avoid a forfeiture, he said,
 " if it did, the freehold must then pass to it by way of surrender,
 " and so drown; but they shall rather be construed to pass *in fine*
 " *et uno statu*: and he resembled the principal case to a feoffment
 " by the husband and wife of the wife's lands whereof the hus-
 " band is entitled to be tenant by the curtesy; the heir of the
 " wife shall not avoid the feoffment during the life of the husband.
 " But the case was ended by agreement.

Cro. Car.
285.
Major v.
Talbot.

" Husband and wife, seised of lands to them and the heirs of
 " the husband, make a lease thereof to the defendant, who cove-
 " nants with them and each of them, and with the heirs and
 " assigns of the husband, to do such a thing upon the land. The
 " husband and wife convey the reversion to the plaintiff in fee, who
 " brings covenant, and concludes *unde actio accrevit* to him as
 " assignee of the husband, without averring the wife to be dead.
 " And though it was urged, that he ought to have brought cove-
 " nant as assignee to both, having his estate as well from the wife,
 " who had an estate for life, as from the husband who had the
 " fee, unless he had alleged the wife to be dead; yet it was held
 " well, being brought by the assignee of him who had the in-
 " heritance, and so no prejudice to any; and that the estate for
 " life being transferred with the fee was thereby drowned and
 " confounded, and so the action well brought as assignee of the
 " husband.

Cro. Eliz.
327. Moor,
pl. 870.
Peck v.
Channell.

" *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in
 " fee. *A.* and *B.* intermarry, and after levy a fine *come ceo*, &c.
 " with remainder to *A.* for life, remainder to *B.* the husband and
 " his heirs: then the husband and wife suffer a common recovery
 " with single voucher to the use of the husband and his heirs, and
 " die without issue. *C.* enters within five years. And it was
 " adjudged clearly, 1st, That the fine levied by *A.* and *B.* made
 " no discontinuance, and they would not suffer it to be argued
 " for the reasons in *Bredon's* case; for none can discontinue an
 " estate-tail, but he who is seised thereof in possession, or at least

" of

of the freehold thereof. 2dly, It was adjudged, that the recovery was no bar or discontinuance of the estate-tail or remainders, because he who suffered it was not seised of the estate-tail at the time of the recovery; for by the fine an estate in fee determinable on B.'s death without issue passed, though there was no discontinuance: and by the render a new estate is given to the husband, to which the recompence in value upon the recovery enures, and not to the estate-tail, nor, by consequence, to the remainders depending thereon. And this recovery was not within 32 H. 8. because he in the remainder in tail joined with the tenant for life. But it was agreed, that the fine would have bound the issue, if there had been any, by virtue of the statutes.

" A. tenant for life, remainder to B. for life, remainder to C. in tail, remainder to B. in fee. B. levies a fine *come ceo*, &c. to D.; this is a forfeiture of his remainder for life; so that after the death of A., C. may enter; for by this fine B. is estopped to say that he did not pass a fee in possession without any fraction of estate. And therefore this differs from *Bredon's* case, where the estate for life and remainders were immediate one to the other, which here they are not.

1 Roll. Abr.
855. pl. 9.
Owen, 146.
Styles, 192.
Garratt v.
Blissard.
2 Mod. 114.
infra.

" Feme tenant in tail general, remainder to the husband and his heirs during the life of A., remainder to A. in fee. The husband and wife levy a fine *come ceo*, &c. to D. and E., to the use of the wife and her heirs; the husband dies; the wife dies without issue; A. brings formedon against the heir of the wife, upon pretence that the fine levied by her being tenant in tail in possession, was a discontinuance, and that the estate in remainder of the husband for the life of A. was merged and extinguished in the fee granted by the fine to D. and E., so that upon the death of the wife without issue, the remainder to A. was to come into possession. But it was held, that the estate-tail of the wife, and the remainder of the husband for the life of A. were conveyed as two distinct estates in being to the devisees, and that the estate for life was not extinguished or involved in the estate-tail given by the fine; for then it must be either by surrender, forfeiture, or confirmation. By surrender it cannot be, because it is subsequent to the estate-tail; by forfeiture it cannot be, because the tenant for life gave not the fee alone, but gave only so much thereof as he had, and joined with the tenant in tail, who had power to give a fee during the estate-tail without wrong to any. And if need were, as in *Bredon's* case, to avoid a discontinuance, they construed the remainders in tail to pass first; so here, to avoid a forfeiture, her estate for life may be said to pass first, though in the devisee they both made but one entire estate. And if the fine were reversed for the infancy of the wife, yet the devisee should hold the husband's remainder for the life of A. So, if the fine were upon condition, both estates on breach thereof should be restored in the same plight as at first. But admitting it should be taken as a discontinuance of the wife, being tenant in tail in possession,

Hob. 277.
1 Roll. Abr.
854.
Earl of Clan-
rickard's
case.

“ and as the confirmation of the husband in remainder, yet *A.*
 “ can no more enter during the continuance of the estate, than if
 “ the husband had not joined in the fine, but had kept his right,
 “ or had released it to the discontinuee. For in such case, every
 “ one must sue in their turn to avoid the discontinuance: first,
 “ the issue, then, he in the first remainder, and after *A.* Though
 “ the issue will not, or there be no issue, or the issue be bound,
 “ and the husband cannot by reason of his release, yet it is all one
 “ to *A.* for his right does not begin till after the two foregoing
 “ estates ended. But in *Bredon's* case, if the tenant for life had
 “ surrendered to him in the remainder in tail, and then he had
 “ levied a fine, and died without issue, he in the next remainder
 “ should have had a formedon presently, though the tenant for life
 “ were living; because by the surrender the estate for life was
 “ absolutely determined, but by his joining, as he did there, or, if
 “ he had released or confirmed the land to the donee, in such
 “ case, he should have been said to give only his own single estate
 “ for life, and he in the second remainder should not enter till
 “ that determined. And therefore in the principal case it was
 “ said, that no formedon lay during the life of *A.*

“ *A.* tenant for life, remainder to *B.* in tail, remainder to *A.*
 “ in fee. *A.* and *B.* make a lease for three lives by indenture to
 “ *C.*, then *A.* dies, and *B.* grants the reversion to *D.* in fee, to
 “ the use of his last will, and by his will devises the reversion for
 “ years, and dies leaving issue. The three lives die; the devisee
 “ for years enters, and the issue of *B.* ousts him. And it was ar-
 “ gued, that this lease for three lives was a discontinuance, be-
 “ cause, as it was said, it was more than they could both make,
 “ and so it was a tort; and the reversion gained by tort, though
 “ in whom the reversion was might be a doubt. But it was ad-
 “ judged no discontinuance, and that the entry of the issue was
 “ lawful; for the lease being by indenture was the lease of *A.*, and
 “ the confirmation of *B.*; but, if it had been without deed, then
 “ it had been the surrender of *A.*, and the lease of *B.* only, be-
 “ cause otherwise nothing could pass from him, his remain-
 “ der, as such, not being transferable but by deed.

“ *A.* tenant for life, remainder to *B.* in tail. *A.* makes a
 “ feoffment to the use of himself for life, remainder to *B.*; then
 “ *A.* and *B.* enfeoff *D.* *Gaudy* and *Shute* held clearly, that this
 “ was a discontinuance; for when *B.* enters to make the feoff-
 “ ment, he is remitted by reason of the forfeiture committed be-
 “ fore by *A.*, and then by such remitter he gains the possession,
 “ and it is only his feoffment, and so it is a discontinuance; for
 “ both cannot have the possession. *Clench cont.* Because the in-
 “ tent of *B.'s* entry was only to join in the feoffment with *A.*, and
 “ to pass both their estates together, and not to take advantage
 “ of the forfeiture; and therefore it was no discontinuance.
 “ But the case was adjourned, and no judgment appears to be
 “ given.

“ *A.* tenant for life, remainder to *B.* in tail. *A.* levies a fine
 “ to the use of himself; then he and *B.* join in a feoffment by
 “ letter

letter of attorney. And it was held a discontinuance, because it was the feoffment of *B.*, and the confirmation of *A.* only.

A. tenant for life, remainder to *B.* in tail, remainder to *C.* in tail, or fee; a *præcipe* is brought against *A.* and *B.*, who both vouch the common vouchee, and thereupon a common recovery is had; yet this shall not bind the estate-tail or remainders, because *B.* in remainder is not tenant to the *præcipe*, but *A.* the tenant for life only, and therefore the recompence in value cannot go to *B.* in remainder only, he being never seised by force of the tail; but shall go to them jointly according to the writ, which was against them jointly, and supposed them joint-tenants; and by consequence can be no bar to the estate-tail or remainder, whereof they were not jointly seised, but in remainder one after another.

But in that case if *A.* only had been empledged, and had vouched *B.* in remainder in tail, and he the common voucher, and so a common recovery were had; this had barred the estate-tail, and all remainders or reversions depending thereon; because there *A.* was sole tenant to the *præcipe*, and by voucher of him in the next remainder in tail he does his duty. And if he in the next remainder in tail cannot defend the possession, or call in one who will, he must be contented with the recompence in value, which the court adjudges the last vouchee to render to him according to the estate he hath lost; and such recompence is to go over to those in the future remainders, whose estates are likewise by the judgment taken out of them to make good the estate recovered.

A. tenant in tail, and *B.* in reversion in fee, join in a lease for life by deed, which is not warranted by 32 *H.* 8. then *B.* devises his reversion, and dies, and after *A.* dies without issue; and the question was, if this lease was a discontinuance of the estate-tail and the reversion; for then the devise of *B.* is void, he having no reversion, but only a right of a reversion, which is not devisable. And three justices held this lease a discontinuance, and, by consequence, the devise to be void: for the livery is made only by the tenant in tail; for he only hath the immediate freehold, and his lease discontinues the estate-tail and reversion, and gains him a new fee during the lease. And they held likewise, that it was a discontinuance presently or not at all; for the after-accident of the death of the tenant in tail without issue could not make it a discontinuance of the reversion, if it were not so upon making the livery. But *Croke, J.* held it no discontinuance, 1β , because it should be taken to be the lease of the tenant in tail during his life, and the confirmation of him in the reversion; and after the death of the tenant in tail without issue, then it should be taken to be the lease of him in the reversion only; *2dly*, because their joining in such lease shews they had no intent to make any discontinuance to divest or displace the reversion. But by the other three justices it was adjudged to be a discontinuance, and the devise void.

Dyer, 252.
3 Co. 6.
Katherine's
case. Crob
Eliz 670.
Leach v.
Cole.

10 Co. 43.
3 Co. 60.
Cro. Eliz.
562. 570.
Mo. pl. 953.
Jenning's
case.
10 Co. 39.b.
Co. Litt.
362. a.

Cro. Car.
387. 405.
Baker v.
Hacking.

2 Lev. 154.
2 Jon. 65.
2 Mod. 109.
3 Keb. 321.
580. 632.
681. &c.
Piggott v.
Lord Salis-
bury.

" *A.* lessee for years, remainder to *B.* wife of *C.* for life, re-
 " mainder to *D.* in tail, remainder to *C.* husband of *B.* for life, re-
 " mainder to *B.* in fee; the husband and wife, by fine *sur concessit*,
 " grant *tenementa predicta et totum et quicquid habent in tenementis*
 " *predictis* to *E.* and his heirs for the life of the husband and
 " wife, and the longer liver of them, with warranty against them,
 " and the survivor of them: *A.* attorns; afterwards *F.* father of *D.*,
 " and the husband and wife, levy a fine *come ceo*, &c., with warranty
 " severally against *F.* and his heirs, which descended on *D.*: and
 " if the fine *sur concessit* by the husband and wife should enure to
 " pass an estate in possession for their lives, and the life of the
 " longer liver of them, then it was agreed by all that the remain-
 " der to *D.* was displaced, and then the warranty attaching upon
 " him bound him: but, if it had passed only their several estates
 " by fraction, *viz.* the estate of the wife in possession, and the
 " estate of the husband, as a remainder, then there was no such
 " divesting of *B.*'s remainder, as would let in the warranty upon
 " him. But the better opinion seems, that by the grant of *tenementa*
 " *predicta* for the life of the husband and wife, and the
 " longer liver of them, an estate in possession passeth for that
 " time; and that the words *totum et quicquid habent*, &c. cannot be
 " taken by way of restriction to qualify it, so as to pass only their
 " several estates by fractions, that being a distinct independent
 " clause, and added by way of accumulation to include and take
 " in whatever intent the first words might be thought insufficient
 " to carry; and then the remainder to *D.* was displaced, and the
 " warranty of his father attaching upon him, bound his right.
 " For they all agreed, that the first fine, though executory only
 " at first, was well executed by the attornment of the lessee for
 " years; and though this fine *sur concessit* be the most innocent of
 " all others, and but as a grant of *totum statum suum*, if there be
 " proper words of restriction, yet with such words it passes a fee as
 " well as the fine *come ceo*, &c., which, if levied by tenant for life
 " or years, is always a forfeiture of their estate, be the restriction
 " what it will. And here they ought to have only granted *totum*
 " *statum suum et quicquid habent in tenementis predictis*, without
 " saying for what estate, or, if any estate were named, it ought
 " to have been only for the joint lives of the husband and wife,
 " or for the life of the wife, and after the death of *D.* without
 " issue, then for the life of the husband: but as it is here, it
 " passes an entire estate in possession for a longer time than they
 " had power to give it, and so displaces the remainder to *D.*, and lets
 " in the warranty. And yet it was agreed by all, that the intent
 " of the husband and wife was only to pass their several estates,
 " because otherwise *D.*, by his entry for the forfeiture, might not
 " only have defeated the estate of *E.* the purchaser, but might
 " also (being in possession) by a common recovery have barred
 " the remainder in fee to the wife; to prevent which, as they
 " thought, they contrived such fine, *E.* having agreed to the pur-
 " chase of the whole estate, and *D.* being only to join in the
 " sale when he came of age. Note—*Garratt v. Blizard* (*supra*)
 " was

was cited and relied on; but the parties after agreed, and no judgment was given.

"A., by lease and release on a marriage intended with B., conveys lands to the use of himself for 99 years, if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to B. for life for her jointure, remainder to the first, second, and other sons in tail male successively, remainder to the heirs male of the body of A. on the body of B. to be begotten, remainder to the right heirs of B.; the marriage takes effect; and before the birth of any son, A. and B. mortgage the said lands for 500 years to the plaintiff for securing 1000*l.*, and then levy a fine *come ceo*, &c. to the plaintiff, in the first place for corroborating the term, and after to the use of the right heirs of A.; the trustees enter for a forfeiture; then a son is born, after A. dies, and the trustees continue possession in right of the son; the plaintiffs enter, and B. is yet living. And if the plaintiffs should hold during the life of B., was the question; for there was no endeavour to prove the contingent remainders destroyed, there being a sufficient estate in the trustees to preserve them till they came *in esse*. For the plaintiffs it was argued, that they should hold during the life of B., for if the remainder in fee had been in a stranger, and A. and B. and that stranger had levied such fine, this had been a forfeiture of A.'s estate, by reason of the intermediate remainder to the trustees, who did not join; but it could be no forfeiture of B.'s estate for life, because he in the remainder joined; and therefore they only passed what they lawfully might pass, *viz.* their several estates. (1 Co. 76. 6 Co. 15.) And though both are conjoined in the conusees, yet there being no forfeiture, surrender, or extinguishment of B.'s estate for life, the estate of the conusee shall open to let in the contingent remainders when they happen, as if no alienation had been made, there being a sufficient estate to support them. And if there was no forfeiture of the estate for life of B. upon levying the fine, the birth of the sons after cannot make it so, that being matter *ex post facto*, and 1 Co. 76. *Englisb's* case was cited, where tenant for life and an infant in remainder joined in a fine, which was after reversed for the infancy; yet the conusee held during the life of the tenant for life. 2dly, Admitting the estate for life of B. could not revive and separate from the inheritance to let in the contingent remainders when they happen, being conjoined in the conusee; yet, after the death of B., they may take place without any such interposition; as if A. be tenant for life, the remainder to B. in fee, and A. be disseised, and release to the disseisor, he shall have the whole fee during the life of A., and B. cannot defeat it or take out his remainder till A.'s death. So, if A. be tenant for life, remainder to his first and other sons in tail, and before the birth of any son A. be disseised, and then after a son be born, and A. release to the disseisor, he, by this, shall have

2 Jo. 98.
3 Keb. 824,
2 MSS. 507,
Lane v.
Vane.

Co. Litt.
276.
Hob. 278.
1 Roll. Abr.
855.

“ have a fee till *A.*’s death, and then the son may defeat it by
 “ entry; because the right of *A.* supported it till it came *in esse*,
 “ and then his release after cannot destroy it. So here, the estate
 “ for life of *B.* is virtually *in esse*, though being conjoined with
 “ the remainder in fee in the conveyance it should not survive. But
 “ in this case the remainder in fee being in the wife, she has no
 “ estate for life to forfeit or surrender, but has the whole fee in
 “ her, subject to divide and let in the contingent remainders
 “ when they happen, and she has then no new estate but the
 “ same she had before, then joined, now divided, and therefore
 “ the conveyance shall hold during her life. On the other side it
 “ was argued for the defendant, that, till the contingent remain-
 “ ders came *in esse*, the wife had the whole fee executed in her,
 “ and no estate for life; for that was not to arise till the birth of
 “ the sons: and therefore, by her joining in the fine, could not
 “ be granted or transferred over as any certain or fixed interest,
 “ but, being in contingency, was extinguished and destroyed by
 “ the fine before it took effect; and therefore the estate of the
 “ son shall be now in possession discharged of it. And a case was
 “ cited to be resolved in Chancery by the Chancellor, *Hales*
 “ *Ch. J. Wyld, Ellis and Wyndham, February 1672*, where *A.* con-
 “ veyed lands to the use of himself for life, and after his death
 “ and the death of *B.*, then to the use of *C.*, this limitation to
 “ the use of *C.* was resolved to be contingent, by reason that *B.*
 “ had no estate, and he might survive. And there it was agreed,
 “ that if *C.* had levied a fine or made a feoffment, the estate to
 “ *C.* could never vest. But this case differs from *Bredon* and
 “ *Treport’s* cases; for in those cases there was an estate for life
 “ *in esse*; but here there was none, but in contingency. But the
 “ principal case was adjourned, and no judgment appears to be
 “ given.

Smith *ex*
dem. *Dormer*
v. Pack-
hurst, 3 Atk.
 135.
 4 Br. P. C.
 353. and
 405.
 38 Vin. Abr.
 413.
Fearne’s
C. R. 335.
 4th edit.
 2 Str. 1105.
Andr. 315.
S. C.

· In the case of *Smith*, on the demise of *Dormer v. Packhurst & al.* (commonly called by the name of *Dormer and Fortescue*) there was a limitation in remainder (after several preceding estates for life and in tail) to the use of *A. for ninety-nine years, if he should so long live*, and from and after the death of *A.*, or other sooner determination of the estate limited to him for ninety-nine years, to the use of trustees and their heirs, during the life of the said *A.*, upon trust to preserve contingent estates, &c. and for that purpose to make entries and bring actions, &c. but to permit the said *A.* to receive the rents and profits, &c. during the term of his life; and after the end or other sooner determination of the said term, to the use of the first and other sons of *A.* successively in tail-male, with divers remainders over. By the expiration of all the preceding estates, *A.* came into possession of the estate limited to him for ninety-nine years; and having a son, he, together with that son, when he came of age, levied a fine of the lands to make a tenant to the *præcipe*, and suffered a recovery of the same, in which the son was vouched. The son died without issue, and afterwards *A.* died without leaving any other son; the next surviving remainder-

man made his actual entry within five years, and the question was, Whether the recovery had barred his remainder? This point depended entirely on another question, Whether the freehold was in the trustees during the life of *A.* or not? For if it was, the recovery was not well suffered for want of a good tenant to the *præcipe*, and consequently did not bar the remainder; but if the trustees had not the freehold, then it was in the son, and of course he was capable of making a good tenant to the *præcipe*, and the recovery in that case was well suffered; for the court held that the fine by lessee for years, (*A.*) or the reversioner, (the son) could only operate by way of estoppel, to bar the parties claiming under such lessee or reversioner; but did not acquire the freehold, as a feoffment would have done.—To prove that the freehold was not in the trustees, it was insisted, *first*, That the remainder to the trustees was void in its creation, because to commence after *A.*'s death, and then hold during his life, which was repugnant, and could never take effect at all. *Secondly*, If not void in its creation, it was a contingent remainder, because it was uncertain whether it ever would take effect, as the term of ninety-nine years might not determine in *A.*'s lifetime. *Thirdly*, That if it was neither void nor contingent, yet it did not amount to a legal estate, but was only a right of entry.—But the court resolved, that the remainder was not void in its creation, its commencement not being restrained to the death of *A.*, but limited from the death of *A.*, or other sooner determination of the estate for ninety-nine years, and therefore might take effect by surrender, forfeiture, or effluxion of time, in *A.*'s lifetime. *Secondly*, That it was not a contingent remainder, being limited to persons *in esse*, without any condition precedent to be performed; it did not depend on the death of *A.*, but on such other events, (*viz.* forfeiture, surrender, &c.) as might determine the particular estate from the nature of the estate itself. *Thirdly*, That it was not a mere right of entry, but a legal estate; for a grantor cannot reserve a right of entry to a stranger, nor can a right of entry subsist without an estate. Therefore the trustees had the freehold for the life of *A.* And, upon the whole, the court held, that the fine and recovery did not bar the remainder.

“ *A.* tenant for life of certain lands, remainder to his son *B.* in tail. *A.* and *B.* join in a lease by indenture to *C.* for life, remainder to *D.* for life, rendering 10*l.* per annum rent. *A.* dies; *B.* accepts the rent from *C.*, and dies, having issue, who also accepts the rent from *C.*, and then enters, and makes a feoffment, and levies a fine to *J. S.*; then *C.* re-enters, and dies, and *D.* enters as in his remainder. And the question was, If *J. S.* the purchaser of the remainder might avoid this lease in remainder to *D.*, or if the acceptance of the rent from *C.*, the first tenant for life, had made good the remainder to *D.*, so that he coming in under the issue of *B.*, who so accepted the remainder, should be bound by it? And it was adjudged, that the lease in remainder to *D.* was good, and not avoidable by *J. S.* the purchaser; for the power to avoid this lease was only given to the issue in tail in respect of his estate-tail, and when that by

Cro. Eliz.

253.

1 Leon. 243.

Jeffery v.

Coite.

“ the

Cro. Eliz.
90. Knight
v. Fortipan.

“ the fine is bound and gone, the purchaser, who is a stranger to the
“ estate-tail, and not in in privity thereof, cannot have the privileges
“ annexed thereto, nor, by consequence, can avoid the lease, which
“ the issue in tail, as such, only had a power to do.

“ Copyhold was granted to one for life, remainder to an infant
“ in fee; they both join in a surrender to one who was admitted
“ tenant for life, and after the infant dies, and his heir enters.
“ It was adjudged, that he might well enter without being put
“ to his writ of *dum fuit infra etatem*; for such surrender was but
“ a conveyance by matter *in pais*, which cannot bind an infant,
“ but that he or his heirs may enter, or bring trespasses before
“ admittance.

Cro. Car.
103. Holt
v. Sambach.

“ *A.* tenant for life of certain lands, remainder to *B.* in tail male,
“ remainder to *A.* in tail, remainder to *B.* in tail general, remainder
“ to *A.* in fee. *A.* and *B.* join in a deed, whereby *A.* grants, and *B.*
“ confirms to *C.* and his heirs a rent-charge of 10*l.* *per annum* out
“ of the said lands, *B.* being then within age; then *A.* and *B.* levy
“ a fine of the same lands to the use of *A.*, and his heirs, who en-
“ feoffs the plaintiff, and dies, and *B.* hath issue yet living. And if
“ the plaintiff was chargeable with this rent, was the question. It
“ was argued, that if a rent be granted by tenant for life, and con-
“ firmed by him in the remainder in fee, being within age, that
“ this issues out of the estate for life only, and is merely a void
“ grant as to the remainder; so that if the tenant for life pur-
“ chases the reversion or remainder, and dies, this shall not bind
“ the inheritance. And though he had made a feoffment over,
“ yet a feoffee after his death should avoid it. But here, because
“ *A.* was not only tenant for life, but had also a remainder in tail,
“ and after that a remainder in fee, the rent is issuing out of all
“ his estates; and though it were void as against *B.*, who was
“ the next in remainder in tail, and confirmed it, by reason of his
“ infancy, yet now that estate-tail of *B.* being bound by the fine,
“ and the whole estate limited to the use of *A.* and his heirs, the
“ court inclined that the rent had still a continuance, and should
“ bind the plaintiff; for the privilege which the tenant in tail
“ could have had of avoiding the rent by reason of his infancy
“ shall not help the plaintiff, who comes in under all the estates of
“ *A.*, which of themselves would have been sufficient to go
“ through the whole grant of the remainder, were it not for
“ the remainder in tail to *B.*, and that remainder is now by the
“ fine barred and gone.

Mo. pl. 274.

“ A case in effect was this: *A.* tenant for life, remainder to *B.* in
“ tail, reversion to *A.* in fee. *A.* grants a rent out of the lands,
“ to begin after his death; then he and *B.* join in a fine to the
“ use of *A.* for life, remainder to *B.* in tail, or in fee; then *A.*
“ dies; yet the rent shall not charge the remainder of *B.*, for each
“ passed their several estates only, *viz.* *A.* his estate for life, and
“ reversion in fee, and *B.* his remainder in tail; and there was
“ no estoppel, because a several interest passed from each of them;
“ and then the remainder of *B.* is no more chargeable with this
“ rent after the fine than it was before, he granting only his own
“ remainder

remainder distinct from what *A.* granted; and by consequence, none of the charges of *A.* can affect such remainder after the time any more than they would have done before. But *quære*, upon *B.*'s death without issue, if the rent shall not then take effect, being well chargeable at first upon the reversion of *A.*?"

(H) In what Cases a Remainder or Reversion shall be subject to the Acts or Charges of the particular Tenant.

I Am now to consider in what cases the remainder or reversion shall be subject to the acts or charges of the particular tenant, and in what not, (which has been partly treated of before,) and when, and how, the charges of him in the remainder or reversion shall take place."

A. tenant in tail, remainder to *B.* in tail; *B.* grants a rent-charge, *A.* suffers a common recovery, and dies without issue; the grantee of the rent-charge distrains the alienee of *A.*, and the distress was held unlawful; *first*, Because the alienee comes in under the tenant in tail in possession, whose estate was not subject to the charges of him in the remainder; for, if the tenant in tail in possession had made only a feoffment in fee, or a lease for years first, and then after a feoffment in fee, and died without issue; yet, till the feoffment avoided, the leases or charges of him in the remainder should not take place either against the lessee or feoffee of the tenant in tail. *Secondly*, The reason that these leases or charges out of such remainder are good, is for the possibility of the remainder coming into possession; for of itself it is a thing not manurable or visible, and, consequently, not liable to any distress; and therefore, if it be destroyed before it comes into possession, the charges granted thereout must fall too, as the shadow falls with the substance. *Thirdly*, Another reason is, that he who claims only out of such remainder after an estate-tail, cannot falsify the recovery had against the tenant in tail, for the recovery bars the remainder itself; so that he cannot falsify or any way plead to defend his remainder, unless he were vouched, nor, by consequence, can those who derive their interest under him.

But, where *A.* was tenant for life, remainder to *B.* in tail, and *B.* granted a rent-charge, or made a lease for years, to begin after the death of the tenant for life; and *A.* the tenant for life, after suffered a common recovery, though with voucher of *B.* in the remainder in tail; yet the lease or rent shall take place according as they were made or granted; for there, such a lessee or grantee may falsify the recovery either by the common law or statutes; for the tenant for life hath no power to bar the remainder, without the assent or concurrence of him in the remainder, as the tenant in tail in possession hath; and his assent

Co. 62.
Poph. 6.
Moor, 190.
2 Co. 52.
6 Co. 42.
Plow. 390.

Cro. Eliz.
718.
Pledgare
v. Lake.

1 Co. 62.
Poph. 6.

‘ or concurrence cannot operate to defeat his own acts, any more than a recovery against tenant in tail in possession can defeat his own leases or grants; because in both cases the recoveror comes in by the tenant in tail, whether in possession or remainder, who alone has power over the estate, and shall be bound by his own acts.

Co. 67.
Co. Litt.
338.
7 Co. 63.
3 Co. 145.
9 Co. 107.
Ld. Raym.
521.

‘ If *A.* be tenant for life, remainder to his first and other sons in tail-male, remainder to *B.* in fee; and *A.* before the birth of any son make a lease for years, grant a rent-charge, acknowledge a statute, &c. and afterwards surrender to him in the remainder, or make a feoffment, or commit other forfeiture, for which he in the remainder enters; yet he shall hold the estate subject to the charges of the tenant for life; for these being his own acts to determine his estate, shall not turn to the prejudice of the lessee or grantee, who is a stranger; but his estate for life shall to this purpose be still said to have continuance, though as to all other purposes it is determined; and therefore the contingent remainders not being to arise out of the estate for life, but depending thereon till they come in *esse*, are, by the determination thereof before they come in *esse*, destroyed and gone.

3 Co. 145.
Davenport's
case.

‘ So, where lessee for years of an advowson granted the next avoidance, and after surrendered the term to the lessor, yet this shall not defeat the grantee of the next avoidance; because the surrender was his own act, before which there was a good grant, and that shall bind him in the remainder, who to this purpose comes in under the estate of the grantor.

6 Co. 79.
Ld. Aberga-
veny's case.

‘ So, where two joint-tenants for life were, and judgment in debt was given against one of them, and then he released to the other joint-tenant, who died, and he in the reversion entered; yet it was adjudged, that he should hold a moiety subject to the judgment, during the life of the joint-tenant who released; for, as to this purpose, the estate for life in a moiety hath still continuance, though to all other purposes the lessor was in of his ancient reversion for the whole, and the joint-tenant, to whom the release was made, was in by the first lessor, and not by him who made the release.

Cro. Car.
101.
Hutt. 91.
Sir Edward
Pere v. Pen-
berton.

‘ One seized of lands in fee grants thereout a rent-charge to *A.* for life, and after makes a lease to *A.* for 500 years of the same lands; then *A.* surrenders his lease to the lessor, who accepts it; and after *A.* distrains, and avows for the rent. It was held that he might; because by the lease for years the rent was only suspended, and now, by the surrender of that lease the suspension is taken off, and, by consequence, the rent revived; as, if the lease for years had been made upon condition only, by breach of the condition, the lease being determined, the rent would revive; though as to any stranger, who might have prejudice by such surrender, the lease for years shall still be said to have continuance.

“ Tenant for life of a copyhold, remainder in fee; he in remainder makes a lease by parol (which, as it seems, must be warranted by custom); then the tenant for life, and he in the remainder, join in a surrender to the use of him in the remainder in fee, and the question was, If this was a good lease, and should take effect in the life of the tenant for life? And it was held, that it should; for it was a good lease against him in the remainder; and by the surrender of the tenant for life, to the use of him in the remainder, his estate is merged in the fee, and cannot hinder the lease from taking effect, more than if he were dead; and the whole being in his hands can have no privilege severed from the inheritance; as if he in the remainder grant a rent-charge, and after the tenant for life surrender, the rent shall begin presently.

Cro. Eliz.
160. Doves
v. Williot,
& vide Co.
Litt. 338.
Cro. Eliz.
547.

“ So, where one made a lease for years, and after granted the reversion to another for years, to begin after the end or expiration of the first term; and then, during the continuance of the first term, made a lease for life to the first lessee; whereupon the grantee for years of the reversion brought an ejectment; it was held maintainable, because the first lease for years being, by the taking such lease for life, surrendered and gone, by the act and concurrence of the lessee and lessor, his grant of the reversion comes next to take place.

Plow. 198.
Wrottesley's
case.

“ If a woman inheritrix takes husband, and they have issue a son, and the husband dies, and she takes a second husband who lets the lands to one for life, and then the tenant for life surrenders his estate to the second husband; the son may enter upon the second husband during the life of the tenant for life; because as to the son the estate for life is drowned, and, by consequence, the inheritance, which the husband gained wrongfully by making such lease, is now by the surrender thereof vanished and gone; and then the rightful inheritance falls upon the son, and he may enter as if no such lease had been made, that which hindered his entry being taken out of the way. But, if a reversion be granted with warranty, and the tenant for life surrender his estate for life to the grantee, yet shall not the grantee have execution in value upon the warranty against the grantor, during the life of the tenant for life. So, if the tenant for life surrender to him in the remainder, or reversion, within age, yet he shall not have his age, because in these cases such surrenders would work a prejudice to a third person, which the law will not allow; though when it is for the benefit of a third person, he shall take advantage thereof, “ as by the cases before mentioned appears.”

Litt. feft.
636. Co.
Litt. 338.

A. seised of lands in fee makes a feoffment to the use of himself and the heirs male of his body; remainder in tail to several others, remainder to his own right heirs; *proviso*, that if there shall be a failure of issue male of his body, and that *B.* be dead, and *C.* be married, or of the age of twenty-one years, then she shall have 200*l.* *per ann.* for ten years; then *A.* dies, leaving *D.* his son, who makes a lease for one thousand years, then levies a

Mod. 108.
Sir T. Raym.
236.
2 Lev. 28.
3 Keb. 274.
237. Benfon
v. Baron
Hudson,
S. C.

fine

fine and suffers a recovery, and afterwards dies without issue male; and the contingencies all happened; and the questions were, *first*, If this rent was barred by the recovery? *secondly*, If the lease for one thousand years was chargeable with it? And it was *adjudged per tot. cur.* that this recovery that barred all the remainders *did also bar this rent*, which was to arise out of them; for though it were to arise precedent to the remainders, yet it was subsequent to the estate-tail of him who suffered the recovery; and therefore being chargeable upon and to arise only out of these remainders, and they being barred by the recovery, so was this rent also, which was to arise thereout; and for the very same reasons which are given in *Capell's case*, which it was said was the same case with this. *Secondly*, it was adjudged that this rent could not be chargeable upon the lease for one thousand years; because that was derived out of the estate-tail, which was precedent to and paramount the commencement of the rent; and the lessee was in after the remainders barred by the recovery, in continuance of the first estate-tail; which lease being before the recovery, the recoveror took the estate subject thereto. And they agreed, that if a gift in tail be made, rendering rent, or upon condition of re-entry, that no recovery by the tenant in tail will bar the rent or the condition, they being coeval with the very estate-tail itself; and therefore the recoveror, who comes in, in continuance of the estate-tail, takes it subject to such rent or condition; and yet, in this case of the rent, the reversion is barred, though the rent continues as a rent-service distrainable for at common law; but the condition they say must be a condition annexed to the rent, and not a collateral condition; for that will be barred with the reversion by a common recovery.

(I) To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates.

Mob. 71.

‘ IF one make a lease to *A.* for life, remainder to *B.* for life, in tail, or in fee, and *A.* die; the law adjudges the freehold in *B.* presently, and he is tenant to every *præcipe* till he disclaims or disagrees to it; for both the particular estate and remainder make but one degree, and a writ of entry *sur disseisin* may be brought against him in remainder after the particular estate ended, as well as it might against the particular tenant himself; and if there be tenant for life, remainder over of a seignory, and the tertenant alien in mortmain, they both shall have but one year and a day for entry; and if termor or guardian let for life, the remainder over, and he in the reversion agree, he is a disseisor as well as the tenant for life.

Litt. sect.
521. Co.
Litt. 297.

‘ If a disseisor make a lease for life, remainder over in fee, and the disseisor release to the tenant for life, this shall enure to him in the remainder, because by the release all his right is gone; but a confirmation only of the estate for life shall not enure to him

him in the remainder, because nothing is confirmed but the estate for life, and then the remainder lies open without any sanction given to it. But in the other case, by the release of the disseisee to the tenant for life, all his right is gone, and the tenant for life doing wrong only during his own estate, the release can extend only to cure that wrong, and therefore for the residue must fall into the remainder. So it is, if seoffee upon condition make a lease for life, remainder in fee, and the seoffor release the condition to the lessee for life, this shall enure also to him in remainder, because the condition went to the whole estate, and therefore, being discharged, must exonerate the whole estate, whereof he in the remainder has part.

‘ If the disseisee confirm the estate of him in the remainder, without any confirmation made to the tenant for life, yet the disseisee cannot enter upon the tenant for life, because the remainder is depending thereon; and if he should defeat the estate for life, he must also defeat the remainder which he has confirmed; but this he cannot do, therefore neither can he defeat the estate for life. Litt. sect. 521.

‘ So, if a disseisor make a lease for life, saving the reversion to himself, and the disseisee confirm the reversion of the disseisor only, yet he cannot enter upon the tenant for life, because then he must draw out and defeat the reversion likewise, which against his own confirmation he cannot do (and yet such reversion is not depending upon the estate for life, as the remainder is, but is paramount to it); for, if a disseisor make a lease for life, and after levy a fine with proclamations, and five years pass, so that the disseisee is barred for the reversion, he shall not enter upon the lessee for life. Co. Litt. 298.

‘ If a reversion or seignory be granted to one for life, remainder to another in fee, attornment to the tenant for life is good to him in the remainder likewise, because both make but one estate and degree; and for this reason it is, that if no attornment be to the tenant for life, but after his death attornment is made to him in the remainder, this is void, because both making but one estate, if the first be not completed, the other cannot take effect. Co. Litt. 310.
2 Co. 67.

‘ Admittance of the tenant for life of copyhold lands is also a good admittance of him in the remainder to all purposes, except the lord's fines, if there be a custom for two several fines; and though the first tenant were only for years, yet admittance of him is such an admittance of him in the remainder likewise, as shall make a *possessio fratris* of the remainder, and carry it to the sister of the whole blood. Cro. Eliz. 504. 662.
Moor, pl. 448. 658.
Roll. Abr. 505.
4 Co. 22.
Cro. Jac. 31.
Mod. 102.
120.

1 Vent. 260. 2 Lev. 107. [3 Keb. 263. 329. Gilb. Ten. 174. Watkins's edit.]

‘ Custom of a manor was, that upon surrender of copyhold land made to one and his heirs, if three proclamations passed, and he did not come in to be admitted, the lord should have it as forfeited; and there a surrender was made to the use of A. for life, Cro. Eliz. 879.
Yelv. 1.
Bastpool v. Long.

‘ life, remainder to *B.* in fee; *A.* suffers three proclamations to pass without coming in to be admitted; yet it was held, that this should not forfeit the estate of *B.* in remainder, for they are divided estates; and the custom being to forfeit one estate only, shall be taken strictly, and intended of an entire fee-simple in possession.

Moor,
pl. 149.
Cro. Jac.
437.

‘ And yet where copyholds were devisable for three lives *successive*, whereof each to take in order as they were named; and the custom was, that they could not cut timber; the first tenant for life cuts timber; this was held a forfeiture of all their estates; the reason whereof may be, that this was but one entire estate in possession at first, though the custom after shares and divides it to go in succession; for it is held, that if a copyholder for life commit waste, this shall be no forfeiture of the estate of him in remainder. Wherein this diversity appears, that for the benefit of him in the remainder his estate is accounted as one with the particular estate, and therefore one admittance goes to both; but as to any prejudice which he may receive by the act of the particular tenant, his remainder is accounted as a several and divided estate, and shall not share in it.”

“ And so in several of the other cases before mentioned.”

Cro. Eliz.
598.
[See Gilb.
Ten. 246.
250. 305.
Watkins's
Edit. 2 Ld.
Raym. 999.
3 P. Wms.
10. note F.]

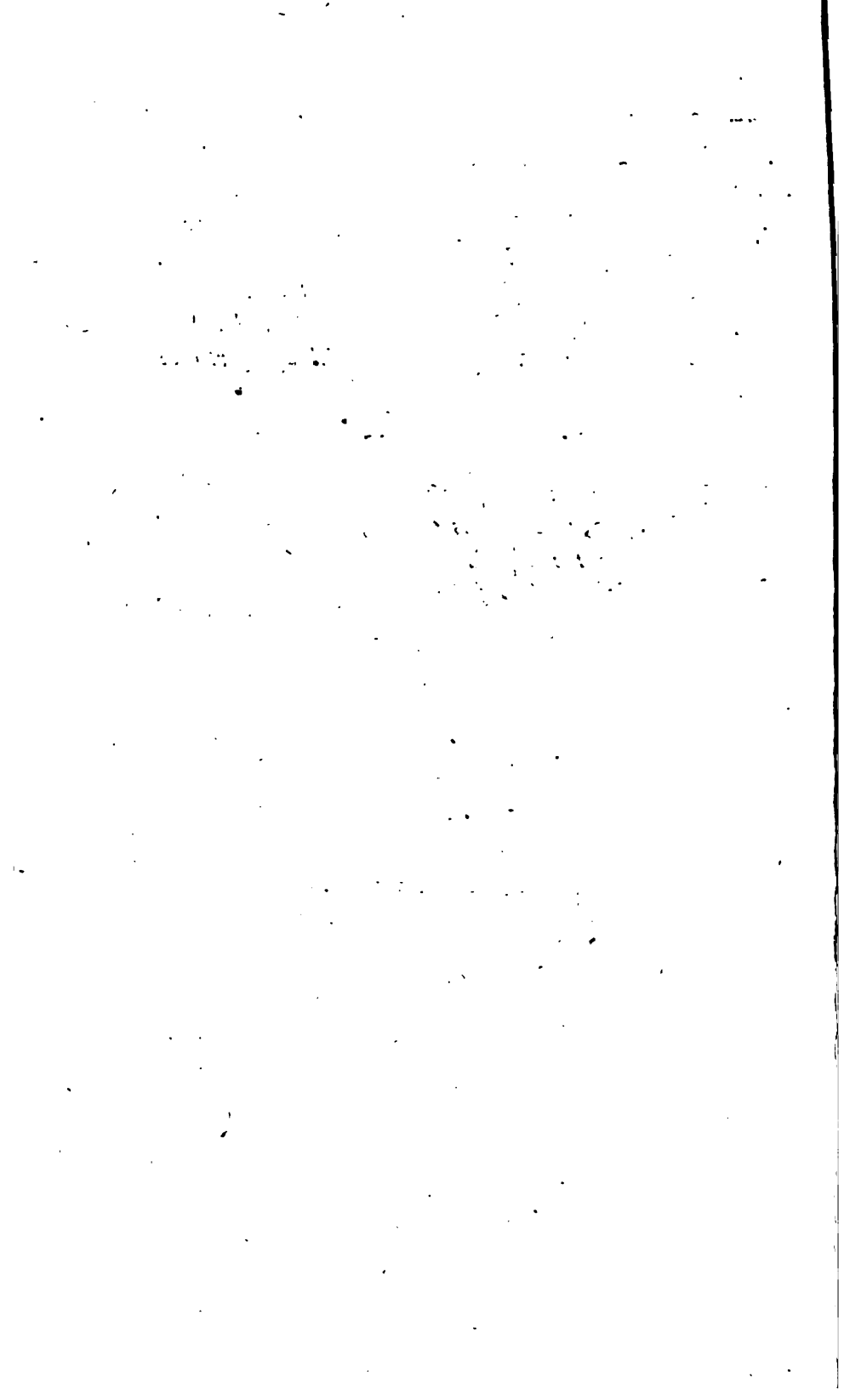
✧ *AS the rule in Shelley's case is intimately connected with the doctrine in the preceding Treatise, and as a controversy respecting the extent of the application of that rule has unhappily long divided the opinions of some of the greatest Lawyers of Westminster-hall; the Editor feels it a duty he owes to the Publick to direct the attention of the reader to a tract lately published by Mr. HARGRAVE in the first Volume of his Collection of Law Tracts, intitled, "Observations concerning the Rule in Shelley's Case, chiefly with a View to the Application of that Rule in Last Wills." The controversy is there fully stated; the errors of each of the contending parties are pointed out distinctly, but with delicacy; and the author's idea of the true principle of the rule, its spirit and use, is disclosed with perspicuity, and maintained with admirable force and*

cogency

cogency of reasoning.—It may be added, that this idea of the rule has been fortified by the opinion of Lord Thurlowe in the case of Jones v. Morgan (1 Br. Ch. Rep. 220.), and by what is said by Mr. Fearn in the later editions of his profound Essay on the learning of Contingent Remainders. It is to be hoped therefore, for the credit of the Profession, and for the sake of those whose titles would become the subject of it, that the controversy will henceforth be elosed.

* * * *The long note upon the case of Sympton v. Southern, in pages 779, 780, 781 of this volume, was communicated to the Editor by the ingenious Author of The Law of Descents, and is extracted from a Treatise on Copyholds, with the publication of which the Profession will be shortly gratified.*

END OF THE FIFTH VOLUME.





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